

<b>Levitt &amp; Kaizer v Charles</b>
2016 NY Slip Op 30794(U)
April 19, 2016
Supreme Court, New York County
Docket Number: 104127/09
Judge: Barbara Jaffe
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE  
J.S.C.  
*Justice*

PART 12

Hevity & Raizer

INDEX NO. 104127/2009

Wayne Ivory Charles

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for Vacate

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

**FILED**  
APR 22 2016  
COUNTY CLERK'S OFFICE  
NEW YORK

**RECEIVED**  
APR 22 2016  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

Dated: APR 19 2016

BARBARA JAFFE, J.S.C.  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X

LEVITT & KAIZER,

Index No. 104127/09

Plaintiff,

Mot. seq. no. 002

-against-

**DECISION AND ORDER**

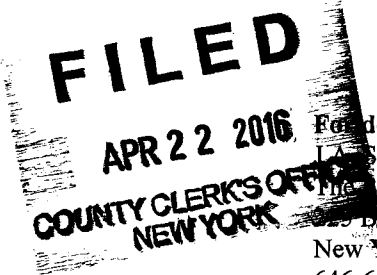
WAYNE IVORY CHARLES,

Defendant.

-----X

BARBARA JAFFE, J.:

**For plaintiff:**  
Peter S. Dawson, Esq.  
Pollock & Maguire, LLP  
4 W. Red Oak Lane, Ste. 302  
White Plains, NY 10604  
914-251-1525



**For defendant:**  
J.A. Sanchez-Dorta, Esq.  
Law Offices of J.A. Sanchez-Dorta  
225 Broadway, Ste. 1901  
New York, NY 10007  
646-657-5345

By order to show cause, defendant moves pursuant to CPLR 5015(a)(3) for an order vacating a decision and order issued by another justice of this court, by which plaintiff's motion for an order appointing a receiver was granted, and preliminarily enjoining the receiver and any other person from selling or otherwise transferring any interest in the premises at issue. Plaintiff opposes.

On January 28, 2016, the justice issued an interim order granting plaintiff's request for relief solely to the extent of recusing himself from this action. The motion and proceeding was then transferred to me.

I. BACKGROUND

The pertinent facts are here culled from those set forth in a federal complaint commenced

in 2015 by defendant against plaintiff and others:

In 2009, one of plaintiff's attorneys, Richard Levitt, represented defendant in a federal criminal proceeding. On March 24, 2009, toward the end of the three-week trial, Levitt asked defendant to sign a confession of judgment, by which defendant agreed to the entry of a judgment against him in the sum of \$150,000, as follows:

The amount confessed herein - \$150,000 - is the agreed upon amount which [defendant] owes [plaintiff] for legal fees. Defendant . . . agrees to entry of this judgment and the subsequent levy upon his real or personal property, wherever it may be located, to satisfy said judgment. It is specifically agreed, in addition to the foregoing, that this Judgment may be satisfied by lien or levy upon the real property known as 80 West 120 Street, New York, NY . . . said property being owned in its entirety by [defendant] . . . Defendant waives any homestead exemption he may be entitled to under NY CPLR Art. 52.

(Affirmation of J.A. Sanchez-Dorta, Esq., dated Dec. 21, 2015 [Sanchez-Dorta Aff.], Exh. A).

According to defendant, Levitt told him that if he did not sign the confession of judgment, he would have to find a new attorney to represent him for the remainder of the trial, and due to defendant's "reasonable fear that he would not be able to locate new counsel at such a late date, and the panicked state of mind that naturally accompanies the threat of incarceration," he signed it. Defendant alleges that he had already paid plaintiff \$130,000, and denies having signed a retainer or letter of engagement with plaintiff. He also denies that the confession of judgment was notarized in his presence or that he ever met the notary. (*Id.*).

The court records reflect that on March 25, 2009, plaintiff commenced this matter by paying for an index number and filing the affidavit of confession of judgment with the New York County Clerk's office. The same day, plaintiff filed the judgment of confession against defendant for the sum of \$150,225, which included costs and fees.

Between March 25, 2009, when plaintiff purchased the index number, and March 27,

2015, when it filed the order to show cause at issue here, plaintiff took no action to enforce the judgment.

By order to show cause dated March 27, 2015, plaintiff moved for an order directing the appointment of a receiver for the purpose of taking control over, and conducting a sale of, defendant's premises at 80 West 120<sup>th</sup> Street in Manhattan, among other relief.

On September 27, 2015, the previous justice heard oral argument on plaintiff's motion for the appointment of a receiver. The justice noted that plaintiff represented that it had requested the appointment of a receiver in order to maximize the amount of money for which the premises could be sold for the benefit of both plaintiff and defendant, and also that the receiver would be able to collect rent from any tenants at the premises and apply the sums to defendant's obligations pending the sale. While defendant opposed on the ground that the judgment was obtained by fraud and/or duress, the justice observed that a confession of judgment may be attacked only in a plenary action, not in a post-judgment enforcement proceeding, and that defendant had not moved for relief in either a plenary action or to vacate the judgment pursuant to CPLR 5015(a)(3). The justice therefore granted the motion for a receiver, and appointed plaintiff to act as the receiver absent any specific objection thereto by defendant, but also required plaintiff to post a bond in the amount of \$3 million, the value of the premises according to plaintiff, as an undertaking pursuant to CPLR 6403.

By order dated October 2, 2015, apparently in response to a request by plaintiff, the justice appointed Paul A. Shneyer, Esq., as the receiver in lieu of plaintiff for the purpose of conducting a sale of the premises to satisfy plaintiff's judgment against defendant and any other liens and encumbrances affecting the property.

On or about October 7, 2015, Shneyer obtained a \$3 million bond.

On or about November 23, 2015, defendant commenced an action in federal court against plaintiff, Shneyer, and others based on his allegations of fraud and duress in obtaining the judgment of confession. One of the defendants is the justice's court attorney who, defendant alleges, encouraged his attorney to betray him by suggesting that the action be settled.

On January 28, 2016, the justice issued the interim order, and granted a temporary stay of the sale of the premises.

## II. CONTENTIONS

Defendant moves for an order vacating the order appointing a receiver on the ground that the notary who signed the confession of judgment is currently delinquent in his New York State attorney registration, and that therefore his affirmation under penalty of perjury that he was present when defendant signed the confession may constitute extrinsic fraud. He also contends that plaintiff fraudulently asserted to the justice that its intention in seeking a receiver was to obtain the best possible price for the sale of the premises, having immediately after its motion for a receiver was granted, advised defendant's attorney that if defendant did not resolve the matter, it would conduct a sale of the premises at a "fire sale price of \$1.5 million." Defendant maintains that these allegations, coupled with those set forth in his federal complaint against plaintiff and others, constitute sufficient grounds to vacate the appointment of a receiver. (Affirmation of J.A. Sanchez-Dorta, Esq., dated Dec. 21, 2015).

Plaintiff contends that defendant's allegations of fraud in his federal complaint are meritless and outrageous, and that in any event, defendant has failed to plead fraud with requisite particularity. It also maintains that defendant has not established that extrinsic fraud occurred

based on counsel's statement regarding the "fire sale" or the court attorney's alleged conversation with defendant's attorney. Plaintiff denies that the notary's delinquent registration status is relevant as it does not bar him from practicing law. (Affirmation of Peter S. Dawson, Esq., dated Jan. 26, 2016).

### III. ANALYSIS

Pursuant to CPLR 5015(a)(3), the court may vacate an order on the ground of fraud, misrepresentation, or other misconduct of an adverse party. "Extrinsic" fraud is defined as conduct that deprives a party of a full trial or prevents the party from fully presenting its case, and a judgment obtained based on extrinsic fraud may be attacked both directly and collaterally. When a judgment is allegedly based on a fraudulent instrument or perjured testimony, it involves an intrinsic fraud and may only be attacked directly, ie, by moving to vacate the judgment before the court that entered it. (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, C5015:8 [2016]).

Here, defendant fails to show that the order appointing a receiver was procured by fraud. Defendant had a full and fair opportunity to oppose the motion on its merits and did so, both in writing and during oral argument, and was thus not deprived of his ability to present his case fully. As the court was authorized to appoint a receiver pursuant to CPLR 5228, it is irrelevant whether plaintiff misrepresented that it would attempt to sell the property at the best price. Defendant's allegations against the justice's court attorney do not establish that any alleged fraud or misrepresentation by her affected or influenced the procurement of the order. And, the notary's delinquent registration status has no bearing on his ability to practice law. (*Matter of Scarsella*, 195 AD2d 513 [2d Dept 1993] [attorney's failure to register and pay fees does not

preclude attorney from practicing law]).

IV. CONCLUSION

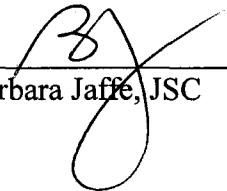
Accordingly, it is hereby

ORDERED, that defendant's motion to vacate the order appointing a receiver is denied; it is further

ORDERED, that any temporary restraints are hereby lifted; and it is further

ORDERED, that the parties are directed to appear for a status conference on May 4, 2016 at 2:15 pm at 80 Centre Street, Room 279, New York, New York.

ENTER:

  
Barbara Jaffe, JSC

DATED: April 19, 2016  
New York, New York

**FILED**  
**APR 22 2016**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**