

**Sitomer v Hirsch**

2019 NY Slip Op 33694(U)

December 17, 2019

Supreme Court, New York County

Docket Number: 159769/2013

Judge: Kathryn E. Freed

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 159769/2013

KENNETH SITOMER,

MOTION SEQ. NO. 006

Plaintiff,

- v -

**DECISION AND ORDER**

MATTHEW HIRSCH, BRETT HIRSCH and OAKMONT  
CAPITAL MANAGEMENT, LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 139

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action for, *inter alia*, breach of contract, defendant Matthew Hirsch (“Hirsch”) moves to vacate, in the interests of substantial justice, the default judgment entered against him on January 26, 2015 (Docs. 104-109). Plaintiff opposes the motion (Docs. 113-135). After oral argument and a review of the parties’ papers and the relevant statutes and case law, the motion is **denied.**

**FACTUAL AND PROCEDURAL HISTORY:**

In October 2013, plaintiff Kenneth Sitomer (“Sitomer”) commenced this action by filing a summons and verified complaint against defendants Hirsch, Hirsch’s brother Brett Hirsch (“Brett Hirsch”), and Oakmont Capital Management, LLC (“Oakmont”). In the complaint, Sitomer alleged, *inter alia*, that he entered into a contract in February 2010 with a fraudulent

investment company, Oakmont, pursuant to which Sitomer agreed to deposit \$100,000 for a return investment percentage of 22% per annum (Docs. 1-2).<sup>1 2</sup> Pursuant to the contract, Oakmont agreed to make twelve monthly payments of \$1,833.33 (Doc. 2). After Oakmont breached the terms of the contract by failing to make at least one interest payment, Sitomer gave written notice to defendants seeking to recover the \$100,000 he provided to Oakmont pursuant to their agreement as well as the associated interest (Docs. 3, 106).

In or about December 2011, Sitomer and defendants executed an addendum to the contract (Doc. 4). The addendum directed Hirsch to pay \$8,000 in accrued interest and the remaining \$100,000 at the original interest rate of 22% (Doc. 4). The addendum was signed by Hirsch, Brett Hirsch and Sitomer (Doc. 4). Sitomer alleged that defendants paid the \$8,000 in interest and an additional payment of \$5,000 in March 2013; however, no further payments were made thereafter, and an outstanding balance of \$95,000 with additional accrued interest remained (Doc. 106). Sitomer claimed that Oakmont was the alter ego of Hirsch and Bret Hirsch (Doc. 106).

Hirsch never filed an answer or otherwise responded and, consequently, Sitomer's counsel filed an application with the Judgment Clerk to enter a default judgment against defendants in August 2014 (Doc. 121).<sup>3</sup> In January 2015, a judgment was entered against

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<sup>1</sup> In 1998, Hirsch was convicted of defrauding investors out of \$75 million dollars while working as a broker in A.R. Barons & Co. (Docs. 114-118).

<sup>2</sup> The parties agree that the contract was not signed by Hirsch but rather was forged by a nonparty (Docs. 105 at 3).

<sup>3</sup> Sitomer's counsel concedes that "it appears that the exhibits to the Complaint were inadvertently not attached to the Complaint that was attached as Exhibit A to the Affirmation . . . in Support of Judgment" (Doc. 134 at 3). He nevertheless affirms that "the Judgment Clerk had access to the entire file, and, undoubtedly, reviewed the Complaint and the attached exhibits before issuing the Judgment" (Doc. 134 at 3).

defendants in the amount of \$159,897.58 (Docs. 122). Thereafter, in April 2015, Sitomer filed a transcript of the judgment on the Westchester County Clerk's office, creating a lien on Hirsch's property at 1072 Washington Avenue, Pelham, NY 10803 ("the Westchester property") (Doc. 124).

