

Nexus Capital Invs. LLC v Unger
2020 NY Slip Op 33352(U)
October 13, 2020
Supreme Court, Kings County
Docket Number: 509661/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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NEXUS CAPITAL INVESTMENTS LLC,

Petitioner, Decision and order

- against -

Index No. 509661/20

EZRA UNGER,

Respondent,

and

October 13, 2020

425 MARCY AVENUE LLC,

Necessary Party Respondent,

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved seeking to turn over the respondents interests in 425 Marcy Avenue LLC in order to satisfy a confession of judgement. The respondent has cross-moved seeking to dismiss the petition on the grounds it has been improperly filed. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On November 16, 2017 the respondent Ezra Unger borrowed \$350,000 from the petitioner. The respondent executed a promissory note as well as a confession of judgement. A week later on November 24, 2017 the respondent Ezra Unger borrowed an additional \$290,000 from the petitioner. Indeed, the second loan, termed a 'loan modification' was negotiated because the "Borrower has requested that Lender agree to increase the Loan by an additional \$290,000.00 and Lender has agreed to do so in accordance with the terms and conditions of this Agreement and

the terms and conditions of the Note" (see, Loan Modification, page 1). Thus, a new loan amount of \$640,000 now existed. There is no dispute that on December 16, 2017 Unger repaid \$350,000. There is further no dispute that Unger has not repaid the remaining \$290,000. On June 13, 2019 the petitioner filed the confession of judgement in the amount of \$350,000 which petitioner alleges comprises the \$290,000 plus interest. This motion seeking a turnover followed. The respondent argues the confession of judgement only concerned the first loan. Thus, even though the loans and notes were consolidated the confession of judgement only concerned the first loan and since such loan was repaid the confession of judgement must be vacated.

There can be little dispute the confession of judgement could not include any interest. The affirmation of confession of judgement stated it could be filed "in the principal sum of \$350,000.00, without interest" (see, Affirmation of confession of judgement, ¶3). Thus, since the respondent paid \$350,000, the confession of judgement could not be filed for \$350,000 since that very same amount had already been repaid. However, there is no evidence presented the respondent's payment of \$350,000 could not be applied to the amount of \$290,000 plus \$60,000 toward the balance of \$350,000 leaving an amount owed of \$290,000. This scenario would be consistent with the petitioner's stated goal of being repaid at least the principle of the money loaned.

Further, since the loan had been modified and now consisted of one large loan there is no reason why petitioner could not allocate the payment in this manner. Thus, the petitioner would be permitted to file a confession of judgement in the amount of \$290,000.

There is scant authority whether a court may sua sponte change the terms of a confession of judgement that contains incorrect information. In Milstein v. Northeast Ohio Harness, 30 Ohio App. 3d 248, 507 NE2d 459 [8th District, Cuyahoga County 1986] the court held that a court may alter incorrect terms of a confession of judgement. The court noted that to conclude otherwise would "elevate form over substance" (id). Indeed, in Vagianos v. Metropolitan Enterprises, Inc., 1995 WL 601080 [Court of Appeals of Ohio, Eighth District, Cuyahoga County 1995] the court permitted the trial judge to alter the amounts of a confession of judgement sua sponte.

In this case, although there is no law to the contrary the better course of action would demand that petitioner file a new confession of judgement in the amount of \$290,000. Therefore, the confession of judgement is vacated to the extent the petitioner may file a fresh confession in the amount of \$290,000. The cross-motion seeking to dismiss the petition is denied. The petitioner's motion seeking a turnover and the appointment of a receiver is held in abeyance pending the filing of a new

confession of judgement and affording the respondent time in which to substantively oppose the requests noted. The parties may reach out to the court for any further scheduling of any motions.

So ordered.

ENTER:

DATED: October 13, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC