70526-1

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No. 70526-1-I

KUNG-DA CHANG,

Appellant,

v.

SHANGHAI COMMERCIAL BANK LTD,

Respondent.

APPEAL FROM THE WASHINGTON STATE SUPERIOR COURT
IN AND FOR THE COUNTY OF KING

Shanghai Commercial Bank v. Chang, et al

Case No. 12-2-21293-7

The Honorable Laura G. Middaugh

REPLY BRIEF OF APPELLANT KUNG-DA CHANG

John J. Tollefsen, WSBA #13214
Frank S. Homsher, WSBA #26935
Chris Rosfjord, WSBA #37668
Tollefsen Law PLLC
Attorneys for Appellant Kung-Da Chang
2122 164th Ave SW, Suite 300
Lynnwood, WA 98087-7812
(206) 624-5300
TOLLEFSENLAW

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I. ARGUMENT

A. Hong Kong judgments are not universally accepted throughout United States courts.

Shanghai Commercial Bank ("SCB") states in its Response, "No American court has *ever* taken issue with *any* aspect of Hong Kong's due process protections, as evidenced by the unanimous federal and state court decisions recognizing the adequacy of Hong Kong forums and the legitimacy of Hong Kong judgments." This statement is grossly misleading and does not accurately reflect the landscape of American case law concerning Hong Kong judgments.

B. Shanghai Commercial Bank inaccurately depicts the underlying Hong Kong action.

KD Chang does not disagree that the judgment for which SCB sought recognition was in HCA 806. KD Chang has acknowledged throughout these proceedings that the Hong Kong matter consisted of three actions - HCA 1996, 805, and 806. KD Chang has stressed throughout these proceedings how intertwined those three Hong Kong actions were. SCB, on the other hand, refuses to acknowledge the complexity of the Hong Kong proceedings, and it continues to try to depict the Hong Kong judgment and the recognition action as a simple attempt to collect

an unpaid loan.[1]

The three Hong Kong cases all related to issues that arose from the actions of SCB employee, Daniel Chan, and his dealings with KD Chang and Clark Chang while Clark Chang maintained accounts at SCB and Bank of East Asia ("BEA"). KD Chang and Clark Chang procured $16 million in loans through SCB, based on the advice of Daniel Chan. Chan, who had managed Clark Chang's BEA accounts, knew the decrepit state of the BEA accounts (because he had caused the losses), but still deceived the Changs into taking the loan. Chan's actions were the Bases for the Changs' claims against BEA and SCB, as well as the bases for their defenses to SCB's claims.[2]

KD Chang has further acknowledged that the securities for costs were ordered in HCA 1996 and 805.[3] KD Chang has asserted throughout these proceedings that the securities for costs in HCA 1996 and 805 were essentially securities for costs in HCA 806. The Changs' claims against SCB in HCA 1996 were identical to their counterclaims in HCA 806. Likewise, SCB's counterclaims against the Changs' in HCA 1996 were identical to its claims in HCA 806.

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[1] SCB's Response Brief at 4.
[2] CP 1145, ¶ 12.
[3] SCB's Response Brief at 6.

SCB has conceded this fact. Ultimately, the security for costs in HCA 1996 effectively prevented KD Chang and his father from pursuing their counterclaims against SCB in HCA 806.

At the Motion for Summary Judgment hearing, KD Chang presented substantial evidence that the Hong Kong Court's security for costs order in HCA 1996 thwarted their counterclaims in HCA 806:

1) There were a multitude of disturbing irregularities associated with the Hong Kong Court's security for costs order, such as favoring the multi-billion dollar Hong Kong banks.[4]
2) Though KD Chang did not disclose his assets, he unequivocally told the Hong Kong Court that a security for costs order would stifle his case if cash payment was required.[5]
3) Despite uncontested evidence of inflated billing and overcharging, the Hong Kong Court still ordered KD Chang and his father to pay $838,000 ***cash*** within 14 days or see their claims dismissed.[6]
4) KD Chang and his father did not pay the $838,000 cash and their claims in HCA 1996 were dismissed.

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[4] CP 406 - 407 (See list of irregularities).
[5] CP 406.
[6] CP 408.

5) When the Changs' claims in HCA 1996 were dismissed, SCB also obtained a $9 million judgment on its counterclaims in HCA 1996 due to the Changs' lack of a defense.

6) Had KD Chang and his father elected to pursue their counterclaims in HCA 806, SCB still would have been able to obtain this rubber-stamp judgment in June 2011.[7] As admitted by SCB, the default judgment received in HCA 1996 was based solely on uncontested evidence presented by SCB and affidavits previously submitted by KD and Clark Chang.[8]

7) Resolving KD Chang's counterclaims in HCA 806 would have taken well-beyond June 2011, due to the complexity of the claims and the need for preparation and scheduling. HCA 806 involved securities fraud allegations spanning five years. There would have been extensive motions, testimony from numerous BEA and SCB employees, expert testimony on investments and securities law, and days of testimony from Clark Chang and KD Chang about the details of their interactions with Daniel Chan.[9]

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[7] According to Pamela Mak, KD Chang's Hong Kong attorney, any hearing held prior to the issue of the HCA 1996 judgment would have been limited in scope because it would not have included cross-examination of SCB witnesses by KD Chang's attorney and KD Chang's witnesses. See CP 367, ¶27.
[8] CP 30, ¶ 10.
[9] CP 366, ¶ 18.

8) Due to the lapse of time that would have occurred between the $9 million judgment in HCA 1996 and resolution of the Changs' counterclaims in HCA 806, it is an entirely reasonable assumption (and litigation strategy) that SCB would have employed all the mechanisms available to Hong Kong creditors, including prohibition and imprisonment.[10]

In the end, evidence of the circumstances surrounding SCB's loans to the Changs, including Daniel Chan's deceptive acts, was shielded from Hong Kong Court by the $838,000 security for costs order against KD Chang and his father. KD Chang has presented sufficient evidence for this Court to find that the security for costs order in HCA 1996 had an adverse effect on the Changs' claims in HCA 806.

C. There are no new legal arguments being asserted by KD Chang on appeal.

In its Response Brief, SCB contends that KD Chang is asserting new legal arguments on appeal.[11] First, the Rules of Appellate Procedure ("RAP") do not prohibit an appellant from raising as many issues on appeal as he chooses. Rather, RAP 2.5 merely states, "[t]he appellate court *may* refuse to review any claim of error which was not raised in the trial court." However, the

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[10] CP 368, ¶¶30 - 31; CP 369, ¶ ii.
[11] SCB's Response at 9.

appellate court ***cannot*** refuse to review the following errors raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.[12] Contrary to SCB's assertion, RAP 2.5 does not require the appellant to argue an "exception" applies.[13]

Second, each of the arguments raised by KD Chang in his Opening Brief was made before the trial court. KD Chang argued below that the security for costs order in HCA 1996 and 805 denied KD Chang a meaningful opportunity to be heard in HCA 806.[14] KD Chang argued below that the security for costs order in HCA 1996 constituted a security for cost order in HCA 806.[15] KD Chang argued that recognition of a foreign judgment constitutes state action under the Fourteenth Amendment.[16]

Even if the Court finds the arguments to be new, the arguments challenged by SCB are constitutional in nature and can be raised for the first time on appeal.[17]

D. Recognition of the Hong Kong judgment constitutes state

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[12] RAP 2.5.
[13] SCB's Response at 10. See RAP 2.5. SCB cites no law requiring an appellant to argue that an exception applies.
[14] See CP 417, ¶ 14-20.
[15] See CP 401-429 in general, but specifically CP 410, ¶ 1-15.
[16] See CP 410, ¶ 14 - p.10, ¶ 16.
[17] Rules of Appellate Procedure 2.5.

action under the Fourteenth Amendment

Citing a recent Ninth Circuit decision, SCB argues that recognition and enforcement of a foreign judgment does not constitute state action.[18] That, however, is not what the Ninth Circuit ruled in *Ohno v. Yasuma*. In fact, the *Ohno* Court affirmed that "the action of state courts and of judicial officers in their official capacities [has long been] regarded as action of the State within the meaning of the *Fourteenth Amendment*[.]"[19] In *Ohno*, the Ninth Circuit simply held that recognizing and enforcing a judgment is distinct from rendering the judgment.[20]

E. Washington's Security for Costs statute has never been constitutionally challenged.

SCB argues that because security for costs have been upheld in Washington, the Court should find no issues with the Hong Kong security for costs order. As noted in KD Chang's opening brief, the Washington security for cost statute is archaic and ripe for constitutional challenge.[21] SCB cites to just one case, *White Coral*, in which RCW 4.84.210 is addressed - re-emphasizing KD Chang's point that the security for cost rule has not been

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[18] SCB's Response at 15-16.
[19] *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013) (citing *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)).
[20] *Ohno,* 723 F.3d at 993.
[21] KD Chang has not challenged RCW 4.84.210 because the statute is not at play in this case.

constitutionally challenged because it is so effective in denying foreign plaintiffs access to the courts.

In the *White Coral* case, the Division II Court of Appeals upheld the dismissal of a case for the plaintiff's failure to post security for costs. The plaintiff in *White Coral* only argued that security for costs could not include attorney fees and challenged the amount of the order.[22] The plaintiff never challenged the constitutionality of the security for costs statute. The appellate court simply reviewed the trial court's decision as to whether or not attorney fees could be included as "costs" for abuse of discretion and upheld the ruling.

F. **Because the Security for Costs Rule infringes upon a non-resident plaintiff's fundamental right of access to the court, whether or not the classification is suspect is irrelevant.**

SCB argues that a classification based upon non-residency does not subject the classification to strict scrutiny. Instead, claims SCB, the State need only show 1) substantial reason for the difference; and 2) the discrimination bears a substantial relationship to the State's objective.[23] This, however, is the wrong test when the

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[22] *White Coral Corp. v. Geyser Giant Clam Farms, LLC,* 145 Wn. App. 862, 866-869, 189 P.3d 205 (2008).
[23] SCB's Response at 20.

classification bears upon a non-resident's fundamental rights.[24] When a classification affects a fundamental right, the classification is subjected to strict scrutiny.[25] In this case, as set forth in KD Chang's Opening Brief, security for costs rules infringe upon non-residents' most fundamental right - the right of access to the courts.[26] Therefore, they will only be upheld if they are suitably tailored to serve a compelling state interest.[27] However, there is no sufficiently compelling reason why a person should ever be forced to pay significant costs just for the opportunity to exercise this fundamental right.

Even if the "substantial relationship" test is used, the security for costs rule's discrimination against non-residents cannot survive the lesser scrutiny. SCB advances one reason for security for costs: 1) foreign plaintiffs do not usually have assets in the forum.[28] SCB asserts that the States have two objectives: 1) helping collect on judgments; and 2) discouraging spurious litigation. If these truly were State objectives, security for costs would be available in every case. Foreign plaintiffs are certainly not the only source of frivolous

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[24] Appellant's Opening Brief at 30.
[25] Appellant's Opening Brief at 30.
[26] Appellant's Opening Brief at 22-26.
[27] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1984).
[28] SCB's Response at 18-20.

lawsuits, and domestic plaintiffs can easily remove assets from the forum state to avoid attachment.

Regardless, these objectives do not warrant impinging upon a foreign plaintiff's fundamental right of access to the courts, especially given the fact that a defendant with a cost award can now easily record the judgment in the foreign plaintiff's home state. Now that judgments are portable, security for costs are archaic and unnecessary.[29] The states no longer have any justification for requiring foreign plaintiffs to post security for costs.

G. Substantial changes have been made to the Uniform Foreign-Country Money Judgments Recognition Act.

SCB contends that this Court is required to recognize the Hong Kong Judgment simply because California recognized a Hong Kong judgment in 1997.[30] The Washington Uniform Foreign-Country Money Judgments Recognition Act was enacted in 2009. It is based upon the 2005 Uniform Foreign-Country Money Judgments Recognition Act (the "2005 Act") drafted by the National Conference of Commissioners of Uniform State Laws.

The 2005 Act added two substantial grounds for non-

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[29] Appellant's Opening Brief at 27-29. The notations from John A. Gliedman's law review article, *Access to Federal Courts and Security for Costs and Fees*, were omitted from KD Chang's Opening Brief. The footnotes tell the tale of security for costs in England and the United States.

[30] SCB's Response at 23-24.

recognition that were not part of the original 1962 Act: 1) "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;"[31] and 2) "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[32] Since these provisions were not part of the old Uniform Foreign-Country Money Judgments Recognition Act, the California court in the *Chong* case cited by SCB cannot be said to have considered them.[33] Therefore, this Court must ignore the *Chong* case and any other case recognizing a Hong Kong judgment prior to 2009.

As noted above, SCB grossly misguides this Court in stating, "No American court has *ever* taken *any* aspect of Hong Kong's due process protections, as evidence by the unanimous federal and state court decisions recognizing the adequacy of Hong Kong forums and the legitimacy of Hong Kong judgments."[34] The caselaw regarding recognition of Hong Kong judgments, particularly after the 1997 transfer of sovereignty to China, is very sparse. It is this Court's duty to consider on its own whether or not to recognize this

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[31] 2005 Recognition Act § 4(c)(7), cmt 4. See RCW 6.40A.030(3)(g).
[32] 2005 Recognition Act § 4(c)(8), cmt 4. See RCW 6.40A.030(3)(h).
[33] SCB's Response at 23-24.
[34] SCB's Response at 2.

particular Hong Kong Judgment, given facts and circumstances surrounding the Judgment.

H. **There is no evidence that KD Chang refused to provide proof of his financial assets to the Hong Kong Court.**

SCB alleges that KD Chang refused to provide proof of financial assets to the Hong Kong Court.[35] There is nothing in the record stating that KD Chang was required to provide proof of his assets to the Hong Kong Court or that SCB moved in any way to compel disclosure of KD Chang's assets. As noted in KD Chang's initial brief, the Hong Kong Court was considering the entire extended family's resources and not just KD Chang's financial resources. Essentially, the Hong Kong Court said, "Borrow the money if you want to proceed." The process was unfair and did not comport with due process. Moreover, there was ample reason for the Hong Kong Court to disapprove of SCB's entire request for security for costs based on the blatant discrepancies in billing uncovered by KD Chang's forensic billing expert.

I. **The Hong Kong judgment in HCA 806 was far from ordinary and is repugnant to Washington and US public policy.**

SCB asserts that the $9 million Hong Kong Judgment is an ordinary judgment and that it does not contravene public policy

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[35] SCB's Response at 26.

considerations.[36] The reason the Hong Kong Judgment is repugnant to public policy is not because Hong Kong and Washington legal systems differ. The basis is that the Hong Kong Judgment was rendered under unfair circumstances and is unconstitutional because it violated due process.[37] The Judgment was far from ordinary:

1. SCB obtained two identical $9 million judgments against KD Chang in HCA 806 and 1996 for the exact same claims.[38]

2. The underlying loan from SCB to the Changs, which was the basis the $9 million judgments, was obtained through fraud.[39]

3. There were numerous patent irregularities in the Hong Kong Court ruling on security for costs: 1) favoring multi-billion dollar banks over a non-resident family; 2) concern over the multi-billion dollar banks reputation; 3) considering the assets of extended family members; 4) considering KD Chang's exempt retirement assets.[40]

4. The amount of the security for costs was extraordinary and higher than normal.[41]

5. The Hong Kong Court ignored KD Chang's warning that requiring the security to be paid in cash would stifle their claims.[42]

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[36] SCB's Response at 28 and 29.
[37] The *Untersteiner* case as cited by SCB on page 28 of its response specifically notes that due process must be considered, as well as whether discretionary ruling were reasoned or arbitrary.
[38] Appellant's Opening Brief at 12.
[39] See Appellants' Opening Brief and materials filed in the Hong Kong Court in HCA 1996 and HCA 806 (CP 1142-1464).
[40] Appellant's Opening Brief at 8-10 (See other irregularities in the Hong Kong Court's Security for Costs Order).
[41] Appellant's Opening Brief at 11.
[42] Appellant's Opening Brief at 8.

6. The Hong Kong Court awarded SCB the entire $9 million sought, despite clear evidence, presented through affidavits, that SCB obtained the underlying loan through fraud.[43]

These irregularities resulted in unfairness to KD Chang and violated his fundamental constitutional right of access to the courts.

J. There are genuine issues of material fact.

Whether or not the Hong Kong Judgment comported with due process and the integrity of the Hong Kong Court in issuing the Judgment are issues of material fact on which reasonable minds could differ. Each of the grounds for non-recognition raised by KD Chang is an issue of material fact - they are not purely legal arguments. Thus, there are genuine issues of material fact before the Court.

II. CONCLUSION

The Hong Kong security for costs rule is unconstitutional because it denies foreign plaintiff's their fundamental right of access to the court. The Hong Kong Court's application of the security for costs rule against KD Chang further violated his rights to due process by preventing him from being able to defend against SCB's claims. The Hong Kong Court's ruling raises substantial questions about the integrity of that Hong Kong Court. Thus, there are genuine issues of material fact regarding reasons for non-

[43] Appellant's Opening Brief at 12.

recognition of the Hong Kong Judgment, the trial court order granting summary judgment should be reversed.

DATED this 15th day of January, 2014.

TOLLEFSEN LAW PLLC

Chris Rosfjord, WSBA # 37668
John J. Tollefsen, WSBA # 13214
Frank S. Homsher, WSBA # 26935
2122 164th St SW, Ste 300
Lynnwood, WA 98087-7812
Telephone: (206) 624-5300
Email: chris@tollefsenlaw.com
Email: frank@tollefsenlaw.com
Email: john@tollefsenlaw.com
Of Attorneys for Appellants