Docket No. 122873

IN THE ILLINOIS SUPREME COURT

MARTIN CASSIDY, Plaintiff-Appellee, v. CHINA VITAMINS, LLC, Defendant-Appellant, and TAIHUA GROUP SHANGHAI TAIWEI TRADING COMPANY LIMITED and ZHEJIANG NHU COMPANY, LTD., Defendants.	On Appeal From The Illinois Appellate Court, First Judicial District Docket No. 1-16-0933 There Heard On Appeal From The Circuit Court of Cook County, Illinois County Department, Law Division No. 07-L-13276 The Honorable Kathy M. Flanagan, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT CHINA VITAMINS, LLC

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ARGUMENT

I. SECTION 2-621(b)(4) OF THE CODE OF CIVIL PROCEDURE REQUIRES THE PLAINTIFF TO PROVE THAT THE PRODUCT MANUFACTURER IS UNABLE TO SATISFY A JUDGMENT AND NOT MERELY THAT THE PLAINTIFF IS UNABLE TO ENFORCE THE JUDGMENT FROM ASSETS WITHIN THE COURT'S JURISDICTION

The issue presented by this appeal is one of statutory interpretation. That issue involves section 2-621(b)(4) of the Code of Civil Procedure (735 ILCS 5/2-621(b)(4) (West 1994)), commonly known as the distributor statute. The language at issue allows the seller or distributor to be reinstated for product liability when the court determines that the

manufacturer "is *unable* to satisfy any judgment as determined by the court" (emphasis added). The parties' arguments on appeal to this court reflect the disagreement between different appellate panels which have construed this language.

Previously, in *Chraca v. U.S. Battery Mfg. Co.*, 2014 IL App (1st) 132325, 24 N.E.3d 183, the appellate court held that the plain and ordinary meaning of the phrase "unable to satisfy any judgment" was that a product manufacturer was bankrupt, insolvent or otherwise nonexistent and unable to pay a judgment. *Id.* at ¶ 24 (citing *Harleysville Lake States Ins. Co. v. Hilton Trading Corp.,* No. 12 C 8135, 2013 WL 3864244, at *3 (N.D. Ill. July 23, 2013); *Finke v. Hunter's View, Ltd.,* 596 F.Supp.2d 1254, 1271 (D. Minn. 2009); *Malone v. Schapun, Inc.,* 965 S.W.2d 177, 182 (Mo. Ct. App.1998)). The *Chraca* plaintiff could not meet his burden of proof when he presented no evidence about the Chinese manufacturer's financial viability and the record suggested that it was an ongoing business. *Id.* at ¶ 25. This court denied the plaintiff leave to appeal.

The majority of the appellate panel in this case rejected the *Chraca* court's interpretation and held that the "unable to satisfy any judgment"language was a term of art synonymous with "judgment-proof" or "execution-proof." *Cassidy v. China Vitamins, LLC,* 2017 IL App (1st) 160933, ¶ 33, 89 N.E.3d 944. Notably, like the *Chraca* court, the majority did not consider China's "alleged policy to disregard judgments rendered in American state courts dispositive" on the issue of a distributor's reinstatement. *Id.* at ¶ 37. Rather, it was enough that the plaintiff had presented some evidence of his unsuccessful efforts to discover assets in Illinois to satisfy the judgment against the Taihua Group Shanghai Taiwei Trading Company Limited ("Taihua Group"). *Id.* at ¶¶ 35-38. The dissenting justice disagreed with the majority's gloss which limited its

consideration of the manufacturer's financial inability to assets located within a particular jurisdiction. The dissenting justice agreed with the *Chraca* court that a distinction exists under the statute between a manufacturer's inability to *satisfy* a judgment and a plaintiff's inability to *enforce* a judgment within the particular jurisdiction. *Id.* at ¶¶ 48-55.

The plaintiff argues that the *Chraca* court's interpretation of section 2-621(b)(4) in practice "would create a perverse incentive" for product manufacturers and distributors to agree that the manufacturer will "remain insolvent, but not bankrupt" in order for those intermediaries in the distribution chain to avoid strict liability (Br., at 13-14). The plaintiff's hypothetical is fanciful. The plaintiff fails to explain how an "insolvent" manufacturer would not also be bankrupt, yet remain in business. By definition, an "insolvent" company's liabilities exceed its assets, and if it is "insolvent," it will become bankrupt. It cannot be one without also being the other. *See* 11 U.S.C. § 101(32)(A) (2010) (an entity is "insolvent" under the Bankruptcy Code when the sum of its debts is greater than all of its property).