In March 2016, Sitomer moved, by order to show cause, to compel defendants to respond to previously served information subpoenas (motion sequence 001) (Doc. 27). In response to the order to show cause, Hirsch appeared before this Court on May 24, 2016, at which time Sitomer and Hirsch agreed to enter into a settlement (Doc. 27). In June 2016, they executed a post-judgment stipulation of settlement ("the stipulation of settlement") to partially settle the \$159,897.58 judgment, only as to Hirsch in his individual capacity, for \$89,000 (Doc. 129). The stipulation of settlement directed Hirsch to pay \$25,000 on or before July 5, 2016 and \$2,206.90 per month for the next 29 months (Doc. 129). It also directed that, if Hirsch defaulted on his payments, he would "continue to be responsible for the entire [j]udgment of \$159,897.58 plus interest of 9% from January 26, 2015, less any payments made" pursuant to the settlement (Doc. 129). The stipulation was so-ordered by this Court on June 23, 2016 and filed on June 24, 2016 (Doc. 37). Notice of entry was filed with the County Clerk's office on January 28, 2016 (Doc. 38).

Following a judgment of foreclosure and sale, an auction of the Westchester property was scheduled for June 3, 2019 (Doc. 133). On May 31, 2019, days before the auction, Hirsch filed an order to show cause seeking to vacate the judgment and to stay its enforcement pending this Court's determination (Doc. 97). His order to show cause was later withdrawn and refiled as a motion on June 6, 2019 (Doc. 103-104). Sitomer's attorney affirms that the sale did not take

place because Hirsch filed a notice of appeal from the foreclosure order and a motion to stay the sale of the Westchester property pending the outcome of the appeal (Doc. 113 at 9-10).

In the instant motion, Hirsch argues, *inter alia*, that the default judgment entered against him violates the strong public policy in this state against usurious rates of interest because the 22% interest rate violates, *inter alia*, General Obligations Law § 5-501 since the judgment was entered as against him in his individual capacity (Doc. 105). Moreover, he claims that Sitomer failed to demonstrate, in his application to the Judgment Clerk, that Hirsch can be held liable for Oakmont's obligations under the contract since he was not a party to the agreement and acted only in his official capacity (Doc. 105). He also claims that Sitomer should not have submitted a proposed judgment to the Clerk because "(1) the fraud claim was not for a 'sum certain' and (2) there was an issue as to the alter ego liability of the individual defendants" (Doc. 105).

#### LEGAL CONCLUSIONS:

Pursuant to CPLR 5015 (a) "a party may move to vacate a judgment or order on the grounds of, *inter alia*, newly discovered evidence or fraud, misrepresentation, or other misconduct of an adverse party. However, CPLR 5015 does not 'provide an exhaustive list of the grounds for vacatur'" (*City of New York v OTR Media Group, Inc.*, 175 AD3d 1163, 1163 [1st Dept 2019] [emphasis added], quoting *Goldman v Cotter*, 10 AD3d 289, 293 [1st Dept 2004]). "In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; see *Goldman v Cotter*, 10 AD3d at 293).

Hirsch has failed to demonstrate a basis for vacating the judgment in the interests of substantial justice. It is well-established that "[s]tipulations of settlement are favored by the

courts and not lightly cast aside” (*Hallock v State*, 64 NY2d 224, 230 [1984]; see *34 Funding Associates, Inc. v Pollak*, 26 AD3d 182, 182 [1st Dept 2006]). Thus, “[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation” (*Hallock v State*, 64 NY2d at 230). Here, Hirsch does not allege any basis for vacating the stipulation of settlement, which supersedes the judgment. Under the stipulation of settlement, Hirsch is liable for the “the entire Judgment of \$159,897.58 plus interest of 9% from January 26, 2015, less” the amount he has already paid Sitomer. Thus, his allegations regarding, *inter alia*, the improper interest rate in the underlying contract and the alleged errors in the computation of the judgment lack merit since an inquiry into “the propriety of the default judgment . . . is precluded by the parties’ subsequent [stipulation of settlement]” (*Cora Realty Co., LLC v Turner*, 5 Misc 3d 134 [A], 2 [1st Dept, App Term 2004]; see *Broadway Famous Party Rental v Cipriani 42<sup>nd</sup> Street, LLC*, 289 AD2d 45, 45 [1st Dept 2001]). Moreover, although Hirsch contends, in support of his alter ego argument, that the underlying contract was between Oakmont and Sitomer, and that he thus cannot be held liable due to his position as a corporate officer of Oakmont, his argument is belied by the record. Hirsch signed both the addendum to the contract and the stipulation of settlement in his individual capacity (Doc. 129). Based on the foregoing, the motion to vacate in the interests of substantial justice is denied.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that the motion by defendant Matthew Hirsch seeking to vacate the judgment entered on January 26, 2015 is denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

12/17/2019

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: