Kaplan v Kaplan
2017 NY Slip Op 33152(U)
October 20, 2017
Supreme Court, Rockland County
Docket Number: 033759/15
Judge: Gerald E. Loehr

To commence the statutory time 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
COUNTY OF ROCKLAND

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RONALD P. KAPLAN,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 033759/15
Action No. 1

STEVEN R. KAPLAN,

Defendant.

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RONALD P. KAPLAN,

Plaintiff,

-against-

STEVEN R. KAPLAN, ELLEN F. KAPLAN, 144 RAMAPO ROAD CORPORATION, 397 SMITH ROAD LLC, 31 TOBY ROAD, LTD, S&E MANAGEMENT LLC, KAPLAN HOLDING CORP., FISHER-KAPLAN HOLDING CORP., ET AL.,

Index No. 030538/2016
Action No. 2

Defendants.

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LOEHR, J.

The following papers numbered 1-8 were read on Defendant's motion in action No. 1 to vacate a Judgment entered by confession and Plaintiff's motion to either award attorneys's fees as a sanction or under the Confession of Judgment.

	Papers Numbered
Order to Show Cause - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Memorandum of Law in Opposition	3
Affidavit in Opposition	4
Reply Memorandum of Law	5
Reply Affirmation - Exhibits	6
Reply Affidavit - Exhibits	7
Notice of Cross-Motion - Affirmation	8

Upon the foregoing papers, it appears that on November 29, 2004 Plaintiff loaned Defendant, his brother, $300,000 as evidenced by a one-year Promissory Note which bore interest at 10%. On October 1, 2005, the parties converted the Note into a two-year Promissory Note but still for $300,000 at 10%. Between then and 2013, Defendant paid the principal balance down to $150,000. Defendant, then expecting to sell property in which he had an interest while the parties disagreed on the amount of the interest that had accrued under the Notes, the parties entered in a Settlement Agreement, dated August 19, 2013. In the Agreement, Defendant, first and foremost, acknowledged that he was indebted to Plaintiff in the principal amount of $150,000, and agreed that the accrued interest on the Notes from April 2009 and projected to August 1, 2015, if not paid sooner, would be $57,000.[1] The Agreement continued that, provided Defendant executed and delivered to Plaintiff an Affidavit of Confession of Judgment in the amount of $207,000 and made the payments set forth upon the sale of the specified property,

[1] Presumably Defendant paid some interest, in addition to $150,000 in principal, from the inception of the loan until the date of the Settlement Agreement because the interest on $150,000 at 10% from April 2009 to August 1, 2015 would be over $90,000, not $57,000.

Plaintiff would forebear from taking steps to collect the Loan/Notes until August 1, 2015 (when it was otherwise payable in full), otherwise the Affidavit of Confession of Judgment could be filed after three days email notice. Defendant having failed to repay the loan on August 1, 2015, after providing notice, Plaintiff filed the Affidavit of Confession of Judgment on August 10, 2015, the Clerk entered Judgment in the amount of $207,225 the next day, and Plaintiff immediately started collection efforts. A year later and after having allegedly fraudulently conveyed assets in an attempt to avoid the Judgment, Defendant moved to vacate the confessed Judgment pursuant to CPLR 3218(a) and General Obligations Law § 17-103.

As the Affidavit set forth the amount confessed, the basis therefor and authorized its filing, CPLR 3218(a) was complied with (*see generally Weinstein v Pollack,* 208 AD2d 615, 617 [2d Dept 1994]). As to GOL § 17-103, Defendant argues that Paragraph 6d thereof, which provides:

"[Defendant] WAIVES ANY AND ALL DEFENSES HE MAY HAVE, NOW OR HEREAFTER, TO OR WITH RESPECT TO THE LOAN, NOTE AND/OR DEBT, AND AGREES THAT SUCH WAIVER WITH RESPECT TO ANY AND ALL DEFENSES, WHETHER NOW EXISTING OR SUBSEQUENTLY ARISING . . ."

is unenforceable pursuant to GOL § 17-103. GOL § 17-103 renders invalid and unenforceable any agreement which would extend the statute of limitations on a contract claim for more that six years from the date of the agreement (*see Bayridge Air Rights, Inc. v Blitman Construction Corp.,* 80 NY2d 777, 779 [1992]). Thus, in *Bayridge*, where the agreement extended the statute of limitations for more than six years after its date, it was found unenforceable and the action was dismissed as untimely. Here, assuming the quoted language was intended to extend the statute of limitations indefinitely, it would be unenforceable under GOL § 17-103. That, however, has no effect on this case. The original loan had been rolled over repeatedly and paid in part between 2004 and 2013 when Defendant *acknowledged* the remaining debt in a signed writing – the Settlement Agreement. That restarted the statute of limitations – assuming it had otherwise expired (General Obligation Law § 17-101). This action commenced on August 10, 2015 was therefore within the statute of limitations without the need to rely on any tolling or extension.

Plaintiff seeks sanctions based on the motion to dismiss being frivolous. The Court finds it to be frivolous for the reasons stated above, interposed solely to delay the proceedings. Alternatively, Plaintiff seeks attorney's fees pursuant to the Affidavit of Confession of Judgment

which provides:

"I hereby confess judgment with respect to the Debt in the amount of $270,000 plus any and all reasonable attorneys' fees or other costs incurred by Ronald in connection with his efforts to enforce the Agreement of this Affidavit . . . ."

Inasmuch as Defendant has engaged in frivolous litigation in an attempt to vacate the confessed Judgment, Plaintiff is entitled to his reasonable attorney's fees incurred in connection with his efforts to enforce it. The Court will determine same at the end of this case.

As the forgoing was transpiring, and based on the limited discovery Plaintiff apparently obtained in Action No. 1, in a Complaint filed on February 18, 2016, Plaintiff alleged that Defendant made conveyances of his assets to the other Defendants in violation of sections 273 to 278 of the Debtor and Creditor Law.[2] All the Defendants were served in March 2016. Defendant Steven Kaplan – and only such Defendant – has moved to dismiss pursuant to CPLR 3211(a)(7), arguing that Plaintiff's failure to identify all of the transferred assets is fatal. In response, both sides have submitted factual affidavits identifying additional assets. On the other hand, all of the other Defendants have defaulted[3] and more than a year has past. Pursuant to CPLR 3215(c), when a plaintiff fails to take proceedings for the entry of a default judgment within one year of the default, the court may dismiss the complaint as abandoned unless sufficient cause is shown why it should not be.

Based thereon, the Court converts Steven's motion to dismiss to one for summary judgment. As to all the other Defendants, Plaintiff shall show cause why the Complaint should

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[2] The Ninth Cause of Action alleges Joint Venture Liability against all of the Defendants. The Court is at a loss as to what that might mean. If Plaintiff is alleging that the other Defendants were aiding and abetting or conspiring with Defendant to make fraudulent conveyances, he should amend the Complaint to say so. Alternatively, if Plaintiff is alleging that the Defendants – other than Defendant's wife – are just Defendant's alter ego, again, Plaintiff should amend the Complaint to say so, otherwise the claim shall be dismissed (*Lanzi v Brooks,* 43 NY2d 778, 780 [1977]; *Gateway I Group Physicians, Inc.,* 62 AD3d 141, 145-46 [2d Dept 2009]; *Shisgal v Brown,* 21 AD3d 845, 847 [1st Dept 2005]; *Menaker v Alstaedter,* 134 AD2d 412, 413 [2d Dept 1987]; *Ed Moore Advertising Agency, Inc. v Shapiro,* 124 AD2d 696 [2d Dept 1986]; *Oltchim v Zebulon Industries,* 26 Misc3d 1209[A][Sup Ct. West. Co. 2009]).

[3] The fact that these corporations and LLC's have defaulted after being served through the Secretary of State gives credence to the assertion that they are just Steven's alter ego, otherwise why have they not appeared and defended when their assets are threatened?

not be dismissed as abandoned or why, instead, a default judgment should not be entered against them. All further papers as to both issues shall be efiled on or before December 1, 2017. This constitutes the decision and order of the Court.

Dated: New City, New York
~~November~~ October 20, 2017

HON. GERALD E. LOEHR
J.S.C.

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