Before this court, the plaintiff does not assert that the Taihua Group is financially unable to pay the judgment imposed by the court. Instead, the plaintiff argued, first in his answer opposing leave to appeal, that the manufacturer "may" or "may not" have assets to pay the judgment (at 2). Then, in his brief, the plaintiff's argument has evolved to the manufacturer having no assets "available" to satisfy the judgment (Br., at 16). The plaintiff does not explain what he means by "available" assets, which is not part of section 2-621(b)(4)'s language, but in light of the divided appellate court's focus on assets within the court's jurisdiction, the plaintiff's use of the phrase "available" can refer only to assets within the court's jurisdiction. However, not having an assets in Illinois "to

satisfy" a judgment is not the same as being "judgment-proof" or "execution-proof" under any reasonable meaning of the phrase. Otherwise, a large, profitable manufacturer, whether domestic or foreign, with operations or assets located just across the border from Illinois would still be considered "judgment-proof" or "execution-proof" under the plaintiff's interpretation of section 2-621(b)(4) for no reason other than an inability to enforce the judgment in Illinois. Not even the plaintiff (or the *amicus* brief filed by the Illinois Trial Lawyers Association ("ITLA")) appears to argue for this interpretation of the statute.

The Chinese manufacturer in this case is not insolvent, bankrupt or non-existent. The plaintiff does not dispute that the manufacturer is an ongoing business operating through subsidiaries in many countries outside China. The record shows that the plaintiff's collection efforts to date were confined to Cook County. If, as the plaintiff says, his digging has so far come up dry (Br., at 17), his attorney should look elsewhere in the United States to the State of Georgia where Taihua USA Inc. operates a sales office or to France and Germany where offices and a central warehouse are located (R.C3013-19). As it stands, the plaintiff presented no evidence that his judgment would be unenforceable outside Illinois.

Much of the plaintiff's brief and the *amicus* brief filed by ITLA emphasize the public policy behind strict product liability, but that is not the only public policy at play under section 2-621(b)(4). The purpose of the distributor statute is to allow certifying defendants to obtain dismissal of a product liability action at an early stage in order to avoid expensive litigation and to defer liability upstream to the manufacturer as the ultimate wrongdoer. *Kellerman v. Crowe,* 119 Ill. 2d 111, 119, 518 N.E.2d 116 (1987);

Cherry v. Siemans Medical Systems, Inc., 206 Ill. App. 3d 1055, 1060-61, 565 N.E.2d 215 (1st Dist. 1990). The plaintiff has not shown how either policy would be defeated by requiring at least some evidence that the judgment is unenforceable where the manufacturer has operations or assets. Had the plaintiff made this showing at any time, the plaintiff would have met his burden to reinstate China Vitamins, as section 2-621(b)(4) contemplates.

Like the plaintiff in *Chraca*, the plaintiff here did nothing to show that the judgment was uncollectible where the Taihua Group does business in the United States or Europe. There is nothing unreasonable about a judgment creditor having to enforce a judgment in another jurisdiction. No civil judgment is self-executing—even in a personal injury case. A judgment debtor is not "judgment-proof" or "execution-proof" simply because the judgment-creditor's business operations and assets are found outside Illinois. As noted in the opening brief (Br., at 17-18), other states and countries have enacted laws recognizing and enforcing foreign judgments. The plaintiff elected not to avail himself of those laws, but that did not mean the manufacturer was "judgment-proof" or "execution-proof." The plaintiff does not even acknowledge the existence of those laws in his brief. Nothing in section 2-621(b)(4) says that a product manufacturer is "unable to satisfy any judgment" when the manufacturer has assets that can be reached through process under the laws of other jurisdictions.

The plaintiff also ignores that other jurisdictions have adopted provisions that allow for reinstatement of the distributor when the court determines that it is "highly probable that a claimant would be unable to enforce a judgment" (WASH. REV. CODE ANN. § 7.72.040(2)(b); IDAHO CODE § 6-1407), but the General Assembly has not seen fit

to include this language in section 2-621(b)(4) since its enactment over 30 years ago in 1983. If the General Assembly wanted to include the "highly probable" language in section 2-621(b)(4), it certainly could have done so. The Model Act had been promulgated four years earlier. 44 Fed. Reg. 62714 (1979). This court should not graft this language onto the statute when the General Assembly declined to do so.

The plaintiff's reliance on federal cases (*Halperin v. Merck, Sharpe & Dohme Corp.*, 2012 U.S. Dist. LEXIS 50549, at *13, 2012 WL 1204728, at *4 (N.D. Ill. Apr. 10, 2012); *Whelchel v. Briggs & Stratton Corp.*, 850 F. Supp. 2d 926, 932 (N.D. Ill. 2012); *Fisher v. Brilliant World Int'l*, 2011 U.S. Dist. LEXIS 87321, at *5 n.2, 2011 WL 3471222, at *2 n.2 (N.D. Ill. Aug. 4, 2011); *Rosenthal v. Werner Co.*, 2009 U.S. Dist. LEXIS 30918, at *19, 2009 WL 995489, at *6 (N.D. Ill. Apr. 13, 2009); *Gilmore v. Festo KG*, 1999 U.S. Dist. LEXIS 8323, at *10, 1999 WL 356295, at *3 (N.D. Ill. May 21, 1999)) is misplaced (Br., at 10-11). These cases refer to "judgment-proof" manufacturers without discussing whether the manufacturers owned property or assets that could be reached beyond the court's jurisdiction. These cases are of no help to the plaintiff here.

ITLA's *amicus* brief is of no help to the plaintiff or to the court. The *amicus* brief characterizes efforts to enforce an Illinois judgment in China as a "fool's mission" (Br., at 13), but the appellate court here did not address whether the judgment could be collected in China, let alone the wisdom of trying. Indeed, the majority specifically noted that any issue concerning China's "alleged policy to disregard judgments rendered in American state courts" was not dispositive of the distributor's reinstatement. *Id.* at ¶ 37.

Curiously, the *amicus* brief observes that, unlike China, "North American countries and most European and Asian countries respect the fact that their manufacturers

are subject to the liability laws of the State of Illinois" (Br., at 14). China Vitamins agrees with this statement—which is why a foreign manufacturer is not "judgment-proof" or "execution-proof" merely because its operations and assets are found outside Illinois. The *amicus* brief is wrong, however, in stating that this case "involves collection efforts *in* China" (emphasis added) (Br., at 23). On the contrary, this case involves a plaintiff who did not pursue collection against a Chinese manufacturer's business operations and assets *outside* China. The *amicus* brief is making a strawman's argument about barriers to the collection of American state court judgments in China (Br., at 18-26). Those barriers, if any, were not of immediate concern to the courts below and are not at issue here.

II. THIS COURT AS A REVIEWING COURT CANNOT MAKE FINDINGS OF FACT IN THE FIRST INSTANCE

Although the appellate court remanded the case to the trial court for further proceedings to determine whether Taihua Group is unable to satisfy the judgment under its interpretation of section 2-621(b)(4) (at ¶ 41), the plaintiff asks this court to "resolve the ultimate issue" and remand with directions to allow the complaint to be amended to reinstate China Vitamins (Br., at 24). The plaintiff's request is not well-taken.

By asking this court to make this determination in the first instance, the plaintiff invites this court to act as a finder of fact. This court should respectfully decline the invitation. It is well-settled that this court serves no function as a fact-finding body. *Lamkin v. Towner*, 138 Ill. 2d 510, 523, 563 N.E.2d 449 (1990). Here, the appellate court disclaimed making any finding of fact on whether the manufacturer was unable to satisfy the judgment and directed the trial court to make this determination based on its determination of the statute on remand. On this record, this court would be usurping the trial court's role if it made any finding of fact regarding the Taihua Group's financial

inability to satisfy the judgment against it.

CONCLUSION

For the reasons set forth herein and in the opening brief, the defendant-appellant, China Vitamins, LLC, respectfully requests that this court reverse in part the opinion and judgment of the Illinois Appellate Court, First Judicial District, and affirm in part the memorandum opinion and order of the trial court denying the motion of the plaintiff-appellee, Martin Cassidy, to reinstate against the defendant-appellant, China Vitamins, LLC, on March 14, 2016.

Respectfully submitted,

/s/ Michael Resis

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance and the notice of filing, is 8 pages.

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PLEASE BE ADVISED that on this 26th day of April, 2018, we caused to be electronically filed with the Clerk of the Illinois Supreme Court, the defendant-appellant's reply brief on behalf of China Vitamins, LLC, a copy of which, along with this notice of filing with affidavit of service, is herewith served upon all attorneys of record.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Jacqueline Y. Smith, a non-attorney, on oath state that I served this notice via electronic mail to the attorneys listed above at their email address prior to 5:00 p.m. on April 26, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jacqueline Y. Smith
SMITHAMUNDSEN LLC