

Bezpalco v Field

2007 NY Slip Op 33617(U)

October 30, 2007

Supreme Court, New York County

Docket Number: 0105313/2007

Judge: Michael D. Stallman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

ALEXANDER BEZPALCO,
Plaintiff,

INDEX NO. 105313/07

- v -

MOTION DATE 8/29/07

MOTION SEQ. NO. 001

ALEX FIELD, GARY FISKIN, EDWARD RENKO,
MICHAEL VDOVETS and MARINA KREYMER,

MOTION CAL. NO. 17

Defendants.

The following papers, numbered 1 to 6 were read on this motion to vacate a confession of judgment

| | PAPERS NUMBERED |
|--|-----------------|
| Order to Show Cause— Affidavits — Exhibits A-H | 1-4 |
| Answering Affidavits — Exhibits | 5-6 |
| Replying Affidavits | |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ J.S.C.

Dated: 10/30/07
New York, New York

MICHAEL D. STALLMAN
J.S.C. 
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
NOV 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
ALEXANDER BEZPALCO,

Plaintiff,

Index No. 105313/07

- against -

ALEX FIELD, GARY FISKIN, EDWARD RENKO,
MICHAEL VDOVETS and MARINA KREYMER,

Decision and Order

FILED

Defendants.

-----X

NOV 09 2007

HON. MICHAEL D. STALLMAN, J.:

COUNTY CLERK'S OFFICE

Defendant Michael Vdovets moves by order to show cause, and pursuant to CPLR 5015 (a), to vacate a judgment by confession (Judgment) entered against him by the New York County Clerk on April 19, 2007 and filed by plaintiff on April 24, 2007 in the Circuit Court of Cook County, Illinois. The Judgment is in the amount of \$1,550,225.

Vdovets had provided plaintiff with an affidavit of judgment by confession (Affidavit), sworn to on September 6, 2005, to secure Vdovets's guarantec (Guarantee), signed on the same date, of a promissory note (Note) executed, on the same date, by non-party EAG Capital Holdings, Inc. (EAG), a Delaware corporation based in Illinois. Vdovets and co-defendants Alex Field, Gary Fishkin, and Ed Renko were the equal co-owners of EAG from January 1, 2005 until approximately April 24, 2007. The Note was given to secure a loan in the amount of \$650,000 from plaintiff to EAG. The Note provided, in part, that:

[u]pon the occurrence of a Capital Event ..., all of the indebtedness evidenced by this Note ... shall become immediately due and payable, and Maker [EAG] shall pay, upon Holder's [plaintiff's] demand. A "Capital Event" shall mean any of the

following: (i) the refinance by Developer of the property [Property] known as "Northwest Intersection of Skokie Blvd[.] and Dundee in Northbrook, Illinois (the "Project"); or (ii) the sale of the entire Project.

Harfenist Affirm., Exh. A, at 1. The Note identifies the "Developer" as Northshore Center, L.P. (Northshore). By letter dated April 10, 2007, plaintiff's attorney notified Vdovets that "[a]s the Developer has refinanced the Property a Capital Event under the Note has occurred and EAG is in default" Accordingly, the letter continued, pursuant to the Guarantee, plaintiff would be filing the confession of judgment.

Vdovets argues that the Affidavit lacks the specificity required by CPLR 3218 (a), that no Capital Event, within the meaning of the Note, occurred, and that, in any case, under the Guarantee, plaintiff's sole remedy upon the occurrence of a Capital Event was to convert a guarantee given him by EAG into a membership interest in EAG. Vdovets also argues that the Affidavit states that it may not be used for the purpose of securing plaintiff against a contingent liability, and that, if a Capital Event occurred, such event was a contingent event; and that the sum of money, as to which the Affidavit confesses judgment, amounts to a criminally usurious rate of interest. These arguments will be discussed in turn.

CPLR 3218 (a) provides that, in certain circumstances, a judgment by confession may be entered, without an action,

upon an affidavit executed by the defendant;

2. if the judgment to be confessed is for money due or to become due, stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due.

Vdovets contends that, because the Affidavit lacks certain information pertaining to the indebtedness that it confesses, the Affidavit fails to comply with the requirements of CPLR 3218 (a) (2). The

statutory requirement of specificity in an affidavit of confession of judgment is for the benefit of the debtor's creditors, who might be injured by fraudulent transfers by the debtor; the debtor lacks standing to challenge any lack of specificity in his or her affidavit. Franklin Nursing Home v Local 144 Hotel, Hosp., Nursing Home and Allied Scrvs. Union, SEIU, AFL-CIO, 122 AD2d 22 (2d Dept 1986); Girylyuk v Girylyuk, 30 AD2d 22 (1st Dept 1968), affd 23 NY2d 894 (1969).

The Guarantee provides that:

3. In case of maturity of the Note or a Capital Event (as defined in the Note), any or all of the indebtedness hereby guaranteed then existing shall, at the option of [plaintiff], immediately become due and payable from the undersigned.

Harfenist Affirm., Exh. B, at 1. Accordingly, while plaintiff had the right, upon the occurrence of a Capital Event, to acquire an interest in EAG, he was not limited to that remedy.

However, it does not appear that a Capital Event occurred. It is undisputed that, on December 15, 2005, North Shore Center THC, LLC (NSC), a wholly owned subsidiary of Northshore, closed title on the Property. Plaintiff states in his affidavit that, on July 5, 2006, NSC "refinanced the Property, thereby triggering a Capital Event." Vdovets denied in his affidavit that the property was refinanced. Irrespective of whether NSC refinanced the Property, Northshore did not, and the Note defines a Capital Event as either a refinancing of the Property by Northshore, or a sale of the entire Project. Had plaintiff sought to bar the refinance of the Property by an entity other than Northshore, he could easily have done so.

Moreover, while plaintiff states in his affidavit that "the refinance of the property is the precise event [that] the guarantee was intended to protect against, since it would alter the financial risk of my investment," the Affidavit states that "[t]his confession of judgment is not for the purpose of securing the plaintiff against a contingent liability." A refinancing that occurred, if it occurred at

[* 5]

all, approximately a year after the date on which the Affidavit was executed falls within the meaning of "a contingent liability" and cannot serve as a valid ground upon which to obtain a judgment on the basis of the Affidavit.

In view of the discussion above, the court need not address Vdovets's argument that the Note was criminally usurious.

Accordingly, it is hereby

ORDERED that the judgment by confession entered by the Clerk of the Court on April 19, 2007, in the amount of \$1,550,225, against defendant Michael Vdovets and in favor of plaintiff Alexander Bezpalko, is hereby vacated.

Dated: 10/30/07
New York, New York

ENTER:



J.S.C.

MICHAEL O. GYALMAN
J.S.C.

FILED

NOV 09 2007

COUNTY CLERK'S OFFICE
NEW YORK