

AMK Capital Corp. v Vaknin

2009 NY Slip Op 32744(U)

November 10, 2009

Supreme Court, Nassau County

Docket Number: 8767/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

AMK CAPITAL CORP., as Agent,

Petitioner,

- against -

YEHUDA VAKNIN,

Respondent.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 8767/09

Motion Sequence No. 001, 002

For an Order pursuant to CPLR 5206(e) TO
PERMIT THE SALE OF A HOMESTEAD
OWNED BY THE RESPONDENT LOCATED AT
544 EAST BROADWAY, LONG BEACH, NEW
YORK 11561,

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The petitioner seeks a judgment pursuant to CPLR 5206 (e) directing the sale of real property of the respondent described in the petition as 544 East Broadway, Long Beach, New York 11561. The respondent opposes this petition, and cross moves to dismiss this proceeding, deny the petitioner's motion, and impose costs, attorneys fees and sanctions

against the petitioner and its attorneys based upon misrepresentation and misconduct of the adverse party. The petitioner opposes the cross motion. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to this petition and cross motion.

The petitioner's attorney states, in an affirmation dated July 21, 2009, judgment was duly entered on July 6, 2009, against the respondent in the Supreme Court, in Nassau County under Index number 13103/09 for a \$740,091.81 money judgment. The petitioner's attorney maintains there is presently outstanding as due and payable to the petitioner that \$740,091.81 money judgment plus interest from July 6, 2009. The petitioner's attorney points out an execution was duly issued on May 1, 2009, to the Sheriff of the County of Nassau for the satisfaction of the judgment out of real and personal property of the judgment debtor and the debts to him which execution remains unsatisfied.

The respondent states, in an affidavit dated August 5, 2009, the July 6, 2009 judgment was entered improperly, and in sheer retaliation for a malpractice lawsuit commenced by the respondent against his former attorney and the principal of the petitioner. The respondent states the underlying judgment based on a purported confession of judgment dated September 13, 2006, should be vacated pursuant to CPLR 5015 (a) (3) for fraud, misrepresentation or other misconduct. The respondent claims he never knowingly signed the confession of judgment. The respondent contends documents obtained from the petitioner would indicate substantial profits were earned on property sold

where the respondent was the seller. The respondent asserts those profits were diverted by the petitioner without providing the respondent with a proper accounting. The respondent points to a similar judgment recently vacated by the Court.

The petitioner's attorney states, in a an affirmation dated August 6, 2009, in opposition to the cross motion, the underlying obligation is outstanding, and the judgment was properly entered. The petitioner's attorney notes the respondent does not assert payment of the obligation underlying the July 6, 2009 judgment. The petitioner's attorney maintains the entry of judgment was not retaliatory, and the respondent's claim the confessions were not signed is without merit. The petitioner's attorney avers the petitioner attempted to levy against the respondent's personal property, but that levy was returned unsatisfied by the Sheriff of the County of Nassau. The petitioner's attorney states restraining notices were served on bank s to no avail, so this application is the only method of collecting on the judgment since the only asset of the respondent is the subject real property.

The respondent 's attorney states, in an affirmation dated August 12, 2009, the petitioner's president submitted the August 6, 2009 affirmation, as an attorney, but CPLR 2106 requires he submit that sworn statement as an affidavit. The respondent 's attorney points out the petitioner's president does not deny he was the respondent's attorney, and he had the respondent sign the purported confession of judgment which is the basis for this proceeding. The respondent's attorney notes the petitioner's president is a party with a

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personal beneficial interest in the lawsuit as opposed to an attorney simply bringing an action for a client. The respondent's attorney maintains the Code of Professional Responsibility prohibits the petitioner's president from representing the lender petitioner and the borrower respondent, as well as the purchaser respondent in a real estate transaction.

CPLR 5206 (e) provides:

Sale of homestead exceeding fifty thousand dollars in value. A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding fifty thousand dollars in value. The court may direct that the notice of petition be served upon any other person. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold. Money, not exceeding fifty thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, unless, before the expiration of the year, he acquires an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property; and the exemption of the property so acquired extends to every debt against which the property sold was exempt. Where the exemption of property sold as prescribed in this subdivision has been continued after the judgment debtor's death, or where he dies after the sale and before payment to him of his portion of the proceeds of the sale, the court may direct that portion of the proceeds which represents his interest be invested for the benefit of the person or persons entitled to the benefit of the exemption, or be otherwise disposed of as justice requires.

CPLR 5015 (a) (3) provides: "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: fraud, misrepresentation, or other

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misconduct of an adverse party.” CPLR 321 (a) provides:

A party, other than one specified in section 1201 of this chapter, may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney, except as otherwise provided in sections 1809 and 1809-A of the New York city civil court act, sections 1809 and 1809-A of the uniform district court act and sections 1809 and 1809-A of the uniform city court act, and except as otherwise provided in section 501 and section 1809 of the uniform justice court act.

CPLR 2106 provides:

The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

The Second Department stated:

While a strict compliance must be shown with the provisions of a statute providing for a judgment of confession without action, any alleged deficiency in the statement of confession is not available to the plaintiff. Section 3218 is intended to protect creditors of a defendant from judgments entered on confession by collusion. (*Magalhaes v. Magalhaes*, 254 App.Div. 880, 5 N.Y.S.2d 43; 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3218.03.) In determining whether the statement is sufficient, nevertheless, it is not to be interpreted in a captious spirit, but is to be deemed sufficient if it adequately sets out the facts out of which the debt for which judgment is confessed arose. (*Rae v. Hotel Governor Clinton*, 22 A.D.2d 783, 254 N.Y.S.2d 146.) *Girylyuk v. Girylyuk*, 30 A.D.2d 22, 25, 289 N.Y.S.2d 458 [2nd Dept., 1968].

The Second Department also stated:

a defendant debtor who seeks to attack such a judgment must proceed by plenary action (*see, Williams v. Mittleman*, 259 App.Div. 697, 699, 20 N.Y.S.2d 690, lv. denied 284 N.Y. 822, 30 N.E.2d 732; *Mall Commercial Corp. v. Christa Rest.*, 85 Misc.2d 613, 381 N.Y.S.2d 391; *cf. Rea v. Hotel*

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Governor Clinton, 22 A.D.2d 783, 254 N.Y.S.2d 146)...[and the proponent must] establish by a “preponderance of clear, positive and satisfactory evidence” any fraud, misconduct or other circumstances that would require the judgment in question to be set aside (*see, Giryluk v. Giryluk*, 30 A.D.2d 22, 23, 289 N.Y.S.2d 458, *affd.* 23 N.Y.2d 894, 298 N.Y.S.2d 91, 245 N.E.2d 818) [language added]
City of Poughkeepsie v. Albano, 122 A.D.2d 14, 504 N.Y.S.2d 183 [2nd Dept., 1986].

This Court observes the petitioner’s submission of affirmations instead of affidavits by the petitioner’s attorney, who affirms he is the president of the corporate petitioner is improper with respect to this motion because he is a party to the underlying action (*see Muniz v. Katlowitz*, 49 A.D.3d 511, 856 N.Y.S.2d 120 [2 Dept., 2008]; *see also DeLeonardis v. Brown*, 15 A.D.3d 525, 790 N.Y.S.2d 686 [2nd Dept., 2005]). These petitioner affirmations do not comply with the requirements of CPLR 2106 because the corporate president is the attorney who must present an affidavit rather than an affirmation.

Accordingly, the petition is dismissed without prejudice, and the cross motion is granted only to that extent.

So ordered.

Dated: **November 10, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION xxx

ENTERED
NOV 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE