

Rozengaus v Devterova
2014 NY Slip Op 33935(U)
May 20, 2014
Supreme Court, Nassau County
Docket Number: 600764/14
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 16**
YAN ROZENGAUS and YANA ROZENGAUS,

Petitioner(s),

INDEX # 600764/14

Mot. Seq. 1

Mot. Date 3.10.14

Submit Date 3.10.14

-against-

**ISABELLA DEVTEROVA, ALEXANDER SILVER,
MARINA GLIKLAD, GLIKLAD & SILVER, LLP., COUNTY
CLERK OF THE COUNTY OF NASSAU,**

Respondent(s).

-----X

The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2,3
Memorandum of Law.....	4

Yan Rozengaus and Yana Rozengaus, petition this court for an order vacating expunging and discharging a certain money judgment in the amount of \$37,168.13, dated February 25, 2013, between them and respondent, Isabella Devterova, as judgment creditor. The petition is denied without prejudice.

The instant petition arises from an underlying commercial and/or real estate transaction where the petitioners executed and made a Confessed Judgment Promissory Note on behalf of respondent Isabella Devterova. Devterova's daughter and respondent, Marina Gliklad, moved this court for an accelerated judgment under the subject note and it was granted.

In February 2013, instant respondent, Devterova, obtained a judgment against the petitioners under the Confessed Judgment Promissory Note. The subject judgment was recorded in the Nassau County Clerk's Office in Liber J 3662, pages 190-194. After the petitioners failed to tender payment, the respondents served post judgment discovery requests and subpoenas seeking depositions; however, the petitioners failed to appear for depositions and to comply with discovery.

In August 2013, the respondents filed a motion for contempt against the petitioners. In response and in opposition, the petitioners filed a cross-motion seeking a vacatur of the judgment claiming fraud, arguing that the note was defective, and contending that the Nassau County Clerk wrongfully filed the judgment. The petitioners also sought an order of protection against the requested discovery and deposition requests. In November 2013, the court denied the petitioners' motion without prejudice and it held that because the petitioners sought to set the judgment aside based on fraud, the matter could only be resolved by trial in a plenary action. As to the respondent's motion for contempt, the court held that there was no proof that the defendants were ever served with the notice under which contempt was claimed. The respondent's motion was denied in its entirety.

In November 2013, the respondent reserved the discovery and deposition demands upon the petitioners and, as of the time of the instant petition, such requests are still outstanding. In January 2014, the respondents filed a second motion for contempt upon the petitioners and the matter was conferenced in this court, later in that month. The court set a February 6, 2014 deadline for the petitioners to provide dates when they would provide the discovery and appear for depositions.

The respondents made several attempts to contact the petitioners after they failed to respond to the court's deadline, and the petitioners' counsel responded by informing the respondents of their intent to seek injunctive relief. The court engaged in a telephone conference with all parties to resolve the issue; however, the petitioners filed the instant ex parte motion before this court. In addition to the injunctive relief, they are again seeking a vacatur of the judgment. The petitioners also added the attorneys and their professional entity, who were involved in the preparation of the note, and the Clerk of the County of Nassau as parties.

In 2001, Devterova's husband and non party, respondent Alexander Gliklad, formed an entity, the Newland Group, LLC (Newland), through which he purchased certain real estate in Brooklyn, New York. The petitioner Yan Rozengaus' father, Boris Rozengaus, purchased a 50% interest in Newland, and he and Alexander Gliklad planned to develop the property. They borrowed \$12,000,000.00 from Builders Bank in furtherance to that end.

Boris Rozengaus died and, according to the petitioners, Alexander Gliklad, was "excluded from the United States and compelled to live in Canada." Resultantly, Newland defaulted on the mortgagees and Builders Bank commenced foreclosure proceedings. Prior to Boris' death, his interest in Newland was transferred to the petitioner Yan Rozengaus.

According to the petitioner, Alexander Gliklad assigned his interest to Devterova, who acquired a 50% interest in Newland and partnership with the petitioners. However, the respondent denies any such partnership with the petitioners.¹

The petitioners retained counsel to defend the bank foreclosure action, and they received \$25,000 from Isabella Devterova to defray the legal costs incurred with such defense. There is dispute, however, as to the tenor of the transaction. The respondent, who regards the transaction as a loan, had prepared a Confessed Promissory Note for the petitioners, which they fully executed. The note was presented by Devterova's daughter, Marina Gliklad, and it was drafted by her law partner and respondent, Alexander Silver.

The petitioners regard the funds as a gift and/or a business obligation based on the alleged partnership with Devterova. Petitioners also state that the respondents advised them that the note was a "mere formality" and that their limited comprehension of the English language precluded their full understanding of the note's content and its terms.

The petitioners argue that the Confessed Judgment Promissory Note was replete with errors and was flawed in its construction. As such, the County Clerk should not have accepted the document for recording. Further, a document of such a nature "does not exist in New York State jurisprudence" and in addition to its legal deficiencies, the subject Confession of Judgment is nothing more than a mere promissory note. Also, the legal fee and interest required under the instrument is illegal, exorbitant and unethical. Finally, respondents, Marina Gliklad and Alexander Silver, breached their ethical duties as attorneys and misled the petitioners during the transaction.

The respondents argue that not only are the charges of fraud outrageous and fabricated, the petitioner, Yan Rozengaus, is a sophisticated businessman who has conducted business in the United States for several years, rendering his claims of a language barrier less than credible. Further, the note is unconditional and clear as to its construction and fair consideration was exchanged for the \$25,000 loan. The petitioners also acknowledged the debt and even made promises to pay with expected and anticipated settlements from unrelated matters.

A "confession of judgment" is the entry of a judgment upon the admission or confession of a debtor, without the formality, time, or expense involved in an ordinary action or proceeding. In other words, judgments by confession are governed by CPLR §3218, which provides for entry of judgment without commencement of an action and without service of a summons. The affidavit of the judgment debtor is taken as his or her consent for the entry of judgment against him or her and the debtor's submission to the jurisdiction of the court.

¹ The petitioner, as per his affidavit before the Eastern District Court of the State of New York, in a related action, cites Mordechay Movtady as his partner and the owner of 50% shares of Newland (see Opposition, Exhibit I).

CPLR 3218 (subd. [a]) provides that a judgment by confession may be entered without the necessity of an action upon an affidavit *executed by the defendant stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due* (see *Gold v. Committee on Professional Standards*, 85 AD2d 776 [3rd Dept 1981]). A confessed judgment is valid only if it conforms to the strict requirement of CPLR § 3218 (see *Siegel*, *New York Practice*, 3rd Ed. § 299). It is also well established that confessions of judgment are always closely scrutinized and that courts should adopt a liberal attitude towards vacating a judgment by confession.

In light of the foregoing, this court takes note that the petitioners cross moved for a vacatur of the judgment in this very court before the Hon. Jeffrey S. Brown. The cross-motion set forth the very grounds as in the instant petition and sought virtually the same relief except for the temporary restraining order. Also, in this instance, they have added Marina Gliklad, Alexander Silver and the Nassau County Clerk. In November 2013, the court denied the cross-motion without prejudice and directed that matter could only be resolved by a plenary action. It appears that the petitioners are obviously circumventing the process by using the ex parte order to ostensibly argue the very points already decided by this court, instead of commencing the plenary proceeding. The petitioners are hereby warned that under *Bedford Gardens Co. LP v. Berkowitz*, 15 Misc.3d 1132(A) (2007), their conduct evinces that which would subject them to sanctions by this court.

Sanctions are retributive in that they punish past conduct. They are also goal oriented, in that they are useful in deterring future frivolous conduct. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics. (see *Levy v. Carol Management Corporation*, 260 AD2d 27 [1st Dept 1999]). This court also takes note that in filing an ex parte motion, the petitioners have purchased a new index number and ultimately were able to appear before the Hon. Roy S. Mahon, a new judge.

It is also concerning that instead of complying with the discovery demands as directed by this court, the petitioners brought the instant ex parte motion which not only diverts the court's resources and time to consider the petition, it purports to attain the previously requested relief from a different judge. The only thing that saves them from the swift sword of this court is that they referenced the prior motion and the decision of the Hon. Jeffery S. Brown in the instant motion's verified petition (see Order to Show Cause, Verified Petition ¶ 27).

Although additional parties have been named in the instant petition, the court's prior decision addressed the issues as to the respondent attorneys:

“ [A] judgment debtor who seeks to set aside a judgment entered by confession, on grounds of fraud or misconduct, must proceed by plenary action, not by motion . . . [because] sharply contested issues of fact should not be resolved upon affidavits, but rather by trial in a plenary action” (see Order, Hon. Jeffrey S. Brown,

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No. #2315/13, November 21, 2013, p. 3)

As to the Nassau County Clerk and the acceptance of the flawed instrument, CPLR § 3218 directs the clerk to enter the confessional judgment as long as the affidavit meets the requirements set forth in § 3218(a). It is noted that there is no affidavit attached to the note. The statute is quite clear in setting forth that a judgment by confession may be entered, *without an action*, either for money due or to become due *upon an affidavit executed by the defendant stating not only the sum for which judgment is confessed but also stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due* (see CPLR §3218 [a]).

In light of the foregoing, the Clerk should not have accepted this instrument and as the petitioners are alleging that the Clerk failed to perform her duty as a public and/or municipal officer, the correct action would be for the petitioner to commence an Article 78 proceeding under CPLR 7803(1), which authorizes the proceeding to determine whether the officer failed to perform a duty enjoined upon the officer by law. Here, the entry and filing of the confessed judgment was such a duty and the clerk qualified as such an officer (see *Pro Player Funding LLC v. Goodman*, 2011 WL 6330176 [Sup Ct NY County, 2011]).

As the foregoing is clearly within the purview of a CPLR Article 78 proceeding, and although the court has the discretion to convert the action to an CPLR Article 78 proceeding pursuant to CPLR 103[c] as to the County Clerk, the clerk was not a party in the prior related matters before this Court. The County Clerk, therefore has no prior notice and the petitioners are now required to commence the appropriate Article 78 proceeding.

Regarding the temporary restraining order, such is a provisional remedy routinely granted during the pendency of a preliminary injunction motion. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice (see CPLR § 6313 [a]).

In order for the court to grant a temporary restraining order (TRO) and preliminary injunction, the movants must show (1) they are likely to succeed on the merits (2) they would suffer irreparable harm absent interim injunctive relief and (3) that the balance of the equities were in their favor (see CPLR §6313). Based on the foregoing, the temporary restraining order as ordered by the Hon. Roy S. Mahon, shall remain in effect.

Accordingly, the petition is denied with leave to commence the Article 78 proceeding as to the Clerk of the County of Nassau. The court is also exercising its discretion to convert the instant matter to a plenary action (see *St. Denis v. Queensbury Baybridge Homeowners Ass'n, Inc.* 100 AD3d 1326 [3rd Dept 2012]).

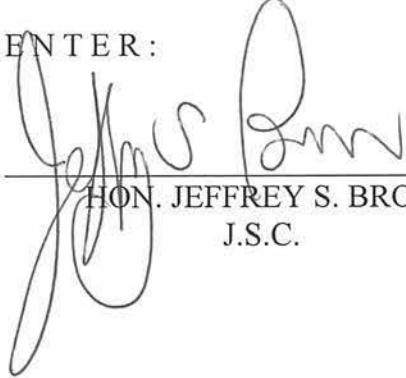
Accordingly, it is

ORDERED, that petitioners have 20 days from service of a copy of this order with notice of entry to commence the Article 78 proceeding against the Nassau County Clerk. Failure to do so will subject the petitioners to sanctions and the temporary restraining order will be immediately removed; and it is further

ORDERED, that all parties shall appear at a preliminary conference at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on July 9, 2014, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 20, 2014

ENTER :

HON. JEFFREY S. BROWN
J.S.C.

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ENTERED

MAY 22 2014

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**