

Alfa Advance, LLC v Konfra LLC
2019 NY Slip Op 34081(U)
July 11, 2019
Supreme Court, Queens County
Docket Number: 700714/2019
Judge: Cheree A. Buggs
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[* 1]

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

ALFA ADVANCE, LLC,

Index No. 700714/2019

Plaintiff,

Motion

Date: April 17, 2019

-against-

Motion Cal. No.: 3

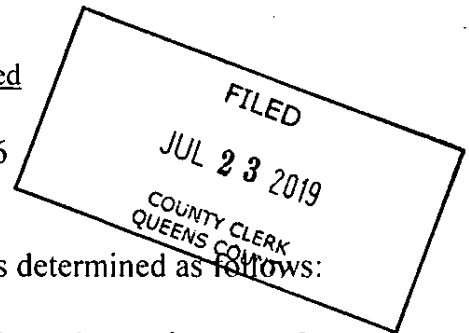
KONFRA LLC, PANORAMA LLC, FOTIOS
SHIZAS, and KONSTANTINOS KATSANOS.

Motion Sequence No.: 1

Defendants.

The following papers numbered EF6 to EF36 read on this Order to Show Cause by defendants to vacate plaintiff's Judgment by Confession that was entered against defendants, jointly and severally, in the amount of \$527,171.20 ("the Judgment"), in Queens County on January 14, 2019.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits.....	EF6-20
Answering Affidavits - Exhibits.....	EF21-36



Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this action provides merchant cash advances. In exchange for an up-front purchase price of \$840,196.81 ("the purchase price"), plaintiff purchased 25% of defendant merchant's total future accounts receivables up to the sum of \$1,175,435.34 ("the purchased amount"), subject to the provisions contained within the Merchant Agreement. Pursuant to the terms of the Merchant Agreement, defendants agreed to remit daily payments in the amount of \$8,673.75 to plaintiff. On or about January 9, 2019, defendants defaulted under the Merchant Agreement by filing an action in New Jersey Superior Court seeking an order

temporarily restraining plaintiff from debiting any of defendants' accounts. On January 14, 2019, the Judgment was entered against defendants and individual guarantors, jointly and severally, pursuant to plaintiff's rights under the Merchant Agreement and the Confession of Judgment ("COJ").

By the instant Order to Show Cause, defendants seek to vacate plaintiff's Judgment on the grounds that the signature of Mr. Katsanos (one of the owners), was forged on various documents accompanying the Merchant Agreement and Confession of Judgment. Defendants also assert that the underlying Merchant Agreement entered into between the parties is a criminally usurious loan and as such, should be voided. The Order to Show Cause is opposed by plaintiff.

Facts

On or about August 30, 2018, plaintiff Alfa Advance LLC ("Alfa"), entered into a Merchant Agreement with Konfra LLC, Panorama LLC ("the Merchants"), with Konstantinos Katsanos and Fotios Shizas personally guaranteeing the loan. Under the terms of the Merchant Agreement, Alfa purchased 25% ("the Specified Percentage") of the Merchants' total future accounts receivable up to the sum of \$1,175,435.34 ("the Purchased Amount"), in exchange for the up-front purchase price of \$840,196.81 ("the Purchase Price"). Prior to funding the Purchase Price, plaintiff conducted an investigation into defendants' bank accounts, financial well-being and overall operative efficiency. The parties agreed that the Merchants would pay Alfa 25% of their daily receipts each business day until the Purchased Amount was paid in full. Based upon Alfa's due diligence in the underwriting process, which included a review of the Merchants' historical bank statements, the parties agreed that \$8,673.75 per business day was a good faith approximation of the Specified Percentage of Merchants' daily receipts based upon past performance ("Specific Daily Amount"). Accordingly, instead of requiring that the Merchants calculate and remit 25% of their actual daily receipts each business day, the parties agreed that the Merchants would pay \$8,673.75 per business day to Alfa, subject to the reconciliation agreement provision included in the Merchant Agreement, as noted below.

The first page of the Merchant Agreement provides a method by which the Merchants can obtain a reconciliation in the event that the aggregate of the payments of the Specific Daily Amount deviate from the Specified Percentage of the Merchants' actual receipts for any given month. Specifically, the reconciliation provision states, as follows:

"The Merchant shall deliver to Alfa Advance, no later than the 18th date of each month the bank statements for the Account in respect of the immediately preceding month. Within three business days of Alfa Advance's receipt of the

Merchants' monthly bank statement, Alfa shall reconcile the Merchants' Account by either crediting or debiting the difference from or back to the Merchant's Account so that the amount debited per month equals the Specified Percentage. If the Merchant fails to deliver the bank statement for the Account for any month, Alfa shall consider that the specific remittances were equal to the Specified Percentage of the settlement amount due from each Transaction for such month.

Accordingly, the Specific Daily Amount, both in its initial calculation and any subsequent variation pursuant to the Reconciliation Provision, is tied directly to the specified percentage of the accounts receivable purchased by Alfa from the Merchants.

Notably, the Purchase and Sale of Future Receivables provision of the Merchant Agreement provides that Alfa was purchasing a specified percentage of the Merchants' total future accounts receivables, not making a loan to the Merchants.

On August 30, 2018, defendants allegedly authorized the entry of judgment against them in the Federal District Court for the Eastern District of New York, Supreme Court of the State of New York, County of Queens, and/or Civil Court of the City of New York, County of Queens, in favor of plaintiff in the sum of \$1,175,435.34 less any payments made pursuant to the Merchant Agreement, plus simple interest thereon at the annual rate of twenty-four percent (24%) per annum from the date of default until full repayment, plus all costs incurred in connection with the enforcement of the Agreement, including attorneys' fees in the amount of 33 1/3% plus costs and disbursements ("the Confessed Amount").

On or about August 30, 2018, Alfa provided the Merchants with an up-front Purchase Price of \$840,196.81, less applicable and agreed-upon fees, in accordance with the provisions of the Merchant Agreement. In exchange for the Purchase Price, the Merchants sold 25% of their total future accounts receivable, up to the sum of \$1,175,435.34, to Alfa. Alfa then began receiving the agreed-upon Specified Daily Amount of \$8,673.75 from defendants each business day. Reconciliation was never requested.

Plaintiff submits that on or about January 9, 2019, the Merchants breached the provisions of the Agreement by commencing an action in New Jersey Superior Court and obtaining a temporary restraining order prohibiting Alfa from debiting any of the Merchants' accounts. The Merchants remitted \$742,776.06 of the \$1,175,435.34 of the accounts receivable purchased by Alfa, leaving a balance of \$432,659.28 as of January 9, 2019. On or about January 11, 2019, Alfa filed the Confession of Judgment against defendant in the New York State Supreme Court, County of Queens, pursuant to its rights under the Merchant Agreement and the COJ. On January 14, 2019, the Queens County Clerk entered judgment

(“the Judgment”), against the defendants, jointly and severally, in the amount of \$527,171.20 (“the Judgment Amount”), in the New York State Supreme Court, Queens County, pursuant to Alfa’s rights under the Merchant Agreement and the COJ.

Defendants seek to vacate the Confession of Judgment on several grounds: that the signature of Katsanos was forged by his son-in-law on the Agreement and on the Confession of Judgment, and that the Agreement is based on a usurious loan and is, therefore, void as a matter of law. The Order to Show Cause is opposed by plaintiff.

Discussion

The statutory mandate (CPLR 3218, subd [a], par 2) that a confession of judgment be entered upon an affidavit by defendant “stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due” is designed for the protection of third persons who might be prejudiced in the event that a collusively confessed judgment is entered, and not for the protection of the defendant (*Girylyuk v Girylyuk*, 30 AD2d 22 [1st Dept 1968], *affd* 23 NY2d 894 [1969]; *County Nat. Bank v Vogt*, 28 AD2d 793 [3d Dept 1967], *affd* 21 NY2d 800 [1968]; CPLR 3218; Practice Commentary by Siegel, C3218:9 in McKinney’s Cons Laws of NY, Book 7B). Consistent with such policy, third-person creditors may seek vacatur of confessed judgments by way of motion (*County Nat. Bank v Vogt, supra*; CPLR 3218, Practice Commentary by Siegel C3218:16).

A judgment debtor, however, 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 (*Regency Club at Wallkill, LLC v Bienish*, 95 AD3d 879, 879 [2d Dept 2012]; *see Posner v Posner*, 277 AD2d 298 [2d Dept 2000]; *Rubino v Csikortos*, 258 AD2d 638 [2d Dept 1999]; *Centurion Taxi v Beizem*, 247 AD2d 502 [2d Dept 1998]; *L.R. Dean, Inc. v International Energy Resources*, 213 AD2d 455 [2d Dept 1995]; *cf. McDonough v Bonnie Heights Realty Corp.*, 249 AD2d 520 [2d Dept 1998]; *Cooper, Selvin & Strassberg v Soda Dispensing Sys.*, 212 AD2d 498 [2d Dept 1995]). The reason for requiring an action to vacate the judgment is that the application is likely to contain “sharply contested issues of fact [which] should not be resolved upon affidavits but rather by trial in a plenary action” (*see Scheckter v Ryan*, 161 AD2d 344, 345 [1st Dept 1990]).


Here, this matter was commenced by the filing of a Confession of Judgment and supporting affidavit. There is no Summons and Complaint containing allegations and causes of action, an answer responding to those causes of action, or an opportunity for discovery, dispositive motions and or trial. Thus, the pending motion is not an action, proceeding, lawsuit or plenary action but merely an index number purchased to file the Confession of Judgment (see CPLR 3218 [A confession of judgment may be entered “without an action”]).

The filing of the Confession of Judgment does not begin an action — it merely provides for a Judgment, which is an end, not a beginning.

Accordingly, the motion is denied without prejudice to commence a plenary action to have the confession of judgment and judgment entered thereon vacated.

The foregoing constitutes the decision and order of this Court.

Dated: July 11, 2019



Hon. Chereé A. Buggs, JSC

FILED
JUL 23 2019
COUNTY CLERK
QUEENS COUNTY