

NRO Boston LLC v Yellowstone Capital LLC

2021 NY Slip Op 32057(U)

September 29, 2021

Supreme Court, Rockland County

Docket Number: 037005/2019

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

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NRO BOSTON LLC, NRO EDGARTOWN LLC,
JASON INDELICATO and ALICE
INDELICATO, individually and on behalf of all
those similarly situated,

DECISION AND ORDER

Plaintiffs,

Index No.: 037005/2019

-against-

YELLOWSTONE CAPITAL LLC, DAVID
GLASS, YITZHAK STERN, and THE JOHN
AND JANE DOE INVESTORS,

Motion Sequences # 10 and #11

Defendants.

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The following papers, filed on NYSCEF, were read on Defendant Yitzhak Stern's and
Defendant David Glass's respective motions to dismiss Plaintiffs' First Amended Complaint
pursuant to CPLR § 3211(a)(5):

Notice of Motion/Memorandum of Law in Support/Affirmation in Support/ Exhibits(A-E).....	NYSCEF Doc. Nos. 243-250
Memorandum of Law in Opposition/Affirmation in Opposition/Exhibits(A-F).....	260-267
Memorandum of Law in Reply/Reply Affirmation/Exhibit F.....	276-278
Notice of Motion/Affirmation in Support/Exhibit A.....	253-255
Memorandum of Law in Opposition/Affirmation in Opposition/Exhibits(A-F).....	268-275
Reply Affirmation/Exhibits(1-2).....	279-281

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

This action arises out of nine merchant cash advance agreements ("MCA Agreements")
between Plaintiffs NRO Boston LLC and NRO Edgartown LLC (collectively "NRO entities") and
Defendant Yellowstone Capital, LLC ("Yellowstone Capital"). The MCA Agreements
contemplate that the NRO entities sell their future business receivables at a specific purchase

amount to Yellowstone Capital in return for an upfront sum. From February 2016 to July 2016, NRO Boston entered into five of these MCA Agreements with Yellowstone Capital, while NRO Edgartown entered into four of the same. Jason Indelicato and Alice Indelicato, the owners of the NRO entities, personally guaranteed the MCA Agreements. When the NRO entities defaulted on the payments to Yellowstone Capital for MCA Agreements entered on July 26, 2016, Yellowstone Capital filed affidavits of confessions of judgments in this Court against both NRO entities and the Indelicatos. Thereafter, the Rockland County Clerk entered two judgments by confession, which amounted to a combined total of over \$1.6 million (“Judgments by Confession”).

On December 13, 2019, the NRO entities and the Indelicatos (collectively, “Plaintiffs”) filed this Complaint against Yellowstone Capital, Yellowstone Capital’s co-founder David Glass and CEO Yitzhak Stern, and various Jane and John Doe Investors. In their Complaint, Plaintiffs alleged violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and the Massachusetts Consumer Protection Statute. Additionally, the Complaint sought to vacate the Judgments by Confession, pursuant to CPLR § 5015. By Decision and Order dated September 29, 2020, this Court granted in part and denied in part all the named Defendants’ respective motions to dismiss Plaintiffs’ Complaint. The Court dismissed the two RICO causes of action against all Defendants. Meanwhile, the claims against all Defendants for violation of Massachusetts Consumer Protection Statute remained, as well as the claim sounding in vacatur of the Judgments by Confession pursuant to CPLR § 5015(a)(3) as against Yellowstone Capital. Then, by Decision and Order dated April 9, 2021, this Court granted Plaintiffs’ motion for leave to file their First Amended Complaint, which cured the defects of their two RICO claims. The Court, however, granted Defendants’ motion to dismiss the claim seeking vacatur of the Judgments by Confession against Yellowstone Capital as untimely. Thus, the remaining causes of action in the First Amended Complaint are the RICO claims as against Defendants Glass and Stern, as well as the John and Jane Doe Defendants. Therefore, Yellowstone Capital is no longer a party hereto.

