

**Pearl Capital Ravis Ventures, LLC v Cleo Healthcare
Serv., Inc.**

2014 NY Slip Op 30714(U)

March 18, 2014

Sup Ct, New York County

Docket Number: 100119/2014

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

PEARL CAPITAL RIVIS VENTURES, LLC,
Plaintiff,

Index No.: 100119/2014

Motion Date: 03/18/14

Motion Seq. No.: 01

- v -

CLEO HEALTHCARE SERVICES, INC. d/b/a
PHARMACY & FRANK COOPER,

Defendants.

The following papers, numbered 1 to 3 were read on this motion to vacate confession of judgment

Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1
2
3

FILED

MAR 24 2014

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that the motion of defendants to vacate the Confession of Judgment entered on January 29, 2014 in amount of \$69,099.77, including a confessed judgment amount of \$54,169.00, and to order the Clerk to docket the Satisfaction of Judgment dated December 17, 2013 shall be granted and the restraints on the bank accounts and health insurance reimbursement account of

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

defendants shall be stricken.

CPLR § 3218 (a) provides in pertinent part:

Affidavit of defendant. ... (A) judgment by confession may be entered, without an action, either for money due or to become due, or to secure the plaintiff against a contingent liability in behalf of the defendant, or both, upon an affidavit executed by the defendant;

1. stating the sum for which judgment may be entered, authorizing the entry of judgment, and stating the county where the defendant resides or if he is a non-resident, the county in which entry is authorized;
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;
3. If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, stating concisely the facts constituting the liability and showing that the sum confessed does not exceed the amount of the liability.

On January 29, 2014, plaintiff filed a Judgment of Confession with the Clerk of New York County. The Judgment of Confession is in the sum of \$69,099.77, including \$54,169.00, the original amount confessed, together with costs and disbursements and legal fees in the amount of \$13,542.25. The affidavit of defendant Frank Cooper, Cleo Healthcare Services, Inc., sworn on September 24, 2012, was filed with the Judgment of Confession. By such affidavit, defendant Cooper states:

The Defendants (all jointly and severally the "Judgment Debtors/Defendants) all jointly and severally hereby Confess Judgment herein, and they authorize entry thereof against them as Judgment Debtors/Defendants in the sum of the total of (a) \$108,675.00 (One Hundred and Eight Thousand and Six Hundred and Seventy Five Dollars and Zero cents), plus (b) interest thereon at 16% per annum from 09/24/12 to the date of the entry of Judgment, and (c) all of the costs and disbursements, and an additional sum for (d) legal fees to Plaintiff calculated at 25% of all the aforesaid sums.

Judgment Debtors/Defendants all have addresses at 7710 Monnmist Drive, Houston Texas 77036 and 13415 Wood Forest Blvd #F, Houston, TX 77015

Judgment Debtors/Defendants authorized entry of Judgment against each and every one of them in any and all Counties in the State of New York, as well as in each and every State, County and foreign country where they reside and/or do business at any time hereafter, which addresses are not in New York State.

This Confession of Judgment is for a debt justly due Plaintiff, arising from the following facts:

Judgment Debtors/Defendants entered into a Contract with Plaintiff to sell certain assets to Plaintiff. Judgment Debtors/Defendants are uncertain of their ability to complete the transaction, and are aware that their failure to do so will cause Plaintiff serious and substantial losses, damages and injuries. In order to induce Plaintiff to enter into the transaction, the Judgment Debtors/Defendants have agreed to secure Plaintiff by their execution of this Confession of Judgment. Debtors/Defendants hereby authorize the Plaintiff to file this Confession of Judgment at any time hereafter that the Judgment Debtors/Defendants default in their obligations to Plaintiff, supported solely by Plaintiff's Affidavit setting forth the fact that the Judgment Debtors/Defendants are in breach of their obligations. No prior Notice to the Judgment Debtors/Defendants is required prior to the filing of this Confession of Judgment.

With the foregoing Confession of Judgment and Affidavit of Defendant, Plaintiff also filed an Affidavit of its president Meir Hurwitz, who states, in relevant part:

3. The Parties entered into an agreement whereby Plaintiff purchased certain assets from Defendant in about March 13, 2013.
4. Pursuant to said agreement, Defendant was to make daily payments to Plaintiff.
5. A copy of our agreement is annexed hereto as Exhibit "A".
6. Defendant has defaulted in payments on numerous occasions and, as of December 11, 2013, has failed to pay the balance owed.
7. Defendant first defaulted in about June, 2013, leaving a balance due of \$124,149.00.
8. The Defendants have paid a total principal amount of \$69,980.00, as of December 11, 2013, together with interest on that amount of \$8,043.59, leaving a current outstanding balance of \$54,169.00

