

Mantis Funding, LLC v Williams
2017 NY Slip Op 32141(U)
October 13, 2017
Supreme Court, Westchester County
Docket Number: 63531/2016
Judge: Terry J. Ruderman
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To commence the statutory time 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 WESTCHESTER

-----X
MANTIS FUNDING, LLC,

Plaintiff,

-against-

DECISION and ORDER

Motion Sequence Nos. 1 & 2

Index No. 63531/2016

ROBERT WILLIAMS a/k/a ROBERT L WILLIAMS III
a/k/a ROBERT L WILLIAMS a/k/a WILLIAMS
ROBERT and REALTIME CARRIERS, LLC d/b/a
REALTIME CARRIERS,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with defendants' motion to vacate the confession of judgment entered in this matter (sequence 1) and plaintiff's cross-motion for costs and sanctions (sequence 2):

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affidavit, Exhibits A - E, Affirmation, and Memorandum of Law	1
Notice of Cross-Motion, Affirmation, Exhibits 1 - 42, Memorandum of Law	2
Reply Memorandum Opposing Sanctions, Exhibit A	3
Reply Memorandum of Law in Support of Cross-Motion, Exhibits 43-46	4

On July 26, 2016, plaintiff Mantis Funding ("Mantis") and defendant Realtime Carriers ("Realtime") entered into an agreement denominated a Merchant Agreement which provided that plaintiff Mantis Funding, for the price of \$32,000, purchased from defendant Realtime Carriers future receivables with a face value of \$47,360. Realtime would pay Mantis its future

receivables through daily payments of 10% of Realtime's average daily sales, calculated as \$540.00, which Mantis was authorized to collect through ACH Debit from Realtime's bank account. The agreement contains a provision allowing Realtime to ask for monthly reconciliation by which Mantis would review Realtime's bank statements and determine if the merchant's actual receipts for that month were higher or lower than the amount anticipated by the Merchant Agreement; if so, Mantis would debit or credit the difference so that it received 10% of Realtime's actual receipts. Realtime's only obligation to obtain such a reconciliation was to provide its monthly bank statements.

As part of the Merchant Agreement, Realtime's principal, defendant Robert Williams, executed a Security Agreement and Guaranty. Further, the Merchant Agreement also provided for Mantis's entry of a Confession of Judgment in the event of a default. The Confession of Judgment executed by Williams both individually and on behalf of Realtime, designated Westchester County in the caption of the Confession of Judgment, although in the body of the document authorized entry of judgment the Federal District Court for the Southern District of New York, the Supreme Court of the State of New York in New York County or Westchester County, or, the Civil Court of the City of New York.

On September 19, 2016, Mantis filed the Confession of Judgment with the County Clerk of this Court, along with an affidavit of Adam Sloane, setting forth the amount of the unpaid balance under the Merchant Agreement and describing defendants' breach of the agreement based on the termination of ACH payments. Judgment was entered in the principal amount of \$39,260, plus costs and interest.

Defendants now move by order to show cause to vacate the confession of judgment, on the grounds that (1) the judgment was entered in violation of statute and in the absence of

jurisdiction, and (2) the underlying agreement violated the prohibition against criminal usury.

Plaintiff cross-moves for costs and sanctions pursuant to 22 NYCRR § 130-1.1.

Analysis

Although defendants challenge the validity of the Merchant Agreement, arguing that examination of its terms reflects that it is, in fact, a usurious loan arrangement, plaintiff entered judgment here based on the Affidavit of Confession of Judgment. By such a document, a person “agree[s] to the entry of judgment upon the occurrence or nonoccurrence of an event” (see Black's Law Dictionary [10th ed. 2014]), giving the holder a remedy that does not require proof of the nature of the transaction or allow for interposing defenses (see *Soler v Klimova*, 5 AD3d 294 [1st Dept 2004]). Therefore, in the context of an application to vacate the confession of judgment, this Court may not inquire into the bona fides of the underlying transaction.

The main ground proposed by defendants for invalidating the Affidavit of Confession of Judgment, and therefore the entered judgment, is its designation of more than one county in which judgment could be entered. Defendants argue that by doing so, the Affidavit violates the dictates of CPLR 3218(b); defendants term this a fatal defect that renders the Affidavit invalid.

CPLR 3218, entitled “Judgment by Confession,” provides in relevant part, in subdivision (a), that:

- “a judgment by confession may be entered, without an action, either for money due or to become due, or to secure the plaintiff against a contingent liability in behalf of the defendant, or both, upon an affidavit executed by the defendant;
1. stating the sum for which judgment may be entered, authorizing the entry of judgment, and stating the county where the defendant resides or if he is a non-resident, *the county in which entry is authorized*;
 2. if the judgment to be confessed is for money due or to become due, stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due” (CPLR 3218[a] [emphasis added]).

Subdivision (b) of the rule authorizes that the judgment “be filed with the clerk of the county where the defendant stated in his affidavit that he resided when it was executed or, if the defendant was then a non-resident, with the clerk of *the county designated in the affidavit*” (emphasis added). Defendants rely on CPLR 3218’s use of the singular “the county” when it refers to an out-of-state resident authorizing entry of judgment in a specified county of this state, to maintain that the broad authorization in the Affidavit of Confession of Judgment allowing judgment to be entered in more than one specified county invalidates the Affidavit of Confession of Judgment.

Defendants cite cases discussing how predecessor statutes, which at first allowed entry of judgment by confession against a New York resident in “a county” or “any county,” were thereafter amended so as to limit such judgments to be filed only in the county in which the defendant was a resident (*see e.g. Steward v Katcher*, 283 App Div 50 [1st Dept 1953] [discussing former Civil Practice Act 543 and its predecessor statutes]).

The Court of Appeals, in *Atlas Credit Corp. v Ezrine* (25 NY2d 219, 226 [1969]), remarked on CPLR 3218(a), as follows:

“With the enactment of the Civil Practice Law and Rules (1962) there came a new requirement that the obligor state in the affidavit ‘the county where [he] resides, or, if he is a non- resident, the county in which entry is authorized’ (CPLR 3218, subd. [a], par. 1). The purpose of this change was ‘so that proper county for entry’ of the judgment will be ascertainable from the affidavit (5th Report, Advisory Comm. on Prac. and Pro., N. Y. Legis. Doc., 1961, No. 15, p. 503). Although the change was primarily to protect creditors, it affords some minimal protection to the obligor in that he may be able to ascertain whether judgment has been confessed against him.”

(*Atlas Credit Corp. v Ezrine*, 25 NY2d 219, 226 [1969]). The Court in *Atlas Credit* also observed that “[t]he theoretical basis for all judgments by confession is that a defendant may consent in advance to jurisdiction of a ‘given court’ (*id.* at 227 [citations omitted]).

Assuming, based on the foregoing, that CPLR 3218 mandates that affidavits of confession of judgment should designate only one county for the entry of judgment against an out-of-state resident, nevertheless, nothing in the statute indicates that an authorization for entry of judgment in more than one county is a fundamental flaw that invalidates the document or precludes entry of judgment under CPLR 3218(b) based on that affidavit. Defendant has not provided this Court with any controlling appellate authorities to that effect, and this Court has found none.

It is noteworthy that in *Steward v Katcher* (283 App Div 50 [1st Dept 1953]), where the supporting documents for a confession of judgment incorrectly authorized entry of judgment in New York County, although the debtor resided in Queens County, the Court held that the failure to comply with the county-of-residence requirement of the predecessor statute to CPLR 3218(b), the former Civil Practice Act § 543, did not establish grounds to void the judgments as a matter of law.

It is also significant that the Affidavit of Confession of Judgment prepared by plaintiff and executed by defendant used Supreme Court, Westchester County in its caption, which reflects an intent that any judgment entered thereon would be in this Court. Since this County was a designated county, entry of the judgment here is not contrary to the authority of *Irons v Roberts* (206 AD2d 683, 684-685 [3d Dept 1994]), where entry of the judgment in an *unauthorized* county rendered it void.

Because defendants failed to establish that the Clerk acted improperly in entering the Confession of Judgment, they have not provided a basis to vacate the judgment in the context of the current motion. Their challenge to the underlying agreement as a usurious loan rather than a permissible receivables purchase agreement may not be addressed in the context of this

proceeding, but requires a plenary action (*see Regency Club at Wallkill, LLC v Bienish*, 95 AD3d 879 [2d Dept 2012]).

This Court has examined defendants' remaining contentions on their motion and finds them to be without merit.

Plaintiff's cross-motion for costs and sanctions pursuant to 22 NYCRR § 130-1.1 is denied. Such sanctions are available where a party of attorney engages in frivolous conduct (*see* 22 NYCRR § 130-1.1[a]-[b]). "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR § 130-1.1[c]). Although this Court has rejected defendants' arguments, their position regarding CPLR 3218 can "be supported by a reasonable argument for an extension, modification or reversal of existing law"; nor does it appear to have been "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" or to assert falsities (*id.*).

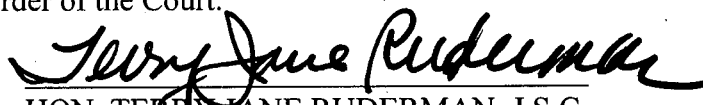
Based upon the foregoing, it is hereby,

ORDERED that defendants' motion to vacate the confession of judgment is denied, and it is further

ORDERED that plaintiff's cross-motion for costs and sanctions is denied.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
October 13, 2017


HON. TERRY JANE RUDERMAN, J.S.C.