Now, before this Court are Defendant Glass’s and Defendant Stern’s motion to dismiss Plaintiff’s First Amended Complaint based upon res judicata under CPLR § 3211(a)(5). They allege that the Judgments by Confession are valid and enforceable as against Plaintiffs, especially because this Court dismissed their claim to vacate the same as untimely in its Decision and Order dated April 9, 2021. Therefore, according to Defendants Glass and Stern, the Judgements by

Confession preclude the RICO claims, which allege that the MCA Agreements entered between Plaintiffs and Yellowstone Capital are usurious loans, disguised as purchases of future sale receivables.

In opposition, Plaintiffs filed combined opposition papers to both Defendants' motions. They argue that this Court has previously addressed and denied Defendants' argument for res judicata and that res judicata does not apply here. Specifically, they allege that the Judgments by Confession do not preclude their RICO claims herein because: (1) Defendants Glass and Stern were not parties to the Judgments by Confession; (2) the RICO claims rests upon broader facts than the two Judgments by Confession; and (3) the precedent relied on by Defendants for dismissal are distinguishable to the facts and circumstances here.

As an initial matter, the Court agrees with Defendants that the Court has not decided the issue of res judicata. In its Decision and Order dated April 9, 2021, the Court found that Plaintiffs' First Amended Complaint sufficiently alleged injury to their business, as required under RICO, because of the liability of their Judgments by Confession. It did not decide whether the Judgments by Confession precludes this action under res judicata, which the Court will now decide.

Pursuant to CPLR § 3211(a)(5), a party may move to dismiss a cause of action asserted against him on the ground that it cannot be maintained because of res judicata. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *see also Private Capital Group, LLC v Hosseinipour*, 86 AD3d 554 [2d Dept 2011]. As explained by the New York State Court of Appeals:

"In New York, res judicata, or claim preclusion, bars successive litigation based upon the 'same transaction or series of connected transactions' (see Siegel, NY Prac § 447 [4th ed]) if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was (see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485, 386 NE2d 1328, 414 NYS2d 308 [1979]; *Weinstein-Korn-Miller*, NY Civ Prac P 5011.08 [2d ed])." *Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v. Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008].

Furthermore, res judicata bars subsequent claims "even if based upon different theories or if seeking a different remedy." *In re Hunter*, 4 NY3d 260, 269 [2005][internal quotation marks

omitted]. “Under an exception to that rule, a separate lawsuit may be brought where the alleged perjury or fraud in the underlying action was “merely a means to the accomplishment of a larger fraudulent scheme.” *Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750, 752 [2d Dept 2009][internal citations and quotation marks omitted].

A judgment by confession obtained from a defendant’s affidavit, pursuant to CPLR § 3218, “may be docketed and enforced in the same manner and with the same effect as a judgment in an action in the supreme court.” CPLR § 3218(b). As continuously held by courts of this State, “[a] judgment by confession stands in much the same position as one by stipulation or consent and is a conclusive adjudication of all matters embraced in it and a bar to any subsequent action on the same claim.” *Canfield v Elmer E. Harris & Co.*, 252 NY 502, 505 [1930]; *see also Silverman v Leucadia, Inc.*, 156 AD2d 442 [2d Dept 1989]; *Girylyuk v Girylyuk*, 30 AD2d 22, 23 [1st Dept 1968]; *County Nat’l Bank v Inter-County Farmers Cooperative Asso.*, 65 Misc 2d 446, 449 [Sullivan County, Sup Ct November 5, 1970]. Indeed, courts have applied *res judicata* on a party’s claims because valid a judgment by confession exists between the parties or their privies and they could have raised such claims by directly attacking the judgment. *See Newtek Small Bus. Fin. v Kup’s Auto Spa*, 2019 N.Y. Misc. LEXIS 14272 [Suffolk County, Sup Ct 2019]. With respect to RICO and *res judicata*, the U.S. District Court for the Southern District of New York has held that “when a party fails to raise the defense of fraud in an initial action, a subsequent collateral challenge to an adverse judgment rendered in that initial action under the guise of a fraud based RICO claim may be barred by *res judicata*.” *Bin Saud v Bank of New York*, 734 F Supp 628, 633 [SD NY 1990]; *see also Peterson v Saperstein*, 267 Fed Appx 751, 754 [10th Cir 2008]. Likewise, the Appellate Division, Second Department has held that “[a] judgment by default that has not been vacated is conclusive for *res judicata* purposes and encompasses the issues that were raised or could have been raised in the prior action.” *Eaddy v U.S. Bank N.A.*, 180 AD3d 756, 758 [2d Dept 2020]; *see also Richter v Sportsmans Props., Inc.*, 82 AD3d 733 [2d Dept 2011]; *Rizzo v Ippolito*, 137 AD2d 511 [2d Dept 1988].

Here, the Court finds that Plaintiffs’ RICO causes of action are indeed barred by *res judicata*. Defendants established that the elements of *res judicata* are present here as (1) the Judgments by Confession are judgments on the merits of a court of competent jurisdiction (*see Prudential Lines, Inc. v Firemen’s Ins. Co.*, 91 AD2d 1, 3-4 [1st Dept 1982]); and (2) Plaintiffs,

were parties to the Judgments by Confession and Defendants Glass and Stern are privies to Defendant Yellowstone Capital. The Court agrees with Defendants that the Judgments by Confession are final and binding on Plaintiffs. *See County Nat'l Bank v Inter-County Farmers Cooperative Asso.*, 65 Misc 2d 446, 449 [Sullivan County, Sup Ct November 5, 1970][“A validly confessed judgment has as much lien value as would an ordinary judgment rendered after trial, no more and no less.”]. New York Courts require litigants to directly attack judgments, such as by moving to vacate them or filing a plenary action where applicable, as under CPLR § 5015(a). In its April 9, 2021 Decision and Order, this Court dismissed the portion of Plaintiffs’ Complaint seeking to vacate the Judgments by Confession, under CPLR § 5015(a)(3) based upon to fraud, misrepresentation, or other misconduct, as it was untimely. In effect, the Judgments by Confession are currently final and binding, which is fatal to their RICO claims as alleged in the First Amended Complaint. *See Tripoint Global Equities, L.L.C. v Fasolino*, 2013 U.S. Dist. LEXIS 150271, 2013 WL 5677126 [SD NY 2013]. As such, Plaintiffs cannot otherwise dress up a vacatur claim based upon misconduct as a RICO cause of action in order to circumvent the validity of the Judgments by Confession. This Court’s reasoning is similar to that of the Appellate Division, Second Department in *83-17 Broadway Corp. v Debcon Fin. Servs., Inc.*, wherein the plaintiff’s causes of action concerned the validity of mortgages that formed the basis of the two foreclosure actions commenced by the defendant’s assignor. 39 AD3d 583, 585 [2d Dept 2007]. The Court found that “[s]ince the plaintiff defaulted in both foreclosure actions and *did not successfully move to vacate its defaults*, the judgment of foreclosure and sale entered in those actions preclude it from litigating the validity of the mortgages in this action.” *Id.* [emphasis added]. Accordingly, the Court therein found that the lower court should have dismissed the plaintiff’s causes of action concerning the validity of the mortgages, pursuant to CPLR § 3211(a)(5). Therefore, as here and as Defendants argue, the Judgments by Confession operates as a bar under *res judicata* to Plaintiffs’ RICO claims.

Additionally, the Court finds that Plaintiffs’ RICO causes of action arise out of the same series of transactions that the Judgments by Confession are based upon. Plaintiffs argue that the RICO causes of action extend beyond the Judgments by Confession because the Judgments only pertain to 2 of the 9 MCA Agreements and, therefore, there has been no litigation of the other 7 MCA Agreements. As pointed out by Defendants, the Judgments by Confession are based upon Plaintiffs’ defaults in payments of the two July 26, 2016 MCA Agreements: one for NRO Boston

and another for NRO Edgartown. Both agreements supersede all prior agreements between NRO Boston and Yellowstone Capital, as well as between NRO Edgartown and Yellowstone Capital, because they both contain integration clauses. These are the final MCA Agreements entered between those contracting parties. As such, any alleged improperly collected criminally usurious loan payment is wrapped into the two July 26, 2016 MCA Agreements. Therefore, Plaintiffs' argument that their Complaint extends beyond the subject matter of the Judgments by Confession is belied by the fact that the two integration clauses contained in the July 26, 2016 MCA Agreements.

Furthermore, the Court disagrees with Plaintiffs that there is no privity between Yellowstone Capital and Defendants Glass and Stern. The First Amended Complaint alleges that Defendant Glass is an owner and the "mastermind" of Yellowstone Capital and that Defendant Stern is an owner and was the CEO of Yellowstone Capital. It extensively alleges that Defendants Glass and Stern actively participated and agreed with one another and others in their racketeering activity, such that they had control over Yellowstone Capital to utilize it as a vehicle to violate RICO. *See Prospect Owners Corp. v Tudor Realty Servs. Corp.*, 260 AD2d 299, [1st Dept 1999]; *Fernicola v Specific Real Prop. in Possession, Custody, and Control of Healthcare Underwriters Mut. Ins. Co.*, 2001 U.S. Dist. LEXIS 21724, *14, 2001 WL 1658257 [SD NY 2001][“the identity of interest between a corporate officer and the entity he or she leads is sufficient to establish privity”]. Specifically, the First Amended Complaint alleges that Defendants Glass and Stern were responsible for the day-to-day operations in “creating, approving and implementing the policies, practices and instrumentalities used by the Enterprise to accomplish its common goals and purposes[,]” which included, *inter alia*, the form of the MCA Agreements as well as the Affidavits of Confession filed in New York State Courts in order to collect on the monies owed. First Amended Complaint ¶¶ 181, 189. Based upon the foregoing, the Court finds there is privity between Yellowstone Capital and Defendants Glass and Stern, so as to render res judicata applicable here. *See Sterling Doubleday Enters., L.P. v Marro*, 238 AD2d 502 [2d Dept 1997]; *see also Hellman v Hoenig*, 989 F Supp 532 [SD NY 1997]; *Syllman v Nissan*, 18 AD3d 221 [1st Dept 2005][“addition of defendants in this action, all of whom are in privity with the corporation, does not circumvent the legal doctrines that preclude these claims”].

Moreover, the Court is unpersuaded by Plaintiffs' argument that *res judicata* does not apply here because they seek damages arising from the fraudulent misrepresentations Defendants used to further their larger fraudulent scheme. First, the RICO claims are based upon the same misconduct that Plaintiffs alleged Yellowstone Capital committed, which also formed their theory of vacatur under CPLR § 5015(a)(3). Therefore, there is no allegation of a "larger fraudulent scheme." *See Aghaeepour v N. Leasing Sys.*, 2015 U.S. Dist. LEXIS 161018, *24 [SD NY 2015][denying plaintiffs' argument that the fraud in the underlying action was a means to accomplish a larger fraudulent scheme because "(t)he fraud that Plaintiffs seek to recover from here (under RICO) is the same fraud that Plaintiffs alleged in their motions to vacate."]. Second, although their RICO claims do not explicitly seek to vacate the Judgments, they otherwise seek the Court to void the MCA Agreements as usurious loans and to award damages to Plaintiffs for the payment of usurious interest in connection with the MCA Agreements, which would in effect permit Plaintiffs to escape their liability under the Judgments. In its first RICO cause of action, Plaintiffs allege that their injuries result from "hundreds of thousands of dollars in improperly collected criminally usurious loan payments and the unlawful entry and enforcement of judgments." First Amended Complaint ¶ 210. Similarly, the second RICO cause of action alleges that their injuries result from "millions of dollars in improperly collected loan payments and the unlawful entry and enforcement of judgments." First Amended Complaint ¶¶ 219. Plaintiffs cannot use RICO as a backdoor entry to collaterally attack the valid and final Judgments by Confession and escape the principles of *res judicata*.

Accordingly, the Court finds that Plaintiffs' RICO causes of action are barred under the doctrine of *res judicata*. All arguments raised and materials submitted on this matter have been considered by the Court, notwithstanding the absence of specific reference thereto.

Based upon the foregoing, it is

ORDERED that the two causes of action in Plaintiffs' First Amended Complaint are dismissed pursuant to CPLR § 3211(a)(5), and as these are the only remaining causes of action therein, this action is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
September 29, 2021

ENTER



HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF

Index No. 037005/2019, Motion Sequences #10 and #11