

McBarron Capital LLC v Marder
2017 NY Slip Op 30336(U)
February 22, 2017
Supreme Court, New York County
Docket Number: 650610/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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MCBARRON CAPITAL LLC, f/k/a ARJENT LLC,

Plaintiff,

DECISION AND
ORDER

-against-

Index No.
650610/2016

GARY RICHARD MARDER and ALEXANDER
CAPITAL, L.P.,

Defendants.

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HON. ANIL C. SINGH, J.:

Defendant judgment debtor Gary Richard Marder moves by order to show cause to vacate a default judgment issued against him after he breached a stipulation of settlement dated March 31, 2016. Plaintiff McBarron Capital LLC (“McBarron”) opposes the application.

This action was commenced by plaintiff to enjoin Marder from soliciting McBarron’s clients in violation of a non-solicitation provision in Marder’s employment contract and from disclosing trade secrets and confidential information to his new employer, defendant Alexander Capital, L.P.

By order dated February 8, 2016, the court granted McBarron a temporary restraining order enjoining Marder from, inter alia, contacting McBarron’s clients and using confidential and proprietary information. Marder and Alexander were

both represented by counsel who filed opposition papers to McBarron's request for a preliminary injunction.

On the return date of the order to show cause, the parties entered into a stipulation of settlement in open court. The defendants were represented by counsel who negotiated the settlement. Alexander paid McBarron \$5,000. Marder agreed to pay McBarron \$20,000 over twelve months in installments of \$1,666.66. In the event of a default, plaintiff was given leave to enter a judgment for the balance owed. The stipulation was placed on the record. Marder agreed to the terms of the stipulation (see March 1, 2016 Transcript at p. 4, lines 7-10). The parties also entered into a written settlement agreement dated March 31, 2016.

Marder made only the April and May 2016 payments. He then attempted to renegotiate the terms of the stipulation by reducing the amount of the monthly payment. He was no longer represented by counsel. After some months, plaintiff made a counter-offer seeking a double payment in September 2016 and resumption of the \$1,666.66 monthly payment in October. Counsel for plaintiff advised Marder that in the event the counter-offer was not accepted, a default judgment would be sought. Marder rejected the counter-offer and did not make further payments. Plaintiff entered a default judgment in the sum of \$18,601.68 inclusive of interest and attorneys' fees as provided for by the settlement

agreement.

Marder seeks to vacate the default judgment and settlement agreement on the grounds that, prior to leaving McBarron, he was advised by James Crafa, the CEO, that in the event he resigned, he could take his clients with him. Marder maintains that his attorney failed to advise the court of the facts during the litigation. Six clients transferred their business to him. However, these clients are generating insufficient business for him to comply with the terms of the settlement. He is unable to make the payments because of financial hardship. Further, FINRA shut down McBarron in December 2016. Had Marder not resigned, he would not be licensed to do business in the industry.

It is well settled that a party may be relieved from the consequences of a stipulation made during litigation only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident (Hallock v. State of New York, 64 N.Y.2d 224, 230 [1984]) (citing Matter of Frutiger, 29 N.Y.2d 143, 149-50 [1971]).

Here, there is clearly no fraud, collusion, mistake or accident. Marder does not dispute that he breached his employment agreement by soliciting McBarron's clients. Marder could have litigated and raised a defense that, despite the restrictive covenant, Crafa gave him permission to solicit clients. Instead, he

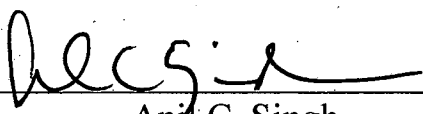
voluntarily entered into a settlement while represented by counsel and consented to the terms of the settlement on the record. He knowingly defaulted. While the court is empathetic to Marder's current financial situation, hardship is simply not a ground upon which to vacate the default judgment and settlement.

Finally, on a separate matter, at oral argument conducted on the record, counsel for plaintiff acknowledged that since McBarron is no longer in business, Marder is not bound by the employment agreement and may freely and without penalty solicit any of McBarron's former clients.

Accordingly, it is

ORDERED that the motion to vacate the default judgment and settlement agreement is denied.

Date: February 22, 2017
New York, New York


Anil C. Singh