

Jaliman v JMJ Films, Inc.

2014 NY Slip Op 33084(U)

March 7, 2014

Supreme Court, Putnam County

Docket Number: 2833/13

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

PLC 6/9/14 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X

MICHAEL JALIMAN,

Plaintiff,

-against -

JMJ FILMS, INC., and JAMES MOSCOVITZ,

Defendants.

-----X

LUBELL, J.

DECISION & ORDER

Index No. 2833/13

Sequence No. 2

Motion Date: 2/18/14

Plaintiff, Michael Jaliman ("Jaliman"), commenced this action against defendants, JMJ Films, Inc. ("JMJ") and James Moscovitz ("Moscovitz"), to enforce the alleged *non-monetary* terms of a confession of judgment arising out of unpaid loans and fees for services rendered by Jaliman to defendants (the "Confession of Judgment"; see CPLR §3218). The Confession of Judgment is in the approximate amount of \$102,000, and was filed and entered in the Office of the Putnam County Clerk on December 20, 2013. By way of a second cause of action sounding in fraud, Jaliman seeks unspecified monetary and punitive damages.

As a first affirmative defense, defendants contend that the Confession of Judgment is void in that it fails to comply with the requirements of CPLR §3218(a)(2). By way of a separately commenced action, defendants seek to vacate the Confession of Judgment on, among other grounds, mistake, fraud and want of consideration (see, Moscovitz and JMJ Films, Inc. v. Jaliman [Putnam Cty Index No. 190/2014]).

Currently before the Court is plaintiff's motion by way of order to show cause for a preliminary injunction: "[e]nforcing the terms granted under the filed Confessions [sic] of Judgment and compel[ling] the transfer of one hundred percent (100%) of the shares of stock of the corporate defendant, JMJ . . . , to plaintiff, Michael Jaliman"; temporarily restraining defendants

from dissipating, converting and/or hypothecating the assets of JMJ; freezing all assets and accounts of JMJ; and other related relief including an accounting.

In order to obtain a preliminary injunction, the movant must present clear and convincing evidence establishing (1) a likelihood of success on the merits, (2) irreparable harm in the absence of preliminary injunctive relief, and (3) a balancing of the equities in favor of the movant (see Aetna Ins. Co. v. Capasso, 75 NY2d 860, 862 [1990]; Yedlin v. Lieberman, 102 AD3d 769, 769-770 [2013]; Lombard v. Station Sq. Inn Apts. Corp., 94 AD3d 717, 718 [2012]).

(E. Coast Drilling, Inc. v. Total Structure Enter., Inc., 106 AD3d 688, 689 [2d Dept 2013]).

A determination of the merits of this application requires consideration of the novel issue of whether one can employ a confession of judgment to enforce anything other than its monetary value. The Court answers the question in the negative.

Reason in and of itself to deny the motion, is plaintiff's failure to "demonstrate a likelihood of success on the merits based on undisputed facts" (Gagnon Bus Co., Inc. v. Vallo Transp., Ltd., 13 AD3d 334, 335 [2d Dept 2004], citing Dental Health Assoc. v. Zangeneh, 267 A.D.2d 421, 701 N.Y.S.2d 106).

This is not a contract action. Rather, plaintiff seeks to enforce the asserted *non-monetary* terms of a confession of judgment. However, the Confession of Judgment does not provide for the terms sought to be enforced; to wit, the transfer of shares of stock from defendant Moscovitz to plaintiff. Properly so, it merely specifies the sum of a monetary judgment confessed by defendant Moscovitz in favor of plaintiff as is set forth in and aggregated from the underlying Affidavits for Judgment by Confession.

The Affidavits for Judgment by Confession provide, at plaintiff's option, for plaintiff's receipt of a "confession of judgment of 100% of the shares of JMJ Films, Inc., currently owned by James Moscovitz, for the purposes of facilitating the collection of monies owed . . . " However,

[i]t must be remembered that the purpose of the affidavit is to protect third persons,

notably other creditors who, because of the confessed judgment, may have to "wait in line" for the satisfaction of any claims they may have against the same debtor. These other creditors are entitled to see the complete picture of the transaction from the affidavit itself, sufficient to enable them to investigate the claim and ascertain its legitimacy.

(Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., CPLR C3218:9). The language contained in the Affidavits for Judgment by Confession neither modify nor supplement the ensuing Confession of Judgment herein sought to be enforced. "Confessions of Judgments are always closely scrutinized (6 Williston, Contracts [rev. ed.], § 1724, p. 4871) and in judging them a liberal attitude should be assumed in favor of the judgment debtor (4 Weinstein-Korn-Miller, N.Y. Civ. Prac., p. 32-237)" (Corrales v. Walker, 20 Misc 3d 285, 287-88 [NY Dist Ct 2008]).

Therefore, properly so, the Confession of Judgment does not contain the language sought to be enforced and, even if it did, the Court concludes that a confession of judgment is not the proper vehicle to effectuate the transfer of an asset, be it collateral or otherwise. Section 3218(b) of the CPLR provides, in relevant part:

[A judgment by confession] may be filed with the clerk of the county where the defendant stated in his affidavit that he resided when it was executed . . . Thereupon the clerk shall enter a judgment in the supreme court for the *sum confessed* . . . [emphasis added]

By statute, a judgment of confession is limited to a "sum confessed". Therefore, there is no legal basis currently before the Court to compel the transfer of stock, as demanded. As such, plaintiff has failed to establish the likelihood of success on the merits.

Similarly as to the second cause of action, fraud, plaintiff has failed to demonstrate the likelihood of success on the merits.

Where a cause of action . . . is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

(CPLR 3016). The Court does not find from a reading of the complaint or affidavit of plaintiff in support, that the fraud claim is pleaded with sufficient particularity such as would warrant the "drastic remedy" of a preliminary injunction (Related Properties, Inc. v. Town Bd. of Town/Vil. of Harrison, 22 AD3d 587, 590 [2d Dept 2005]). Plaintiff's attempt to cure this deficiency by way of reply papers is rejected on procedural grounds.

In addition, plaintiff has failed to adequately address the balancing of equities factor and has not persuaded the Court that he will suffer irreparable harm, especially when considering that a preliminary injunction should be denied "where . . . a litigant can fully be recompensed by a monetary award" (Price Paper and Twine Co. v. Miller, 182 AD2d 748, 750 [2d Dept 1992]). Plaintiff's conclusory concerns and "fears" to the contrary are unpersuasive and any attempt to address said issue by way of reply papers is rejected on procedural grounds, since it deprives defendants of an opportunity to reply.

Having failed to establish entitlement the relief herein sought, it is hereby

ORDERED, that the motion be and is hereby denied in all respects; and, it is further

ORDERED, that defendants are directed to file an RJI in Moscovitz and JMJ Films, Inc. v. Jaliman, *supra*, referencing this related case and requesting a Preliminary Conference for June 9, 2014, on which date this case will also be calendared.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

The following papers were considered in connection with this Decision & Order:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE/AFFIDAVIT/AFFIRMATION/EXHIBITS	1
SUMMONS/COMPLAINT	2
NOTICE OF APPEARANCE	3
AFFIDAVIT IN OPPOSITION/EXHIBITS A-B	4
REPLY AFFIRMATION/EXHIBITS A-K	5

Dated: Carmel, New York
March 7 , 2014

S/

HON. LEWIS J. LUBELL, J.S.C.

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