Defendants move to vacate the Judgment of Confession arguing that the

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plaintiff's affidavit does not contain a concise statement of facts out of which the debt arose as required pursuant to CPLR § 3180(a). They cite Wood v Mitchell, 72 Sickels 439 (1889), where the Court of Appeals reversed the intermediate appellate court's order that affirmed the trial court's denial of defendant's motion to vacate the confession of judgment for \$5,000 entered on February 21, 1889, and the Court of Appeals granted the motion to vacate the confessed judgment. The Court of Appeals reasoned that the statement was indefinite and insufficient since it lacked any information about the date or amount of the loans or what part of the judgment was principal or interest, and therefore failed to set forth the facts out of which the debt arose. Here, defendants argue that the Merchant Agreement dated March 13, 2013, which plaintiff cites as the only basis of the debt set forth in the Confession of Judgment of January 29, 2014, could not possibly state facts out of which the confessed debt arose, since the parties entered into such Merchant Agreement months after defendant confessed the debt on September 24, 2012.

Both sides agree that there were a series of Merchant Agreements entered into by the parties over a two year period. Such Merchant Agreements were factoring transactions, wherein plaintiff purchased defendant's accounts receivables. Plaintiff appends to its opposition papers copies of such agreements, which each include affidavits of defendant Cooper that are identical to the affidavit of defendant, sworn to on December 26, 2012, except as to the sum of the debt. Two such affidavits, sworn to by the defendant on December 26, 2012 and January 28, 2013, post date the September 24, 2012 affidavit of defendant.

"A confessed judgment may be entered only if accompanied by an affidavit

executed by the defendant- the confessor- in conformity with the requirements of CPLR 3218(a). *** The most important mission of the affidavit is to state the facts of the transaction on which the confession is based. ” Siegel, New York Practice § 300 (3rd Edition 1999). Here, based on the affidavit of plaintiff’s president, plaintiff failed to file the affidavit of defendant that relates to the Confession of Judgment filed on January 29, 2014, but instead filed an affidavit of defendant that clearly relates to an earlier debt and confession under a previous Merchant Agreement. Plaintiff argues “if the court will review the ten virtually identical Agreements, the Court will see that the confessions of judgment are not limited to being security under any single agreement. Both the UCC-1 statements and the confessions of judgment secure all ten agreements.” However the Merchant Agreements that plaintiff (and defendants) append to their papers are illegible. Though plaintiff attaches a blank form agreement, plaintiff does not reference the provisions upon which it relies for the proposition that the affidavit of defendant dated September 24, 2012 relates to each confession of judgment, even those where the amount of the debt was confessed by defendant before the date of the Merchant Agreement out of which the debt accrued. As plaintiff failed to follow the strictures of CPLR 3218 with respect of such affidavit, the Confession of Judgment was improperly docketed.

This court disagrees with plaintiff that defendants are required to commence a plenary action to attack the Confession of Judgment. It is true that the affidavit is for the protection of third parties, not the debtor, and if the Confession of Judgment is challenged on the grounds of fraud or some factor extrinsic to the affidavit, defendant debtor would be required to commence a plenary action. See Siegel, New York

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Practice, supra, § 302. However, where as here, the Confession of Judgment was entered in violation of the affidavit's terms, the defendant debtor may challenge such judgment by a mere motion. Siegel, ibid § 302; compare Schechter v Ryan, 161 AD2d 344, 345 (1st Dept 1990) ("sharply contested issues of fact should not be resolved upon affidavits, but rather by trial in a plenary action").

Finally, defendants submit a copy of a Satisfaction of Judgment dated December 13, 2013, which was signed by the attorney for plaintiff. The court has authority to grant an order that directs plaintiff to docket the Satisfaction of Judgment. See National Bank of NY City v ESI Group, 201 AD2d 469 (1st Dept 1994); CPLR § 5020-a. However, to the extent that defendants seek to vacate certain UCC-1 filings, none of which are appended to the papers before the court, a plenary action is necessary.

Accordingly, it is hereby

ORDERED that the motion of defendants Cleo Healthcare Services, Inc. d/b/a J&J Pharmacy and Frank Cooper to vacate the Confession of Judgment entered with the Clerk of the County fo New York on January 29, 2014 in the amount of \$69,099.77 is granted; and it is further

ORDERED that the Clerk shall mark such Judgment of Confession entered on January 29, 2014 as set aside and void; and it is further

ORDERED that the restraining notices placed on the bank accounts of plaintiff located at Wells Fargo Bank, NA and on the account of plaintiff at Caremark Insurance Company are lifted, and it is further

ORDERED that the plaintiff shall docket the Satisfaction of Judgment dated December 17, 2013 in the amount of \$76,248.20; and it is further

ORDERED that to the extent that the motion of defendants seek to vacate certain UCC-1 financing statements, such motion is denied.

This is the decision and order of the court.

Dated: March 18, 2014

ENTER:

~~J. COLEMAN~~
J.S.C.

DEBRA A. JAMES

FILED

MAR 24 2014

COUNTY CLERK'S OFFICE
NEW YORK