|  |  |
| --- | --- |
|  |  |

|  |  |  |
| --- | --- | --- |
| Niu c. American Cinema Inspires Inc. | | 2025 QCCA 100 |
| English translation of the judgment of the Court  COURT OF APPEAL | | |
| CANADA | | |
| PROVINCE OF QUEBEC  MONTREAL SEAT | | |
|  | | |
| No.: | 500-09-030563-233 | |
| (500-17-123874-235) | | |
|  | | |
|  | | |
| MINUTES OF THE HEARING | | |
|  | | |

|  |  |
| --- | --- |
| DATE: January 31, 2025 |  |
|  |  |
| PANEL: THE HONOURABLE | ROBERT M. MAINVILLE, J.A. |
|  | CHRISTINE BAUDOUIN, J.A. |
|  | JUDITH HARVIE, J.A. |

|  |  |
| --- | --- |
| APPELLANT |  |
| YUAN NIU | PRESENT AND UNREPRESENTED  Absent |
| RESPONDENTS | COUNSEL |
| AMERICAN CINEMA INSPIRES, INC.  TRIAL FILM, LLC | Mtre Ousmane Ndiaye-Kaberamanzi  (*Charness, Charness & Charness*)  Absent |

|  |
| --- |
| On appeal from a judgment rendered on May 3, 2023, by the Honourable Alexander Pless of the Superior Court, District of Montreal. |

|  |  |
| --- | --- |
| NATURE OF THE APPEAL: | **Intellectual Property – Copyright infringement – Application for recognition and enforcement of a foreign judgment rendered by default – Evidence and procedure.** |

|  |  |
| --- | --- |
| Clerk at the hearing: Myriam Villeneuve | Courtroom: Antonio Lamer |

|  |
| --- |
| HEARING |

|  |  |
| --- | --- |
| 9:38 | Commencement of the hearing.  Continuation of the hearing of January 30, 2025. The parties were excused from appearing in Court.  Judgment – see page 3. |
| 9:39 | End of the hearing. |

|  |
| --- |
|  |
| Myriam Villeneuve, Clerk at the hearing |

|  |
| --- |
| JUDGMENT |

1. The appellant appeals from a judgment in first instance that: (1) recognized a foreign judgment rendered by default in the United States by the United States District Court for the District of Arizona (the “**U.S. District Court**”);[[1]](#footnote-2) (2) declared that judgment to be enforceable in Quebec; and (3) ordered the appellant to pay the respondents damages in the amount of CAD$111,636 (USD$90,000), plus interest at the legal rate and the additional indemnity provided for by law as of the date of service.[[2]](#footnote-3) The following is a brief background to this case.
2. The respondents are two U.S. companies operating in the field of motion picture production and distribution. They learned that someone was infringing their copyrights by illegally disseminating one of their motion pictures on the Internet to third parties, all from a site hosted in Arizona, and that the income arising therefrom was being paid to an account opened with the online payment intermediary PayPal Inc. (“**PayPal**”). In May 2021, they obtained information from the site’s host (the “**Host**”) identifying the person behind the dissemination, including his name, a civic address that seemed to be a hotel, and an email address. They initiated proceedings in Arizona before the U.S. District Court seeking to put a stop to this practice and, in early July 2021, they obtained an *ex parte* order requiring that the Host prevent or terminate the dissemination and that PayPal freeze the payments made for such dissemination or as a result thereof and cease all funds transfers. The order also authorized the respondents to obtain information from PayPal related to the associated account and to serve the proceedings on the appellant by email at the address obtained from the Host, the whole pursuant to the *Federal Rules of Civil Procedure* (the “**Federal Rules**”).[[3]](#footnote-4) A few days later, the respondents, as they had been duly authorized to do, served the pleadings and the order by email to the address indicated in the order, and they obtained confirmation that the email had indeed been received and opened by the addressee. As no one responded to the U.S. proceedings, however, the respondents obtained the U.S. default judgment on the merits in early November 2021.
3. In September 2022, the respondents hired a private investigation firm and obtained a consumer credit report that confirmed the information identifying the appellant and provided a new civic address for him. In addition, in November 2022, they obtained information from PayPal that supported the identification of the appellant.
4. In January 2023, the respondents filed an originating application in Quebec and served it on the appellant at the new civic address they had obtained. The appellant contested the application on the ground of mistaken identity. He alleged that he had no connection with the copyright infringement and claimed that he had never received the email effecting service. After hearing the parties, the judge determined that the requirements set out in arts. 3155 and 3156 *C.C.Q.* for the recognition of a judgment rendered outside Quebec had been met and he granted the application.
5. The appellant raises numerous grounds that call into question the judge’s assessment of the evidence, his findings of fact and the application of the relevant principles to his conclusions, but the appellant has not pointed to any palpable and overriding error.[[4]](#footnote-5) He repeats many of the arguments made at first instance and asks for a reassessment of the evidence, inviting the Court to substitute its assessment for that of the trial judge, but that is not the Court’s role.[[5]](#footnote-6)
6. The judge did not accept the appellant’s version, finding that it was not credible because [translation] “[m]uch evidence from different sources supports the conclusion that Mr. Niu is the person who set up the websites and that he contracted with PayPal to administer payments for users of these websites”.[[6]](#footnote-7) The information came from three independent sources – the Host, the payment intermediary PayPal, and the consumer credit report – all of which linked the appellant to the email address to which service had been effected. Moreover, there is no objective evidence to support the appellant’s version or to dissociate him from the identifying information obtained from neutral third parties (telephone number, payments received by PayPal, civic addresses and emails). The appellant nevertheless affirms that there is no direct evidence linking him to the email address, that there is a risk of fraud or identity theft and that he should have the benefit of any doubt in this regard. He is mistaken because, as the judge held, the applicable evidentiary burden in civil matters is proof on a balance of probabilities. Additionally, art. 3156 para. 2 *C.C.Q.* clearly provides that the party against whom a judgment by default has been rendered has the burden of proving that “owing to the circumstances, he was unable to acquaint himself with the act instituting the proceedings”,[[7]](#footnote-8) something the appellant has manifestly not succeeded in doing.
7. The appellant submits that the consumer credit report obtained by the respondents is a violation of his privacy and should be excluded. This argument, which was not raised at first instance, has no merit. There is no evidence that the information was obtained without the appellant’s consent, nor that he did not authorize the sharing thereof, as it is information pertaining to his credit. Thus, he has not convinced the Court that the evidence was obtained “under such circumstances that fundamental rights and freedoms are violated”.[[8]](#footnote-9) Moreover, nothing indicates that the use of this evidence “would tend to bring the administration of justice into disrepute”.[[9]](#footnote-10)
8. To support his allegation of identity theft, he further points out that the consumer credit report contains the annotation “05Aug2021 #HK# POTENTIAL FRAUD VICTIM BEFORE EXTENDING CREDIT VERIFY ALL APPLICANT INFORMATION CONTACT CONSUMER […]”.[[10]](#footnote-11) This annotation, however, which is subsequent to the date on which the appellant’s email address was obtained from the Host, does not provide any details on the type of potential fraud, nor does it lead to the conclusion that the personal data provided by the Host and PayPal is incorrect.
9. Consequently, the judge was justified in concluding that the evidence shows that [translation] “the pleadings were sent and the emails were received and opened”[[11]](#footnote-12) at an email address controlled by the appellant, whereas the latter [translation] “did not convince the Court [...] [that he] was unable to acquaint himself with the act instituting the proceedings”.[[12]](#footnote-13)
10. As to whether the service that preceded the U.S. judgment rendered by default was duly effected, the judge rightly stated that this question must be analyzed in light of U.S. law applicable in the state of Arizona and that the party seeking the recognition and enforcement of the foreign decision has the burden of proving that service was duly effected.[[13]](#footnote-14) The uncontradicted evidence shows that [translation] “when he [the respondents’ lawyer] sought permission to effect notification by email, he did not know the address of Mr. Niu [the appellant], because the address Mr. Niu had provided to Namecheap [the Host] was the address of a hotel”.[[14]](#footnote-15) As set out in the second paragraph of Article 1 of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[[15]](#footnote-16)* (the “**Convention**”), the Convention does not apply “where the address of the person to be served with the document is not known”.[[16]](#footnote-17)
11. U.S. law allows U.S. courts to authorize service by email in situations such as the one here, even when no other method of service has been attempted.[[17]](#footnote-18) Thus, in all cases, determining whether the originating pleading was duly served is to be established “in accordance with the law of the place where the decision [by default] was rendered”.[[18]](#footnote-19)
12. In this regard, the appellant has attempted to cast doubt on the credibility of the U.S. attorney who signed the affidavit establishing the applicable U.S. law, arguing that he represents the respondents, which puts him in a situation of conflict of interest. This allegation cannot stand, given that the attorney is a professional subject to a code of ethics and that his explanation of U.S. law is supported by legislation and case law. Moreover, the appellant did not submit any evidence to contradict him.

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal, with legal costs.

|  |  |
| --- | --- |
|  | ROBERT M. MAINVILLE, J.A. |

|  |  |
| --- | --- |
|  | CHRISTINE BAUDOUIN, J.A. |

|  |  |
| --- | --- |
|  | JUDITH HARVIE, J.A. |

1. Judgment rendered by the Honourable John J. Tuchi, United States District Judge, dated November 2, 2021, No. CV-21-00984-PHX-JJT. [↑](#footnote-ref-2)
2. *American Cinema Inspire c. Niu*, 2023 QCCS 2091 [judgment under appeal]. [↑](#footnote-ref-3)
3. Order made by the Honourable John J. Tuchi, United States District Judge, United States District Court for the District of Arizona, dated July 1, 2021, No. CV-21-00984-PHX-JJT. [↑](#footnote-ref-4)
4. *Mercier c. Essor assurances placements conseils inc.*, 2024 QCCA 1246, para. 21; *Gercotech inc. c. Kruger inc. Master Trust (CIBC Mellon Trust Company)*, 2019 QCCA 1168, para. 8. [↑](#footnote-ref-5)
5. *Fiasche c. Zaraa*, 2025 QCCA 28, para. 5; *McGill Avocats inc. c. Roch*, 2024 QCCA 1581, paras. 45‑50; *Airpura Industries inc. c. Tak Design industriel inc.*, 2024 QCCA 1729, para. 9. [↑](#footnote-ref-6)
6. Judgment under appeal, para. 29. See also: Judgment under appeal, para. 20. [↑](#footnote-ref-7)
7. Art. 3156 para. 2 *C.C.Q.* [↑](#footnote-ref-8)
8. Art. 2858 *C.C.Q.* [↑](#footnote-ref-9)
9. See: *Centre de services scolaire de Montréal (Commission scolaire de Montréal)* *c.* *Alliance des professeures et professeurs de Montréal (FAE)*, 2021 QCCA 1095, para. 55. [↑](#footnote-ref-10)
10. King International Advisory Group, Consumer Credit Report, dated July 21, 2022. [↑](#footnote-ref-11)
11. Judgment under appeal, para. 7. [↑](#footnote-ref-12)
12. Judgment under appeal, para. 30. See also art. 3156 para. 2 *C.C.Q.* [↑](#footnote-ref-13)
13. Judgment under appeal, para. 25. See also: art. 3156 para. 1 *C.C.Q.*; *Platania* *c.* *Di Campo*, 2018 QCCA 1532, para. 26; *Yousuf* *c.* *Jannesar*, 2014 QCCA 2096, para. 28, application for leave to appeal dismissed, October 29, 2015, No. 36271. [↑](#footnote-ref-14)
14. Judgment under appeal, para. 27. [↑](#footnote-ref-15)
15. November 15, 1965, 658 U.N.T.S. 163. See also *Code of Civil Procedure*, Schedule I (art. 494 *C.C.P.*). [↑](#footnote-ref-16)
16. Convention, Art. 1 para. 2. [↑](#footnote-ref-17)
17. Affidavit of U.S. attorney Kerry S. Culpepper, dated March 30, 2023, citing *Rio Props v. Rio Int’l Interlink*, (2002) 284 F.3d. 1007, pp. 1015-1016, and Rule 4(f) of the Federal Rules. The trial judge also concluded that the interpretation given tothe Convention by the Ninth Circuit Court of Appeals and other U.S. federal courts leads to the same result; see judgment under appeal, para. 26. [↑](#footnote-ref-18)
18. Art. 3156 para. 1 *C.C.Q.* [↑](#footnote-ref-19)