

Roc Funding Group LLC v Stop 26 Riverbend, LLC

2019 NY Slip Op 33827(U)

November 13, 2019

Supreme Court, Nassau County

Docket Number: 617361/2018

Judge: Arthur M. Diamond

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(265090)
\$46,618.71

SUPREME COURT – STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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ROC FUNDING GROUP LLC,

TRIAL PART: 6

Plaintiff,

NASSAU COUNTY

-against-

INDEX NO.: 617361/2018

STOP 26 RIVERBEND, LLC, and RUTH G. SQUIRE,

MOTION SEQ.#: 1, 2

SUBMIT DATE: 10/28/19

Defendants.

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The following papers having been read on this motion:

- Notice of Motion..... 1**
- Notice of Cross-Motion and Opposition 2**
- Opposition (to Cross-Motion)..... 3**
- Reply 4**

Defendant Squire moves for an order, pursuant to CPLR 5015(a), to vacate a default judgment entered in the within action as and against both Defendants. Plaintiff has opposed that application and has cross-moved to amend the judgment to a reduced amount. Based upon the following, Defendant Squire’s motion is hereby granted to the following extent and Plaintiff’s cross-motion is hereby denied in its entirety.

The within action was commenced by Plaintiff by way of affidavit and confession of judgment, pursuant to CPLR §3218. The moving papers indicate that Plaintiff, a New York limited liability company with its principal place of business located in Richmond County, entered into a contract with Defendant Stop 26, a foreign limited liability company located in the State of Ohio, wherein Plaintiff would purchase certain receivables in the amount of \$42,554.40 from Defendant Stop 26 for a purchase price of \$28,560.00. Defendant Squire was the personal guarantor on the subject agreement for Defendant Stop 26. Pursuant to the terms of the agreement, Plaintiff would pay the purchase price to Defendant Stop 26 in six (6) separate installments of varying amounts over the course of ten (10) weeks and Defendant Stop 26 would remit payments daily to Plaintiff until the receivables total was reached. The terms of the agreement also indicate that the contract

was being written under the laws of the Commonwealth of Pennsylvania and indicates that any court of sitting in the Commonwealth would be an acceptable forum should legal action be required, but reserved the right of Plaintiff only to select an alternate forum to commence suit in, to which Defendants have no right to contest that selection. Additionally, Defendants agreed to pay all legal fees incurred as a result of any default on their part, without further specificity as to an amount.

On October 9, 2018, Defendant Squire, individually and on behalf of Defendant Stop 26, executed an affidavit confessing to judgment for an alleged default in the agreement based upon their non-payment under the terms of the contract. This document was executed simultaneously with the subject agreement which is the basis of this action. The affidavit authorized the entry of judgment in favor of Plaintiff against defendants in one of three courts located within the State of New York, including Supreme Court, Nassau County, for the full amount of receivables Defendant Stop 26 was to repay Plaintiff. It should be noted that Defendants did not confess to an amount of attorneys' fees to be included as part of the judgment. This affidavit was submitted along with an affidavit from Plaintiff, dated December 14, 2018. Plaintiff's affidavit lacked a statement that it had provided certain funds to Defendant Stop 26, did not include the last date payment was made, the last date a payment was due, or the last date in which payment was demanded, and created a legal fee due to Plaintiff from Defendants in a sum equal to twenty-five percent (25%) of the principal outstanding. Ultimately, a judgment was entered in this matter on December 31, 2018.

A defendant seeking to vacate a judgment entered upon default in appearing and answering the complaint must demonstrate a reasonable excuse for its delay and a meritorious defense to the action. Hillwick, Inc. v. Advanced Ready Mix Supply, 133 AD3d 821, 19 NYS3d 442 (Mem.) (2nd Dept., 2015). The decision on a motion to vacate a default rests within the sound discretion of the court. Carnazza v. Shoprite of Staten Island, 12 AD3d 393, 783 NYS2d 834 (Mem.) (2nd Dept., 2004). The Court has inherent power to relieve a party from a judgment or order entered on default and may open its own judgments or orders for sufficient reason and in furtherance of justice. Town of Greenburgh v. Schroer, 55 AD2d 602, 389 NYS2d 384 (2nd Dept., 1976).

Pursuant to CPLR §3218(a), an affidavit of confession of judgment must state concisely the facts out of which the debt arose and show that the sum confessed is justly due or to become due. However, this statutory language is designed for the protection of third persons who might be prejudiced in the event that a collusively confessed judgment is entered, not for the protection

of a defendant. Regency Club at Wallkill, LLC v. Bienish, 95 AD3d 879, 942 NYS2d 894 (Mem.) (2nd Dept., 2012). Generally, a defendant seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief. Id at 879, 894. On the other hand, confessions of judgment are always closely scrutinized and in judging them a liberal attitude should be assumed in favor of the judgment debtor. Rae v. Kestenberg, 23 AD2d 565, 256 NYS2d 737 (2nd Dept., 1965).

Trial courts have discretion pursuant to CPLR §5019(a) to correct mistakes, defects, or irregularities so as to modify an order or judgment. Pulte Homes of New York, LLC v. Planning Board of Town of Carmel, 136 AD3d 643, 24 NYS3d 409 (2nd Dept., 2016). The law has also long recognized the power of the Court to amend a judgment by confession nunc pro tunc. Princeton Bank and Trust Company v. Berley, 57 AD2d 348, 394 NYS2d 714 (2nd Dept., 1977). However, where a movant seeks to change an order or judgment in a substantive manner, rather than correcting a mere clerical error, CPLR §5019(a) is not the proper procedural mechanism to be employed; rather, relief sought should be through a motion to vacate pursuant to CPLR §5015(a). Pulte at 644, 410.

Here, the Court is faced with a serious quandary. A review of the affidavit of confession and the related affidavit make clear to this Court that neither is sufficient to have entered judgment herein. *See* Rubashkin v. Rubashkin, 98 AD3d 1018, 950 NYS2d 586 (2nd Dept., 2012). Defendant Squires, as a party-defendant to the action, is unable to vacate the judgment entered in this action unless he files a plenary action to argue for such relief. Although Plaintiff is able to file such a motion to vacate, it has elected to seek modification of judgment; yet, with a request to reduce the amount awarded to it by nearly half and only making such request after Defendant Squires highlighted this glaring defect in Plaintiff's judgment, the request for modification is improper. Such a reduction under the circumstances appears sufficiently substantial such that Plaintiff's motion must be denied. It is abundantly clear to this Court, after reviewing the moving papers and all arguments contained therein, that the judgment that was entered against Defendants, jointly and severally, in favor of Plaintiffs by way of confession in the amount of \$36,538.36, plus pre-judgment interest, attorneys' fees, and costs, should not have been entered. Both sides also agree, at the very least, that the amount the judgment was entered for was incorrect.

Pursuant to CPLR §5015, the Supreme Court has the inherent power to vacate its own judgment in the interest of justice, and the grounds enumerated for granting such relief in CPLR

§5015 are neither preemptive nor exhaustive and were not intended to limit that power. Town of Warwick v. Black Bear Campgrounds, 95 AD3d 1002, 943 NYS2d 608 (2nd Dept., 2012). Both motions before the Court warrant denial; then again, judicial economy would be best served if the application pursuant to CPLR §5015, although brought by the wrong party, be granted and avoid further delay for both sides in obtaining appropriate relief necessary under the circumstances. Therefore, in the interests of justice, and in furtherance of judicial economy, the motion to vacate the judgment pursuant to CPLR §5015 is hereby granted and the cross-motion pursuant to CPLR §5019 is hereby denied.

The judgment entered December 31, 2018, in this action is vacated forthwith. Any restraints or executions pursuant to this judgment are hereby lifted. Any funds received by Plaintiff as a result of this judgment shall be returned to Defendant(s) within sixty (60) days from the date of this order.

Plaintiff shall file and serve a copy of the within order with notice of entry upon each Defendant within thirty (30) days from the date of this order.

This hereby constitutes the decision and order of this Court.

ENTER

DATED: November 13, 2019



HON. ARTHUR M. DIAMOND
J.S.C

ENTERED

DEC 02 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**