

**Steenstrup v Araiz**

2023 NY Slip Op 30173(U)

January 10, 2023

Supreme Court, New York County

Docket Number: Index No. 654746/2021

Judge: Verna L. Saunders

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

*Justice*

-----X INDEX NO. 654746/2021  
TIM STEENSTRUP, MOTION SEQ. NO. 002  
Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

J. MICHAEL ARAIZ,  
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for VACATE.

In this action to recover on a promissory note, defendant moves by order to show cause for an order, pursuant to CPLR 5015(a)(1) and (3), to vacate the default judgment entered against him, and upon granting vacatur, for summary judgment dismissing plaintiff's complaint. Defendant also moves to disqualify plaintiff's counsel, non-party James J. DeCristofaro ("DeCristofaro") (NYSCEF Doc. No. 44, OSC).

In September 2019, defendant approached DeCristofaro about arranging a personal loan for him (NYSCEF Doc. No. 21, *defendant aff.*, ¶ 3). DeCristofaro had represented defendant in real estate and legal matters, and they were friends (*id.*). DeCristofaro arranged for a loan from plaintiff, who was another of DeCristofaro's clients and friends (*id.*, ¶¶ 3-4; NYSCEF Doc. No. 37, *defendant aff.*, Ex 16 at 2). By e-mail to DeCristofaro on September 27, 2019, plaintiff proposed the terms for the \$50,000.00 loan; these terms included a signed promissory note and confession of judgment from defendant, a 35% annualized return, and a provision that "[defendant] pays your legal in drawing it up and he also covers legal if there is some problem and he doesn't pay me back. It's agreed you will be my attorney in both events (not his)" (NYSCEF Doc. No. 26, *defendant aff.*, Ex 5). DeCristofaro forwarded plaintiff's e-mail to defendant, who responded that same day and wrote, "I am fine with the terms" and "[i]s it possible to make it a 60k loan" (NYSCEF Doc. No. 27, *defendant aff.*, Ex 6 at 1-2).

In a letter dated September 30, 2019 to plaintiff and defendant on the subject "WAIVER OF CONFLICT OF INTEREST," DeCristofaro disclosed the nature of his attorney-client relationships with each of them (NYSCEF Doc. No. 42, *DeCristofaro affirmation*, Ex B at 1 [Conflict Waiver]) (emphasis omitted). The Conflict Waiver reads, in part, as follows:

"Tim asked that I represent Tim in the preparation of the loan and consulting documentation (the 'Documentation'), and in the event of any default under the Documentation. Michael is not represented by counsel in the preparation of the Documentation, and Michael specifically acknowledges, understands, and agrees that I am not

Michael's attorney in the preparation of the Documentation, and that I am Tim's attorney. As Tim's attorney, I am required by the rules of professional responsibility to act in Tim's best interests, which may not be Michael's best interests.

Also, as Michael's attorney in other matters, I may have access to Michael's confidential information, including the location of assets relevant for the securing of the loan from Tim. However, since Michael has freely disclosed these assets to Tim, the information is not confidential in a manner that would hinder my representation of Tim here in a manner adverse to Michael, whether in the context of drafting the Documentation, or enforcing the Documentation in the event of a default.

Regardless, I have disclosed the nature of my attorney client relationship to both of you, and by signing below, you hereby acknowledge and agree to waive any actual or potential future conflict arising out of my representation in connection with the drafting or the enforcement of the Documentation"

(*id.*). Both parties signed the Conflict Waiver<sup>1</sup> (*id.* at 2).

Defendant signed a promissory note ("Note"), dated September 30, 2019, in favor of plaintiff, which was secured by a lien and security interest on defendant's real and personal property to be memorialized in a separate security agreement<sup>2</sup> (NYSCEF Doc. No. 30, *defendant aff.*, Ex 9 at 1). Pursuant to the Note's terms, defendant agreed to repay the principal balance of \$60,000.00 within six months of September 30, 2019, or by the March 31, 2019 [sic] maturity date, with interest calculated at 25% per annum (*id.*). The Note provided that "[defendant] waives the defense of civil usury" (*id.*). Additionally, defendant agreed to pay plaintiff's legal fees, specifically a "flat attorney fee of \$2,500" to DeCristofaro in connection with his drafting and reviewing the Note and the security agreement, with such fee to be paid to DeCristofaro directly or added to the balance on the Note (*id.* at 2). In the event of a default in payment of the principal balance and interest when due, plaintiff was entitled to recover from defendant the court costs, attorneys' fees, disbursements and related expenses he incurred in connection with collecting on the Note (*id.* at 2-3). Defendant also executed an affidavit of confession of judgment for \$60,000.00, plus \$2,500.00 in attorneys' fees, in favor of plaintiff (NYSCEF Doc. No. 32, *defendant aff.*, Ex 11 at 1).

Plaintiff and defendant executed a separate consulting agreement dated September 30, 2019 ("Consulting Agreement") for plaintiff to review and evaluate a proposal for a project defendant was involved with (NYSCEF Doc. No. 31, *defendant aff.*, Ex 11). Under the Consulting Agreement, defendant agreed to pay plaintiff an initial fee of \$12,000.00 and \$500.00

<sup>1</sup> Although defendant submits an unsigned copy (NYSCEF Doc. No. 37), he admits that "may have signed" the Conflict Waiver and cannot recall if he did (NYSCEF Doc. No. 21, ¶ 16).

<sup>2</sup> While the Note submitted on the motion lacks defendant's signature, he admits that he signed it (NYSCEF Doc. No. 21, ¶ 6).

every month thereafter until the agreement was terminated (*id.*). Defendant executed a separate affidavit of confession of judgment for “Sixty Thousand Dollars and Zero Cents (\$12,000.00), plus \$500.00 per month after September 30, 2019” related to this agreement (NYSCEF Doc. No. 33, *defendant aff*, Ex 12).

On March 31, 2020, DeCristofaro forwarded an e-mail to defendant that he had received from plaintiff, who had asked DeCristofaro for an update as to when defendant would repay the Note and for a closing date on the sale of defendant’s East Hampton home<sup>3</sup> (NYSCEF Doc. 34, *defendant aff*, Ex 13). Defendant avers that he spoke to DeCristofaro to advise him that the loan would be repaid when the home was sold (NYSCEF Doc. No. 21, ¶ 13).

When defendant failed to make any repayments, plaintiff filed a summons for summary judgment in lieu of a complaint to recover the balance due on the Note. Plaintiff filed the summons on August 3, 2021 (NYSCEF Doc. No. 1), and personally served defendant with process on August 11, 2021 at 1:09 P.M. at 800 Fifth Avenue, Apartment 33E, New York, New York 10065 (NYSCEF Doc. No. 50, *DeCristofaro aff*, ¶ 12; NYCEF Doc. No. 9). In a decision and order dated December 10, 2021, this court granted plaintiff’s motion, without opposition, and directed the Clerk of the Court to enter judgment against defendant for \$112,500.00, together with costs and disbursements (NYSCEF Doc. No. 23). Plaintiff subsequently served a restraining notice and information subpoena upon an attorney who represented defendant in an unrelated real estate matter (NYSCEF Doc. No. 21, ¶ 2).

Defendant now moves to vacate the default judgment on the grounds that he has a reasonable excuse and a meritorious defense and that there was a fraud, misrepresentation or other misconduct perpetrated by plaintiff and DeCristofaro. In support of the motion, defendant relies on his affidavit, the Note, the Conflict Waiver and email correspondence with plaintiff and DeCristofaro, among other exhibits.

Defendant attributes his default to his confusion over which party DeCristofaro represented, or wished to represent, in this action. Defendant maintains that, notwithstanding the Conflict Waiver, DeCristofaro had offered to represent him in two solicitation letters he had received.<sup>4</sup> Defendant avers that when he received the first letter in July or August 2021, he had no idea that DeCristofaro was representing plaintiff (NYSCEF Doc. No. 21, ¶ 14). Defendant states that he received this letter before he was served with process on August 11, 2021<sup>5</sup> (*id.*, ¶ 15). When he spoke to DeCristofaro on or around August 11, “DeCristofaro may have told me that a ‘motion’ was filed,” which prompted him to write the following to DeCristofaro on August 17: “Long time no speak. I guess we need to discuss the motion you filed?” (*id.*; NYCEF Doc. No. 35, *defendant aff*, Ex 14). DeCristofaro responded on August 25 and included the motion papers as an attachment (NYSCEF Doc. No. 36, *defendant aff*, Ex 15), which defendant believed

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<sup>3</sup> The home was located at 40 Further Lane, East Hampton, New York (NYSCEF Doc. No. 49, plaintiff *aff*, ¶ 4).

<sup>4</sup> Defendant avers that he did not possess a copy of the first solicitation letter (NYSCEF Doc. No. 21, ¶ 14).

<sup>5</sup> Defendant states that “[i]t is claimed that on August 11, 2021 I was personally served with litigation papers. However, I only remember receiving the first solicitation from DeCristofaro.” (NYSCEF Doc. No. 21, ¶ 15).

was unnecessary if the papers had already been served (NYSCEF Doc. No. 21, ¶ 15). Defendant adds that DeCristofaro mentioned resolving the dispute “consensually” in his e-mail, but “DeCristofaro knew very well that I did not have another attorney because DeCristofaro himself was my attorney!” (*id.*). Defendant avers that after he received the August 25 e-mail, he believed “the matter was on hold until [the] Hampton’s house was sold” (*id.*). Then, on September 7, 2021, DeCristofaro mailed plaintiff a second solicitation letter (NYSCEF Doc. No. 38, *defendant aff*, Ex 17 at 5), which “reinforced” defendant’s belief that the “matter was on hold” (NYSCEF Doc. No. 21, ¶ 15). As for a meritorious defense, defendant contends that the Note is usurious on its face as the interest rate per annum exceeds the 16% interest rate for civil usury and exceeds the 25% interest rate for criminal usury, as the \$2,500.00 in legal fees paid to DeCristofaro must be considered additional consideration for the loan.

Defendant also moves to vacate his default based on plaintiff’s and DeCristofaro’s misconduct in carrying out a criminally usurious scheme, and on DeCristofaro’s misconduct in representing both parties in an illegal transaction. Because the Note is usurious, he seeks summary judgment dismissing plaintiff’s claim against him. Defendant also moves to disqualify DeCristofaro from representing plaintiff because DeCristofaro is an interested witness.

Plaintiff, in opposition, argues that defendant has not articulated a reasonable excuse for his default. The Conflict Waiver states that DeCristofaro represented plaintiff on all pre- and post-transaction issues related to the Note, and the motion papers served upon him clearly identified DeCristofaro as plaintiff’s counsel. Plaintiff avers that DeCristofaro represented plaintiff, only, at all times on this loan transaction with defendant (NYSCEF Doc. No. 49, ¶¶ 9-10), and DeCristofaro avers that defendant could not have believed that he represented him because defendant signed the Conflict Waiver (NYSCEF Doc. No. 50, ¶¶ 9-10 and 13). DeCristofaro also states that his August 25, 2021 e-mail would have dispelled any confusion over which party he represented, as the pertinent part of the email reads:

“As we discussed yesterday, if you are represented by an attorney, kindly forward the attached to that attorney; as long as you are not represented by an attorney (as you mentioned yesterday on the phone), I can communicate with you directly. If you have an attorney for this case, I would need to communicate with your attorney, or have your attorney’s position [sic] to speak with you directly”

(NYSCEF Doc. No. 43, *DeCristofaro affirmation*, Ex C). As for the two “broad-scale attorney advertising” letters defendant mentions, DeCristofaro states that defendant could not have reasonably believed that DeCristofaro intended to represent him because the solicitations contained “first-time introduction” language (NYSCEF Doc. No. 50, ¶¶ 17-18). Plaintiff contends that defendant has admitted that he is familiar with DeCristofaro and had retained DeCristofaro as his attorney on more than one real estate or legal matter.

Plaintiff submits a reply affidavit and a reply memorandum of law, but reply papers are not permitted, as of right, on an order to show cause (*see* CPLR 2214). Therefore, the court shall not consider them.

A party moving to vacate its default under CPLR 5015(a)(1) must establish both a reasonable excuse for its default and a meritorious defense to the action. (see *Jones v Grooms*, 209 AD3d 584, 584-585 [1st Dept 2022].) It is within the court's discretion to determine what constitutes a reasonable excuse. (see *Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010].)

Here, the court finds that defendant has failed to proffer a reasonable excuse for his default. Defendant's belief that DeCristofaro represented or offered to represent him on the loan transaction and in plaintiff's action to collect on the Note is belied by the unambiguous language in the Conflict Waiver stating that DeCristofaro served as plaintiff's attorney. In that same document, defendant acknowledged that he was not defendant's attorney and agreed to waive any conflict related to enforcement of the loan documents. Defendant's lack of recollection of signing the Conflict Waiver does not negate its clear, plain terms.

The correspondence between defendant and DeCristofaro also fails to support defendant's contention that DeCristofaro represented him. First, the summons and notice of motion filed in this action, which plaintiff admits he received on or before August 17, 2021, reflect that DeCristofaro served as plaintiff's counsel in the action. Second, in DeCristofaro's August 25 email, DeCristofaro clearly stated that he could not communicate with defendant directly if defendant was represented by counsel and asked defendant to forward the papers to his attorney if he had retained one. Third, the solicitation letter contains general language advertising DeCristofaro's services and legal experience, offers a free strategy session, contains testimonials from past clients such as plaintiff (NYSCEF Doc. No. 38 at 2) and includes a link to DeCristofaro's website. Nothing in the solicitation letter specifically refers to the action brought by plaintiff and no person reading the letter could reasonably equate the letter to an agreement sufficient to create an attorney-client relationship.

Defendant's contention that he believed the matter was on hold based on DeCristofaro's August 25 e-mail is equally unpersuasive. DeCristofaro expressed his hope they could "consensually resolve these issues without the need to proceed to summary judgment" before suggesting that defendant forward the motion papers to his attorney (NYSCEF Doc. No. 43 at 1). A plain reading of this e-mail does not give rise to the reasonable inference that plaintiff (or DeCristofaro) had agreed to place the matter on hold until defendant's East Hampton house was sold. The property is not mentioned in the e-mail, and DeCristofaro did not write that plaintiff had agreed to refrain from moving forward in the action until after the house was sold. Similarly, nothing in the solicitation letter referenced a temporary stay for any reason.

Last, as defendant has expressed, he considered DeCristofaro a friend and his attorney. By the time defendant received the second solicitation letter in September, he was already on notice that DeCristofaro represented plaintiff in this action, as evidenced in the moving papers served upon him in August. Defendant has not explained why he failed to contact DeCristofaro to clarify the representation issue at any time before the default order was issued. Moreover, if defendant believed DeCristofaro represented him, defendant has not explained why he did not contact DeCristofaro to inquire about the status of the case. (see e.g. *HSBC Bank USA, N.A. v Joseph*, 209 AD3d 633, 634 [2d Dept 2022] [denying a motion to vacate a default where the defendant, who was represented by counsel who was later disbarred, "failed to offer any

reasonable explanation for his failure to apprise himself about the status of the action or inquire with his former counsel about the status of the action for multiple years”]; *Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 604 [1st Dept 2017] [concluding that it was unreasonable for the defendant to believe that its insurer had been defending it in a personal injury action where the defendant continued to receive legal documents, including a monetary judgment, in the action].)

In the absence of a reasonable excuse, the court need not address whether defendant has a potentially meritorious defense to the action (*see Perez v 1790-1792 Third Ave. LLC*, \_\_\_ AD3d \_\_\_, \_\_\_ 2022 NY Slip Op 07011, \*1 [1st Dept 2022]; *Buckley v Nicklous*, 210 AD3d 575, 575 [1st Dept 2022] [concluding that the defendant’s mistaken impression that service of process related to another pending matter did not constitute a reasonable excuse].) Accordingly, the motion, insofar as it seeks vacatur under CPLR 5015(a)(1), is denied.

CPLR 5015(a)(3) allows a party to vacate its default based on “fraud, misrepresentation, or other misconduct of an adverse party.” The type of fraud underlying a motion brought under this subject may be intrinsic or extrinsic. (*see Oppenheimer v Westcott*, 47 NY2d 595, 603 [1979].) Intrinsic fraud involves a claim that the complaint’s allegations are false, and the party moving to vacate its default must demonstrate both a reasonable excuse and a potentially meritorious defense. (*see 3331 102 St. LLC v Newport Beach Holdings LLC*, 205 AD3d 497, 497 [1st Dept 2022].) Extrinsic fraud for purposes of CPLR 5015(a)(3) is “a fraud on the defaulting party that induces them not to defend the case” (*Mortgage Elec. Registration Sys., Inc. v Gifford*, 133 AD3d 429, 431 [1st Dept 2015] [internal quotation marks and citation omitted]). Stated another way, “[e]xtrinsic fraud may be defined as a fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter” (*Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983]). A party claiming extrinsic fraud must “demonstrate ‘some device, trick, or deceit that led him [or her] to believe that he [or she] need not defend this action’” (*US Bank N.A. v Nunez*, 208 AD3d 711, 713 [2d Dept 2022], quoting *HSBC Bank USA, N.A. v Walker*, 201 AD3d 795, 797 [2d Dept 2022]).

As applied here, defendant fails to establish that vacatur based on intrinsic fraud is warranted. Defendant does not contend that the allegations asserted in plaintiff’s motion for summary judgment — that plaintiff had loaned defendant \$60,000.00 and that defendant never repaid that sum — were false. Moreover, as discussed above, defendant has not proffered a reasonable excuse for his default, which obviates the need to address whether he presented a potentially meritorious defense. (*see Chase Bank USA, N.A. v Laroche*, 208 AD3d 845, 847 [2d Dept 2022]; *accord 3331 102 St. LLC*, 205 AD3d at 497).

Nor has defendant demonstrated that plaintiff’s or DeCristofaro’s alleged misconduct constitutes extrinsic fraud (*see Mortgage Elec. Registration Sys., Inc.*, 133 AD3d at 431); *Deutsche Bank Natl. Trust Co. v Willock*, 191 AD3d 576, 576 [1st Dept 2021].) Defendant asserts that plaintiff and DeCristofaro engaged in a scheme to collect criminally usurious interest. However, this alleged misconduct preceded the commencement of this action. Thus, such conduct could not have caused defendant to refrain from mounting a defense (*see U.S. Bank, N.A. v Peters*, 127 AD3d 742, 743 [2d Dept 2015] [no allegation of extrinsic fraud]) and does not suggest any wrongdoing on their part in securing the judgment (*see Empire State Conglomerates v Mahbur*, 105 AD3d 898, 899 [2d Dept 2013] [stating that the allegations failed to rise to the

level of fraud, misrepresentation or other misconduct to warrant vacatur].) Defendant also argues that DeCristofaro engaged in misconduct by offering to represent him in this matter. Defendant, though, has not established how his receipt of two solicitation letters induced him to refrain from defending himself when he was aware of the pending action against him and where DeCristofaro’s communications did not state that he no longer represented plaintiff or that plaintiff had agreed to stay the action (see *Mortgage Elec. Registration Sys., Inc. v Schotter*, 50 AD3d 983, 983 [2d Dept 2008] [denying vacatur where “there is no evidence that the mortgage servicer, the plaintiff, or the plaintiff’s counsel represented to the defendant that he need not defend the foreclosure action, or in any manner agreed to stay the proceedings while he attempted to resolve his financial difficulties”]). Additionally, defendant does not state that he ever retained DeCristofaro’s services specifically for this action. Accordingly, the motion insofar as it seeks vacatur under CPLR 5015(a)(3) is denied.

Given defendant’s failure to demonstrate that his default should be vacated, the part of his motion seeking summary judgment is denied.

Defendant also moves to disqualify DeCristofaro from representing plaintiff in this action. In response to the motion, plaintiff has obtained new counsel, which is reflected in a Notice of Substitution of Counsel filed May 11, 2022 (NYSCEF Doc. No. 48). Thus, this part of defendant’s motion is denied as moot. Accordingly, it is

**ORDERED** that the motion brought by defendant J. Michael Araiz to vacate the default judgment entered against him, for summary judgment and to disqualify counsel for plaintiff Tim Steenstrup (Mot. Seq. 002) is denied; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant.

This constitutes the decision and order of this court.

January 10, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: