# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

*Justice*

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DIANE LACAPRIA and VINCENT LACAPRIA,

Plaintiffs,

- v -

TERRENCE COSCINO,

Defendant.

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**INDEX NO.** 152143/2017

**MOTION DATE**

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 42-51, 55-58 were read on this motion to vacate judgment.

By notice of motion, defendant moves pursuant to CPLR 5015(a)(1) and (3) for an order vacating the judgment against him, and pursuant to CPLR 3211(a)(3) and (7) dismissing the action. Plaintiffs oppose.

## I. PERTINENT UNDISPUTED BACKGROUND

In 2007, defendant married plaintiffs' daughter after having cohabitated with her for several years. On May 28, 2010, defendant executed a promissory note in favor of plaintiffs, then his in-laws, "for value received," unconditionally promising to pay them $60,500 in 12 annual installments of $5,050 commencing October 1, 2010. The note includes provisions for a suspension during the pendency of divorce proceedings between defendant and plaintiffs' daughter and for an acceleration of payment on default. (NYSCEF 44).

Defendant failed to pay plaintiffs pursuant to the note. By email dated November 28, 2016, plaintiffs' daughter notified defendant that he was in default on the promissory note in the amount of $22,750 and set forth payments he had made totaling $7,550. Plaintiffs characterize

this email as a demand that he cure the default. (NYSCEF 44). He did not. By letter to defendant dated February 10, 2017, plaintiffs, through their attorney, advised defendant that they were exercising their rights to accelerate and demand immediate payment of the entire amount, with interest, attorney fees, and other charges and expenses. (*Id.*). Plaintiffs acknowledge that defendant had made some payments. (NYSCEF 3).

II. PROCEDURAL BACKGROUND

A. Plaintiffs' motion for summary judgment in lieu of complaint (NYSCEF 16-35)

By summons personally served on defendant, in hand, on March 8, 2017, plaintiffs moved for summary judgment in lieu of complaint based on the promissory note. (NYSCEF 12). In an affidavit submitted in support of the motion, plaintiff Diane Lacapria stated that plaintiffs as lenders and defendant as borrower were parties to the note pursuant to which plaintiffs had agreed to loan defendant $60,500. Plaintiff set forth all of the terms of the loan and defendant's default, acknowledged defendant's payment of $9,750, and specified that of the outstanding amount of $50,750, $25,600 represented past due principal and $34,900 represented the remaining unpaid principal. (NYSCEF 19).

Defendant neither answered nor opposed the motion.

By decision and order dated January 11, 2018, plaintiffs' motion was granted on renewal and they were directed to submit a proposed order and judgment. (NYSCEF 27). A judgment against defendant in the total sum of $54,632.71 including costs, expenses, and interest, was entered on May 21, 2018. (NYSCEF 35).

2. Defendant's order to show cause (NYSCEF 37-41)

By order to show cause efiled on April 5, 2019, defendant sought, pursuant to CPLR 5015(a)(1) and (3) an order vacating the judgment, pursuant to CPLR 3211(a)(5) and (7) an order

dismissing the action, and an order staying all judgment discovery. In his supporting affidavit, defendant denied having received money or other property from plaintiffs. Rather, he stated, plaintiffs gave their daughter $70,000: $30,000 in 2005 to fund a down payment on an apartment, $25,000 in early 2009 to pay credit card debt, and $15,000 in July 2009 to pursue an advanced degree. Defendant also alleged that in August 2009, he told plaintiffs' daughter that he had incurred some $35,000 in joint credit card debt resulting from gambling losses, which his parents paid. (NYSCEF 38).

Defendant asserted that plaintiffs had told him and their daughter that if they intended to remain married, they wanted the aforementioned money paid back to them and, "[a]s it was conveyed to [him]," his execution of the promissory note was a condition for him and their daughter "remaining together." He denied having made any payments on the note. Defendant and plaintiffs' daughter obtained a judgment of divorce in January 2013. (*Id.*).

