SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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EXPRESS TRADE CAPITAL, INC.,

Plaintiff,

- v -

BRIAN HOROWITZ, HEATHER SMULSON, CREATIVE OUTDOOR DISTRIBUTORS USA, INC.

Defendant.

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INDEX NO. 656949/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40

were read on this motion to/for VACATE JUDGMENT.

Defendants Creative Outdoor Distributor USA, Inc. (Creative Outdoor), Brian Horowitz, and Heather Smulson move for an order vacating a judgment awarded in favor of plaintiff Express Trade Capital, Inc. (Express Trade) against Creative Outdoor, Horowitz, and Smulson, by decision and order entered upon said defendants' default on August 5, 2020 in this "motion/action" for summary judgment in lieu of complaint.

Each of the defendants entered into a settlement agreement with plaintiff as of September __, 2017. (Agreement or Settlement Agreement [NYSCEF Doc. No. 35].) The Settlement Agreement contained the following forum selection clause: "The Parties hereby submit to the exclusive jurisdiction of the courts of the State of New York, New York County, or Nassau County, for any action, suit, or proceeding in any way related to this Agreement." (Id., § 14.) The parties also waived any objection to venue of any such action in such New York courts. (Id.) The Agreement further provided that each of the defendants "shall execute Confessions of Judgment . . . in favor of Express Trade . . . , for the total amount of the Obligations . . . ." (Id., § 3.1.) The parties also agreed to an installment schedule for defendants' payment of the

settlement amount. (Id., § 2.) Upon the occurrence of an Event of Default, the Agreement authorized Express Trade to file one or all of the Confessions of Judgment. (Id., § 5.1 [a].) The Events of Default included "[f]ailure to timely make any minimum monthly payment set forth in Section 2.2 of this Agreement." (Id., § 5.2 [b].)

Pursuant to the Settlement Agreement, each of the defendants executed an Affidavit of Confession of Judgment, which expressly authorized entry of judgment against said defendant in New York County. (Smulson Aff. of Confession of Judgment, sworn to on Oct. 4, 2017, ¶ 2; Creative Outdoor Aff. of Confession of Judgment, sworn to on Oct. 3, 2017, ¶ 2; Horowitz Aff. of Confession of Judgment, sworn to on Oct. 4, 2017, ¶ 2 [collectively, Affs. of Confession of Judgment] [NYSCEF Doc. No. 34].) As held in this court's August 5, 2020 decision and order, upon defendants' failure to make payments required by the Settlement Agreement, plaintiff brought its motion for summary judgment in lieu of complaint based on the Settlement Agreement and the Confessions of Judgment.

Defendants move to vacate the default judgment, claiming that the court lacks personal jurisdiction over them because all of the transactions between the parties took place in California, where they are residents. Defendants claim that the forum selection clause is therefore unenforceable. This contention is without merit. It is well settled that "where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on forum non conveniens grounds." (Sterling Natl. Bank v Eastern Shipping Worldwide, Inc., 35 AD3d 222, 223 [1st Dept 2006]; accord Honeywell Intl. Inc. v ARC Energy Servs., Inc., 152 AD3d 444, 444 [1st Dept 2017].)

Defendants have, in any event, failed to demonstrate that New York is an inconvenient forum. (See Sterling Natl. Bank, 35 AD3d at 223; compare Northern Leasing Sys., Inc. v

French, 48 Misc. 3d 43, 45 [App. Term, 1st Dept 2015].) Defendants engaged in a sophisticated business transaction in which they took a loan of $1.4 million from plaintiff which was not repaid. In settling the action, they expressly agreed, with the advice of counsel, to submit to jurisdiction in New York. (Settlement Agreement, §§ 14, 15.) They also expressly acknowledged that they do business in New York. (Affs. Of Confession of Judgment, ¶ 3.) The fact that defendants also do business and reside in California does not serve, under these circumstances, to establish that New York is an inconvenient forum.

Defendants further argue that the motion for summary judgment in lieu of complaint was not properly based on "the 3213 procedure" because the confessions of judgment were "unenforceable" in light of an amendment of CPLR 3218 regarding the use of confessions of judgment to bind out of state defendants. (See Aff. of Michael Langer [Defs.' Atty] In Supp., ¶ 7 [NYSCEF Doc. No. 30].) CPLR 3218 (a) provides, in pertinent part, that "a judgment by confession may be entered, without an action, either for money due or to become due . . . , upon an affidavit executed by the defendant; 1. stating the sum for which judgment may be entered, authorizing the entry of judgment, and stating the county where the defendant resides." CPLR 3218 (b) provides: "At any time within three years after the affidavit is executed, it may be filed, but only with the clerk of the county where the defendant's affidavit stated that the defendant resided when it was executed or where the defendant resided at the time of filing." By an amendment effective August 30, 2019, CPLR 3218 was revised to "end[] the use of the statute by parties where the debtor has no residence-based connection to New York." (Hon. Mark C. Dillon, 2019 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, C3218:1.) Specifically, the amendment removed from CPLR 3218 (a) (1) and (b) the language that permitted the defendant, if it was a non-resident at the time the affidavit of confession of

judgment was executed, to authorize the affidavit to be filed "with the clerk of the county designated in the affidavit." (2019 McKinney's Session Law News of NY Ch 214 [S 6395].) Defendants contend that the affidavits of confession that they signed violated CPLR 3218 because they authorized filing of the confessions of judgment in New York County, notwithstanding the amendment of the CPLR precluding them, as nonresidents, from giving such authorization.

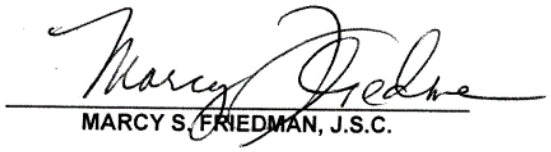
The court rejects defendants' contention. The affidavits were signed before the amendment. More important, CPLR 3218, by its terms, sets forth a procedure for the filing of affidavits of confession of judgment with the clerk and without an action. CPLR 3218 does not govern the procedure for enforcement of a confession of judgment where there is an action. Here, as plaintiff correctly argues, there is the equivalent of an action. The motion for summary judgment in lieu of complaint is based not only on the confessions of judgment but also on the Settlement Agreement in which defendants specifically authorized enforcement of the confessions of judgment in New York. The court accordingly holds that the confessions of judgment are enforceable.

Defendants also appear to assert that they have an excuse for not appearing. Defendant Horowitz submits an affidavit in which he states that in late 2019 Creative Outdoor attempted to address its outstanding debt with plaintiff. Almost immediately thereafter, defendants began to experience drastic effects of the coronavirus pandemic on Creative Outdoor's business, with closing of the business for a period of time. Mr. Horowitz further states that after the business began to reopen in June and July 2020, "we received various papers" in August 2020 and "reach[ed] out" to plaintiff. (Aff. Of Brian Horowitz [Def.'s CEO] In Supp., ¶ 2 [NYSCEF Doc. No. 29].) Notably, defendants do not deny that they were served with the motion for summary

judgment in lieu of complaint. On the contrary, they attach an email from Creative Outdoor to Express Trade, dated November 29, 2019, which states: "I understand you just had an attorney file for the judgment against us in New York." (Horowitz Aff., Ex. B [NYSCEF Doc. No. 32].) Under these circumstances, their bare assertion that their business was seriously affected by the coronavirus pandemic, while regrettable, does not establish a viable excuse for their failure to take any steps to respond to the motion for summary judgment in lieu of complaint.

The court has considered defendants remaining contentions and finds them to be without merit. As the court finds that grounds have not been shown for vacatur of the default judgment, the court does not reach the issue of whether the motion should be dismissed on the ground of forum non conveniens.

This constitutes the decision and order of the court.



9/30/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

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