

<b>Dallorso v App Group Intl., LLC</b>
2022 NY Slip Op 33743(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 654047/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART 42**

*Justice*

-----X

FERNANDO P. DALLORSO,  
  
Plaintiff,

INDEX NO. 654047/2021

MOTION DATE 11/1/2022

MOTION SEQ. NO. 001

- v -

APP GROUP INTERNATIONAL, LLC and EDWIN BATIZ  
  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for JUDGMENT - DEFAULT.

**I. BACKGROUND**

This action arises from a contract to purchase receivables between App Group International, LLC (App Group) and a business identified as 13 LL Square, Inc. d/b/a Mi Casa Latina, Azul East, Inc., Rolos, Inc. Novecento Café (13 LL Square, Inc.). By the terms of the agreement, dated August 28, 2018, App Group advanced \$20,000.00 to the business pursuant to the agreement but was not repaid the agreed sum of \$29,980.00. Plaintiff herein, Fernando Dallorso (Dallorso), a principal of the company, allegedly signed that contract, a personal guaranty of the debt and an affidavit of confession of judgment, all dated August 28, 2018.

A prior action for entry of judgment by confession was commenced by App Group against Dallorso and the business entity, App Group International LLC v 13 LL Square Inc. d/b/a Mi Casa Latina et. al., Index No. 159585/18 (the "prior action"). That action was disposed by entry of a judgment of confession against Dallorso and the business, 13 LL Square Inc., in the sum of \$24,208.75 on October 17, 2018. The plaintiff's motion to vacate the judgment pursuant to CPLR 5015(a)(3) based on fraud was denied by this court (Debra James, J.) without prejudice to file a plenary action. See Midtown Acquisitions L.P. v. Essar Glob. Fund Ltd., 162 AD3d 583 (1<sup>st</sup> Dept. 2018). A satisfaction of judgment was entered by App Group on July 12, 2021.

On June 25, 2021, just prior to the entry of the satisfaction of judgment, the instant plenary action was commenced by Dallorso against App Group and Edwin Batiz, seeking vacatur of the judgment of confession pursuant to CPLR 5015(a)(3) on the ground it was procured by fraud and recovery of attorney's fees and other consequential costs resulting from the fraud. In his supporting papers, Dallorso denies signing the underlying contract, guaranty or affidavit of confession of judgment and claims that his signature was forged by Batiz or another unidentified individual. Dallorso also claims that he first became aware of the forged documents in September 2019 when App Group attempted to enforce the judgment against him through wage garnishment and attachment of a bank account. Dallorso alleges that Batiz, as a principal of 13 LL Square Inc., admitted to him in September 2019 that he forged his signature and promised to reimburse him. He further alleges that he has incurred costs in excess of \$20,000.00 for attorney's fees and efforts to repair his personal credit.

Neither App Group nor Batiz answered this complaint. The action was discontinued as against App Group by a stipulation of the parties and an order dated February 7, 2022.

On June 15, 2022, plaintiff Dallorso moved pursuant to CPLR 3215 for leave to enter a default judgment against defendant Batiz. In light of the subsequently filed satisfaction of judgment, the plaintiff now seeks only to establish that Batiz committed a fraud against him and to recover attorney's fees and other costs incurred by him as a result of the fraud. No opposition was submitted.

In the meantime, Batiz was arrested on August 5, 2021, and charged with Identity Theft in the First Degree (Penal Law §190.80[1]). On August 1, 2022, he pleaded guilty before the Criminal Court of the City of New York, New York County (Peterson, J.) to the reduced charge of Disorderly Conduct (Penal Law § 240.20) and was sentenced to a conditional discharge. At his plea allocution, Batiz admitted under oath that (1) on or about July 30, 2017, he "forged the signature of the complainant, Fernando Dallorso, on a partnership agreement where the principal place of business was Mi Casa Latina" and (2) that on or about August 28, 2018, he "forged the signature of the complainant Fernando Dallorso on a merchant agreement between APP Group and Mr. Dallorso where [he] took out a business loan at the purchase price of \$20,000.00 and the purchase amount of \$29,980.00 in Mr. Dallorso's name."

By a letter dated October 11, 2022, plaintiff Dallorso informed the court of defendant Batiz' criminal disposition and provided a transcript of the proceedings. Upon application of the plaintiff, the court accepted the letter and transcript as supplemental papers on the motion and allowed defendant Batiz to file responding papers. Batiz did not respond.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2<sup>nd</sup> Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

In support of the motion, the plaintiff submits, *inter alia*, the complaint, an affirmation of counsel, an affidavit of the plaintiff and a satisfaction of judgment from the prior action and proof of service. While counsel's affirmation is without probative value or evidentiary significance on this motion (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Trawally v East Clarke Realty Corp., 92 AD3d 471 [1<sup>st</sup> Dept. 2012]), the plaintiff's affirmation with exhibits and the transcript of defendant Batiz' plea allocution constitute proof of the facts constituting his claim.

## II. DISCUSSION

It is well settled that a defendant's guilty plea may be given collateral estoppel effect in a subsequent civil proceeding on the issue of the defendant's liability. See D'Arata v New York Cen. Mut. Fire Ins. Co., 76 NY2d 659 (1990); Maiello v Kircher, 98 AD3d 481 (2<sup>nd</sup> Dept. 2012); National Bank of Pakistan v Basham, 148 AD2d 399 (1<sup>st</sup> Dept. 1989). "A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from re-litigating the issue." Grayes v DiStasio, *supra* at 263. "The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." City of New York v College Point Sports Assn., Inc., 61 AD3d 33, 42 (2<sup>nd</sup> Dept. 2009). As stated, Batiz has not responded in this action. Moreover, having failed to answer, Batiz is "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

Thus, the plaintiff has demonstrated, *prima facie*, that the judgment of confession he seeks to vacate was procured by fraud in the form of forged signatures on the underlying merchant contract, guaranty and affidavit of judgment of confession. In light of the admitted forgeries on the underlying documents, the judgment of confession entered October 17, 2018, is void and without effect, and subject to vacatur. However, the entry of the satisfaction of judgment in the prior action extinguished the underlying judgment of confession, leaving nothing to vacate. See *Platinum Funding Corp. v Blue Ocean Lines, Inc.*, 249 AD2d 19 (1<sup>st</sup> Dept. 1998). That is, “[a] judgment which is paid and satisfied of record ceases to have any existence since a defendant, by paying the amount due, extinguishes the judgment and the obligation thereunder.” H.D.I. Diamonds, Inc. v Frederick Modell, Inc., 86 AD2d at 561 (1<sup>st</sup> Dept. 1982); see *Tocci v Federman*, 67 AD3d 817 (2<sup>nd</sup> Dept. 2009); *Platinum Funding Corp. v Blue Ocean Lines, Inc.*, supra. Thus, the plaintiff’s application for vacatur of the judgment of confession is deemed withdrawn as moot.

In regard to money damages, the plaintiff is entitled to recover attorney’s fees and other consequential damages incurred on account of the fraud. See *Reno v Bull*, 226 N.Y. 546 (1919); *Cayuga Harvester, Inc. v Allis-Chalmers Corp.*, 95 AD2d 606 (1<sup>st</sup> Dept. 1983). “The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud.” *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 71 (1<sup>st</sup> Dept. 1991) citing *Hotaling v A.B. Leach & Co.*, 247 N.Y. 84 (1928). That is, “[d]amages for fraud are to compensate plaintiffs for what they lost.” *Princes Point, LLC v AKRF Engineering, P.C.*, 94 AD3d at 588 (1<sup>st</sup> Dept. 2012). However, the plaintiff has not submitted any proof of attorney’s fees or other costs incurred as a result of the fraud, necessary to establish the proper amount of damages to be awarded. That proof, if any, may be submitted in the form of supplemental papers.

### III. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff’s motion for leave to enter a default judgment against defendant Edwin Batiz pursuant to CPLR 3215 is granted on liability, without opposition, to the extent that he has established a cause of action for fraud as against that defendant, and it is further


ORDERED that the plaintiff’s application for vacatur of the judgment of confession upon a finding that it was procured by fraud is deemed withdrawn as moot, and it is further

ORDERED that the plaintiff may submit supplemental papers to establish the amount of attorney’s fees and other costs incurred as a result of the fraud committed by defendant Edwin Batiz, within 30 days of the date of this order and shall notify the Part 42 Clerk of an such filing, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and order of the court.

11/1/2022  
DATE

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER