

**Morocho v Monterroza**

2016 NY Slip Op 33222(U)

January 29, 2016

Supreme Court, Westchester County

Docket Number: Index No. 53289/2015

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

# DECISION AND ORDER

To commence the statutory period of 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  
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

EUGENIO MOROCHO,

Plaintiff,

MOTION DATE: 05/29/15  
INDEX NO.: 53289/2015

-against-

IRMA MONTERROZA,

Defendant.

The following papers numbered 1 to 6 were read on this motion by Plaintiff for an Order vacating the judgment by confession by defendant, etc.<sup>1</sup>

Papers Numbered

Notice of Motion – Affidavit (Monterroza) – Affirmation (Torres) - Exhs. (A-B).....	1-4
Answering Affirmation (Winston).....	5
Replying Affirmation (Torres).....	6

Upon the foregoing papers, it is Ordered that this motion by defendant for an Order vacating her judgment of confession and declaring defendant's personal loan with plaintiff void as violative of General Obligations Law § 5-501, is denied.

Defendant's motion is denied as procedurally improper with leave for defendant to commence a plenary action. Generally, to obtain an Order setting aside an affidavit of

<sup>1</sup> The Court notes that this motion was fully submitted and returnable to Justice Robert M. DiBella on May 29, 2015 but was reassigned to the undersigned on January 19, 2016.

confession of judgment and vacating a judgment by confession, the movant must commence a plenary action. See Rubino v. Csikortos, 258 A.D.2d 638 (2<sup>nd</sup> Dept. 1999); Scheckter v. Ryan, 161 A.D.2d 344 (1st Dept.1990). Only if the confession of judgment is defective on its face, or it had been entered without authority, or in violation of its terms may same be vacated by the simple expedient of a motion. See County Nat. Bank v. Vogt, 28 A.D.2d 793 (3<sup>rd</sup> Dept. 1967); Rae v. Kestenberg, 23 A.D.2d 565 (2<sup>nd</sup> Dept. 1965); Fabrizio, Radmin, Buksbaum & Co. v. Giordano, 17 Misc.3d 1126(A) (Nass. Co. Dist. Co. 2007); cf. Ripoll v. Rodriguez, 53 A.D.2d 638 (2<sup>nd</sup> Dept. 1976). None of those bases are presented at bar so as to permit defendant's proceeding by way of simple motion, defendant's argument to the contrary notwithstanding.

While defendant's argument that plaintiff improperly had entered judgment against her based upon the executed judgment of confession in the amount of \$19,000, together with "usurious" interest at the rate of \$570.00 per month for a total of 39 months, because defendant had not been properly credited for payments she allegedly had made pursuant to the parties' June 3, 2014, Stipulation of Settlement, may have afforded a basis for defendant to have proceeded herein by motion, the fact is that defendant woefully has failed to demonstrate that the confession of judgment had been entered either without authority or in violation of its terms because defendant has failed to submit the various collateral supporting documents referenced in her motion papers, including the underlying promissory note, the purported June 3, 2014, Stipulation of Settlement and all documents that defendant had intended to file under Exhibit "C," allegedly representing her proof of payments. In the absence of this essential and critical proof, defendant cannot herein obtain the relief she seeks by way of motion.

Nor does the Court find, contrary to defendant's argument, that the fact that the interest rate charged for the underlying personal loan is seemingly usurious under General Obligations Law §5-501, alternatively permits her to obtain relief by motion based upon the confession of judgment being facially defective.

Firstly, the Court notes that defendant does not cite, and this Court otherwise is unaware of, any authority supporting defendant's assertion that a usurious rate of interest contained within a confession of judgment makes said judgment facially defective.

Secondly, defendant's argument does not appear to have merit. CPLR 3218, subdivision (a), paragraph 1, provides that a judgment of confession properly may be entered upon a supporting affidavit executed by a defendant in favor of a plaintiff which states the sum for which defendant agrees judgment may be entered, which authorizes the entry of that judgment and which states the county in which defendant resides. CPLR 3218, subdivision (a), paragraph 2, further states that the required affidavit shall "stat[e] concisely the facts out of which the debt arose and show [] that the sum confessed is justly due or to become due." The affidavit is sufficient under the statute if it adequately sets out the facts giving rise to the underlying debt. See Giryluk v. Giryluk, 30 A.D.2d 22, 25 (1st Dept. 1968), *affd.* 23 N.Y.2d 894 (1969).

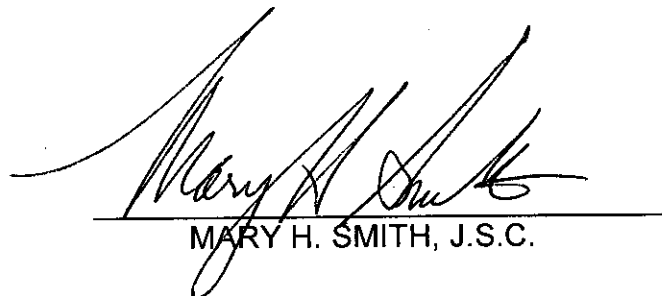
Here, defendant's affidavit adequately states that she is a resident of Westchester County, that the confession of judgment arises out of an executed promissory note, dated December 21, 2011, where defendant had borrowed and received from plaintiff the "sum of \$19,000.00 with three percent interest/month to be paid within six months," and that she authorized plaintiff to enter judgment for that sum against her. Since defendant's affidavit supporting the entered judgment is facially sufficient in accordance with the

statutory requirements, see Spires v. Mihou, 273 A.D.2d 844 (4<sup>th</sup> Dept. 2000); Rubashkin v. Rubashkin, 28 Misc.3d 1240(A) (Sup. Ct. Kings Co. 2010), the Westchester County Clerk, having been presented with a judgment-roll consisting of a copy of defendant's affidavit and the judgment, see CPLR 5017, subdivision (b), properly had entered judgment thereon.

That the confession of judgment ultimately may be adjudicated void because of usurious interest imposed is not akin to stating that the confession of judgment is facially deficient because it sets forth usurious interest.

Notwithstanding the foregoing, plaintiff admits in his opposition that the judgment is incorrect since it does not reflect the interest rate the parties agreed to and it does not deduct payments made by defendant prior to entry of judgment (See Attny. Williams Affirmation ¶ 10). Therefore, within twenty (20) days after the date hereof, plaintiff shall submit either a proposed order vacating the entered judgment or, alternatively, shall submit a memorandum of law, on notice, detailing why an admittedly incorrect judgment should stand.

Dated: January 29, 2016  
White Plains, New York



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