Defendant described how in July 2015, he had admitted himself into a 28-day in-patient hospital for treatment for drug and alcohol dependence, and then moved into a "sober living house" where he remained until January 2016, when he "relapsed" following the death of his father. Defendant related that on one occasion, plaintiffs' daughter told him that she had paid "all outstanding obligations under the Note, and asked [him] to now repay her," offering in support an email from her dated April 4, 2016, in which she stated, "I definitely plan on using all the tools at my disposal to collect the debt that you owe to me." To salvage their "friendship and possibly reconcile," defendant claimed, he made "several payments to her." In October 2016, he moved to another sober living house. (*Id.*).

Defendant also offered an email to him from plaintiffs' daughter dated November 28, 2016, in which she set forth "a record of [his] payments" totaling $7,550, made between

November 5, 2013 and May 21, 2016. In the email, she also observed that "[b]ased on the promissory note you are currently in default of $22,750." She otherwise expressed frustration with his conduct, observing that he had "screwed" her out of her "entire 401k as well as equity in [her] apartment" and "much more which is out of the scope of this $60k." She also advised that she was prepared to "go the legal route." Defendant remained in the second sober living house until March 2017, where he was hand delivered the papers commencing this action, after having corresponded by email with plaintiffs' counsel to arrange such service. He moved out of the second sober living house the following month. (*Id.*).

According to defendant, he did not respond to this action "principally out of fear that doing so would trigger a relapse." He complained of having received no further communications concerning this action, claiming that plaintiffs' counsel did not "reach out" to him to ask if he still lived at the second house and that he had learned of this action upon being served with a restraining notice. (*Id.*).

In support of the motion, defendant alleged that as plaintiffs had failed to comply with CPLR 3215(f) by failing to offer proof of the facts of their claim or identifying any valid consideration in support of the note, the judgment against him should be vacated. He observed that in support of their motion for summary judgment in lieu of complaint, plaintiffs stated only that they had "agreed to loan" him the $60,500, and complained that they had not defined the term "loan," and did not disclose that their daughter had satisfied the "supposedly outstanding payment obligations under the Note," and that they were thereby seeking a double recovery. He thus also sought dismissal of the action and failing that, that his papers be treated as an answer.

Relying on CPLR 5015(a)(3), defendant argued that having misled the court about their daughter's satisfaction of the note, plaintiffs misrepresented the facts, thus warranting the vacatur

of the judgment. He also maintains that he has a meritorious defense as the note is not supported by "valid consideration," in addition to the alleged misrepresentation.

Defendant also argued that his default is excusable within the meaning of CPLR 5015(a)(1), denying a pattern of dilatory conduct or unfair prejudice to plaintiffs, and relying on the strong public policy of favoring dispositions on the merits. He pointed out how cooperative he was with accepting personal service, and he denied having received any further communications about the action as he had moved from the second house in April 2017.

On April 8, 2019, I declined to sign the order to show cause on the ground that defendant had not alleged a fraud within the meaning of CPLR 5015(a)(3). (NYSCEF 41).

## III. DEFENDANT'S MOTION

### A. Defendant's contentions (NYSCEF 42-45)

Now, by notice of motion, defendant seeks the same relief sought in his order to show cause and submits the same affidavit and exhibits. He refers to the motion in his memorandum of law in support as a "renewed" motion to vacate and dismiss, but denies seeking relief pursuant to CPLR 2221.

In addition to the legal arguments he had advanced in his unsuccessful order to show cause, defendant maintains that "proof" of fraud, misrepresentation or other misconduct is not necessary for a motion to vacate based on an adverse party's "fraud, misrepresentation, or other misconduct," and that his own affidavit and the two annexed emails present issues of fact which warrant a hearing.

### B. Plaintiffs' contentions (NYSCEF 50-51)

Plaintiffs deny that defendant offers a reasonable excuse sufficient to warrant relief under CPLR 5015(a)(1), observing that his alleged fear of a relapse is unexplained, especially given his

ability to obtain counsel now. Moreover, they assert, his failure to notify plaintiffs' counsel of his new address estops him from complaining that he received no subsequent legal communications or notices. (*Id.*).

According to plaintiffs, absent a fraud on defendant that allegedly induced him not to defend the case, he sets forth an insufficient basis for vacating the judgment pursuant to CPLR 5015(a)(3). Moreover, they observe, given their reasonable determination, based on defendant's addictions to gambling, drugs, and alcohol, that he could not be trusted to pay the credit card debt he had incurred, they paid the debt directly. That they did so, they claim, is evidence of the consideration on which the note is premised. They also assert that defendant's arguments are unsubstantiated, noting that nothing in their daughter's April 4 email connects her statements to the promissory note and nothing in her November 28 email reflects that the payments defendant made were to her and not to them. Nor did defendant ever before challenge the validity of the note or his liability on it. Plaintiffs also maintain that defendant's claim of duress fails absent his prompt repudiation, observing that he had waited close to nine years to advance it. (NYSCEF 51).

By affidavit, plaintiff Diane Lacapria states that plaintiffs learned of defendant's addictions in 2009 and that he had "maxed out" her daughter's credit cards without her daughter's knowledge. She also alleges that defendant admitted to plaintiffs that he had accumulated "thousands more in gambling debts," that he had used money they had given him for legitimate expenses to gamble and pay off gambling debts, and that he feared being killed by a drug dealer over an outstanding debt. Thus, in exchange for their payment of the various credit card debts directly, defendant executed the note. She explains that the load was not paid directly to defendant because he could not be trusted to use it to pay off the debts and she denies having

conditioned the note on him remaining married to her daughter. Rather, she surmises that defendant executed the note to continue the fraud on her family and accuses him of taking advantage of her and her husband. (NYSCEF 50).

According to plaintiffs, defendant made payments on the note totaling approximately $7,500, and has paid nothing more since May 2016, as of when the outstanding balance was $50,750.

C. Defendant's reply (NYSCEF 55-57)

By affidavit, defendant advances for the first time his own version of the facts giving rise to the note, including a claim that the $35,000 in "gambling-related credit card debt" was paid by his parents, and he denies knowing that plaintiffs had paid $25,500 directly to the credit card issuers. Rather, the "roughly $25,000" in credit card debt was incurred, he claims, by plaintiffs' daughter and paid by plaintiffs, who "transferred those funds directly" to their daughter months before they knew of his gambling addiction. He also states that he was removed as an authorized user on all of plaintiffs' daughter's credit cards upon his disclosure to her in August 2009 that he had incurred approximately $35,000 in debt. (NYSCEF 55).

According to defendant, he "came up" with the amounts set forth in the note and that they were "picked arbitrarily, based on what and when [plaintiffs] gave [their daughter] early in our marriage, and to some extent before we were married." He explains that the "amount owed" was based on a "wrong assumption" that the money plaintiffs gave their daughter during the marriage was gambled away by him and "should be repaid as a condition to our remaining married." He attributes one-third of the amount plaintiffs gave their daughter to a deposit on the apartment that was purchased by her before they were married. He thus complains that the principal amount of $60,500 is "absurd" and that plaintiffs offer no supporting documentary evidence. He also admits

that he did not arrange to have his mail forwarded to his new address following receipt of process. (*Id.*).

By affidavit, defendant's mother alleges that on August 27, 2009, plaintiffs' daughter reached out to her upon learning that defendant had incurred some $35,000 in gambling-related credit card debt for which she was liable and asked that she and defendant's father pay the debt. After she and her husband had agreed to do so, plaintiffs' daughter asked that they transfer to her checking account of $30,700, representing $15,000 charged to American Express and $12,000 charged to a Chase card, and pay $5,647.81 charged to a credit card. Defendant's mother asserts that she wired $20,000 to plaintiffs' daughter on August 31, 2009, and soon thereafter paid a Macy's Visa debt that belonged to neither her or her husband, and wired plaintiffs' daughter an additional $10,700. She offers a copy of her bank statement in support. (NYSCEF 56).

Defendant's mother also alleges that in early September 2009, defendant told her and her husband that he owed a "bookie" some $6,000 and that he called the bookie in their presence. The bookie allegedly agreed to settle the debt for $2,000, after which she and her husband met the bookie in a parking lot and paid him $2,000. (*Id.*).

Defendant relies on his own affidavit, his mother's affidavit, plaintiffs' daughter's alleged oral statement and two emails in arguing that he is entitled to a hearing on his motion to vacate pursuant to CPLR 5015(a)(3). He complains that plaintiffs offer no documentary evidence or an affidavit from plaintiffs' daughter in support of their opposition to his motion and asserts that whether or not he is entitled to relief on the ground of fraud, the failure to state that plaintiffs' daughter satisfied the promissory note "amounts to an intentional and material misrepresentation." He accuses plaintiffs of failing to address the alleged misrepresentation or other misconduct or rebut his allegations, and he now retreats from his previous argument that

the note is unenforceable absent valid consideration in favor of his contention that plaintiffs' omission of the fact that their daughter satisfied his obligation to plaintiffs constitutes evidence that they had engaged in misrepresentation or other misconduct.

IV. ANALYSIS

To the extent that defendant seeks reargument pursuant to CPLR 2221, leave is denied.

To the extent that defendant is entitled to advance this motion when his order to show cause seeking the same relief had been previously denied (*but see Mortgage Electronic Registration Sys., Inc. v Gifford*, 133 AD3d 429 [1st Dept 2015] [motion properly denied on ground that essentially same issue had been resolved in prior denied order to show cause]), I find as follows:

CPLR 5015 provides, in pertinent part, as follows:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
> . . .
>
> 3. fraud, misrepresentation, or other misconduct of an adverse party . . .

A. CPLR 5015(a)(1)

Defendant's alleged fear of a relapse is supported by neither medical evidence nor common sense. In any event, even if a person in recovery may be subject to fears, rational or not, defendant's ability to engage in email correspondence with plaintiffs' counsel to facilitate service of process on him belies such a fear, especially in the absence of an explanation of how that fear caused him to change course and do nothing in response to the service of process in which he had actively participated. Although he admits having been served with the papers initiating this

action, he inconsistently maintains that he did not become aware of this action until he was served with a restraining notice. Consequently, notwithstanding the preference that cases be heard on the merits, in these circumstances, the bare allegation that he did not file an answer or oppose the motion because he feared an unspecified "relapse" does not suffice.

B. CPLR 5015(a)(3)

Defendant relies on his own self-serving, internally inconsistent statements, supported only by the hearsay oral and written statements of plaintiffs' daughter, a nonparty, and those attributed to her by his mother, as evidence that plaintiffs' daughter had paid all sums due under the note and that his parents had paid the gambling-related credit card debts. Notwithstanding plaintiffs' argument in opposition to the motion that he relies on hearsay, defendant offers no evidentiary foundation for it. Rather, on reply, he offers more hearsay, again without foundation. (*See Quadrant Mgmt. Inc. v Hecker*, 102 AD3d 410 [1st Dept 2013] [defendant's assertions that loan was advance against deferred compensation and that plaintiff's president fraudulently induced him to sign note by misrepresenting that it would be credited against deferred compensation "are unsubstantiated and conclusory" and thus failed to raise issue of fact as to bona fide defense]; *Sanchez v Avuben Realty LLC*, 78 AD3d 589, 590 [1st Dept 2010] [defendant failed to establish entitlement to vacatur of default judgment under CPLR 5015(a)(3) due to alleged fraud as affidavit submitted both conclusory and recounted hearsay]).

Even if the daughter's emails were admissible, her mention in the April 4, 2016 email of "the debt that [defendant] owe[s her]" and her intent to collect it does not reference the note. Nor is there an indication in her November 28, 2016 email, notwithstanding her expression of a willingness to go to court, that plaintiffs' daughter demanded that he reimburse her for satisfying the note, that she had paid her parents to satisfy it or that she had undertaken to collect on the

note based on her having paid it. To infer from such evidence that she had undertaken to pay defendant's debt is unwarranted is unwarranted.

The circumstances in issue here closely track those set forth in *Solomon v Langer*, 66 AD3d 508 (1st Dept 2009). There, the Court granted plaintiff's motion for summary judgment in lieu of complaint, finding that the defendant had failed to substantiate, in evidentiary form, his assertion that payments he had made to the plaintiff's mother discharged the note he had executed in favor of the plaintiff, and that he had set forth no evidence of misleading conduct on the plaintiff's part indicating that she had authorized her mother to transact business on her behalf. Moreover, the Court held, the parol evidence rule barred consideration of the defendant's alleged oral agreement with the plaintiff's mother that payments on the note should be made to her. Such a defense, the Court observed, is contrary to the well-settled principle that "invocation of defenses based on facts extrinsic to an instrument for the payment of money only do not preclude CPLR 3213 consideration." (66 AD3d 508).

Not only are defendant's allegations "not 'conclusively established'" (*cf Matter of Travelers Ins. Co. v Rogers*, 84 AD3d 469 [1st Dept 2011]), but they reveal no "potential instances of intentional and material misrepresentations of fact by [plaintiffs]" (*id.*), as again, they are not supported by admissible evidence. Otherwise, as in *Gliklad v Cherney*, 2016 WL 7117198, 2016 NY Slip Op 32401(U) (Sup Ct, New York County), where the defendant relied on "facts inferred indirectly from bank records" and had lawyers and accountants conduct "an elaborate, subjective analysis of an incomplete fraction of voluminous bank records to support a preordained conclusion," here, defendant himself has concocted a scenario palpably intended to obscure the conceded fact that he had signed the promissory note without objection ten years ago. His claim of duress is thus legally insufficient and otherwise meritless. That plaintiffs

submit no affidavit is of no moment as it is defendant's burden on the motion, not plaintiffs', and that burden, given defendant's failure to offer sufficient evidence in the first instance, has not shifted to plaintiffs.

It also bears noting that on reply, defendant offers his mother's affidavit and his own second affidavit containing new assertions. Thus, neither affidavit should be considered. In any event, the affidavit of defendant's mother does "no more than raise issues as to the credibility of adverse witnesses (*Weinstock v Handler*, 251 AD2d 184 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998]), which are not sufficiently indicative of "'fraud, misrepresentation or other misconduct' to warrant vacatur pursuant to CPLR 5015(a)(3)." (*Id.*). Moreover, absent nonhearsay evidence connecting the information contained in the bank statement to plaintiffs' daughter, defendant fails to do so.

Given his allegation that plaintiffs misrepresent the debt owed, i.e., intrinsic fraud, and having failed to demonstrate a reasonable excuse for his default (*supra*, IV.A.), defendant's motion pursuant to CPLR 5015(a)(3) fails for that additional reason. (*See LaSalle Bank NA v Oberstein*, 146 AD3d 945 [2d Dept 2017] [appellant failed to demonstrate reasonable excuse for default, which is required when CPLR 5015(a)(3) motion alleges intrinsic fraud, i.e., that allegations in complaint are false]; *Bank of New York v Stradford*, 55 AD3d 765 [2d Dept 2008] [same]; *cf Matter of Travelers Ins. Co.*, *supra*, 84 AD3d 469 [CPLR 5015(a)(3) does not require showing of reasonable excuse]).

For all of these reasons, defendant fails to raise an issue of fact that would require a hearing on his motion to vacate the judgment pursuant to CPLR 5015(a)(3).

## V. CONCLUSION

Given this result, there is no need to address defendant's remaining contentions, his

motion to dismiss, or his application for a stay of enforcement discovery.

Accordingly, it is hereby

ORDERED, that defendant's motion to vacate the judgment is denied in its entirety; it is further

ORDERED, that defendant's motion to dismiss is denied in its entirety; and it is further

ORDERED, that defendant's motion for a stay of enforcement discovery is denied.

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7/26/2019
DATE

BARBARA JAFFE, J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | | GRANTED | X | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |