Itria Ventures LLC v NB Net Solutions 22 Inc
2024 NY Slip Op 35577(U)
December 20, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2023-51072
Judge: Thomas R. Davis

INDEX NO. 2023-51072
RECEIVED NYSCEF: 12/20/2024

SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present: Hon. THOMAS R. DAVIS, J.S.C.

SUPREME COURT: DUTCHESS COUNTY
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ITRIA VENTURES LLC,

Plaintiff(s),

-against-

DECISION AND ORDER
(Motion Seq. No. 1)
Index No.: 2023-51072

NB NET SOLUTIONS 22 INC, NB NET SOLUTIONS 10 INC,
NB NET SOLUTIONS 11 INC, NB NET SOLUTIONS 13 INC,
NB NET SOLUTIONS 14 INC, NB NET SOLUTIONS 15 INC,
NB NET SOLUTIONS 16 INC, NB NET SOLUTIONS 17 INC,
NB NET SOLUTIONS 18 INC, NB NET SOLUTIONS 19 INC,
NB NET SOLUTIONS 21 INC, NB NET SOLUTIONS 23 INC,
NB NET SOLUTIONS 22 INC, NB NET SOLUTIONS 10 INC,
NB NET SOLUTIONS 11 INC, NB NET SOLUTIONS 13 INC,
NB NET SOLUTIONS 14 INC, NB NET SOLUTIONS 15 INC,
NB NET SOLUTIONS 16 INC, NB NET SOLUTIONS 17 INC,
NB NET SOLUTIONS 18 INC, NB NET SOLUTIONS 19 INC,
NB NET SOLUTIONS 21 INC, NB NET SOLUTIONS 23 INC,
NB NET SOLUTIONS 24 INC, NB NET SOLUTIONS 25 INC,
NB NET SOLUTIONS 8 INC, NB NET SOLUTIONS 3 INC,
NB NET SOLUTIONS 5 INC, NB NET SOLUTIONS 9 INC,
NB NET SOLUTIONS 28 INC, NB NET SOLUTIONS 30 INC,
NB NET SOLUTIONS 30 INC, NB NET SOLUTIONS 33 INC,
NB NET SOLUTIONS 34 INC, NB NET SOLUTIONS 35 INC,
NB NET SOLUTIONS 36 INC, NB NET SOLUTIONS 37 INC,
NB NET SOLUTIONS 2 INC, NB NET SOLUTIONS 4 INC,
NB NET SOLUTIONS 6 INC, NB NET SOLUTIONS 38 INC,
NB NET SOLUTIONS 39 INC, NB NET SOLUTIONS 41 INC,
C-POINT MOBILE INC, ECO-TECH MOBILE INC,
MARBLE HILL MOBILE INC, POST MOBILE INC,
WESTCHESTER SQUARE MOBILE TECH INC,
WHITE PLAINS CELLULAR SERVICE INC,
BRITTON ROOSEVELT TECH INC,
CONCOURSE WIRELESS JUNCTION INC,
HORIZON MOBILE TECH INC, NB NET SOLUTIONS 26 INC,
NB NET SOLUTIONS 7 INC, NB NET SOLUTIONS 31 INC,

NB NET SOLUTIONS 32 INC, BARNUM WIRELESS TECH INC,
CHAPEL WIRELESS TECH INC,
NEW BRITAIN'S WIRELESS STOP INC,
TRUMBULL MOBILE TECH INC,
VICTORY TECH WIRELESS INC,
NAFIUR RAHMAN CHOWDHURY

Defendant(s).

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The instant motion (sequence #1) seeks to vacate a judgment entered by the Clerk of the County of Dutchess pursuant to an Affidavit of Confession of Judgment dated July 26, 2022. The following papers were read and considered in determining the motion:

NYSCEF document numbers 33-41 and 49-60.

Relevant Background

On March 29, 2023, the plaintiff filed a Confession of Judgment dated July 26, 2022 ("the COJ") and an Affidavit of plaintiff's corporate counsel dated March 29, 2023 against the defendants. The COJ was signed by defendant Naifur Rahman Chowdhury ("Chowdhury") individually and on behalf of each of the corporate defendants herein.

The COJ states, *inter alia:*

- the residence (within New York State) of Chowdhury;
- the location of the corporate defendants (denoted therein as the "Merchant Defendant") in Dutchess County;
- that the Merchant Defendant and Chowdhury as guarantor, "confess[] judgment and authorize entry of judgment in favor of Plaintiff and against Merchant Defendant [and Chowdhury, individually] in…any tribunal…where [Merchant Defendant's] operations, offices, assets or domicile are located, in the sum of $378,000.00, *less* any amounts timely delivered to Plaintiff pursuant to the Receivables Sale Agreement…dated July 26, 2022…*plus*" a designated calculation of legal fees, interest at 16% per annum, costs and disbursement and Marshal fees.
- that the amount of the judgment "shall be set forth in an affidavit to be executed by Plaintiff or an affirmation by Plaintiff's attorney…which shall be filed contemporaneously with this Affidavit of Confession of Judgment."
- That the COJ "is for a debt due to Plaintiff arising from Merchant Defendant's material breach of the Merchant Agreement. Such material breach, as detailed in Plaintiff's Affidavit file herewith, includes the failure to remit to Plaintiff the agreed amount of Merchant Defendant's accounts receivable that were purchased by Plaintiff pursuant to the Merchant Agreement, as set forth in Plaintiff's Affidavit…."

The Affidavit of plaintiff's corporate counsel filed with the COJ asserted, *inter alia*, that:

- The confession of judgment is for a material breach of the Agreement

- that pursuant to the parties' agreement, for a purchase price, defendants agreed to allow Plaintiff to collect a percentage of its future accounts receivable until Plaintiff had collected the amount of $378,000.00 in full;
- that defendants defaulted under terms of the agreement by failing to remit payment on March 3, 2023
- that as of the date of the affidavit, plaintiff has collected the amount of $164,822.92.
- that the uncollected amount to-date is $213,177.08
- that defendants agreed to accrued interest on the uncollected amount at sixteen percent (16%);
- that defendants agreed to legal fees in the amount of $53,294.27 to plaintiff, calculated at twenty-five percent (25%) of the uncollected amount

After the aforesaid documents and a proposed judgment were filed, a judgment was signed and entered by the Dutchess County Clerk on March 31, 2023.

The judgment with notice of entry was served, by e-mail, on the defendants' counsel on June 30, 2023 and by mail to each of the corporate defendants on July 18, 2023.

On July 23, 2024, the defendants filed the instant motion to vacate the judgment. In support thereof, the defendants offered the affidavit of Chowdhury and several exhibits. Chowdhury asserts, *inter alia,* that he was not notified, prior to the judgment, that this action had been filed; that the underlying agreement in connection with which the COJ was given was a "loan"—in fact, a series of loans—and that the interest rate thereon was usurious; that the plaintiff was not entitled to any further payments on the underlying agreement among the parties because its business failed and it was no longer receiving any income against which it had to make any payments under the agreement; that the agreement in connection with which the COJ was given was the product of fraud committed by the plaintiff; and that the plaintiff's conduct with respect to the parties' agreement and the alleged loans was the product of racketeering.

In opposition, the plaintiff argues that a judgment obtained by a confession of judgment cannot be vacated by motion but, instead, must be challenged in a plenary action particularly where, as here, there are sharply disputed questions of fact and conflicting affidavits. Plaintiff further argues that the COJ is facially valid and satisfies the requirements of CPLR 3218 in that it states the sum for which judgment may be entered, authorizes the entry of judgment, states the facts out of which the debt arose, and shows that the sum confessed is justly due. Plaintiff also argues that there is also no merit to the defendants' contentions because: the parties' underlying agreement was not a loan; the defendants waived the right to assert defenses within the underlying agreement; there is no basis for a racketeering (RICO) claim; and that there is evidence that the defendants had not, in fact, gone out of business and continued to collect money on receivables after they stopped making payments to the plaintiff.

Discussion

"'Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief (*Morocho v.*

Monterroza, 170 A.D.3d 710, 711, 93 N.Y.S.3d 574 [internal quotation marks omitted])" (*Funding Metrics, LLC v. A & A Fabrication and Polishing Corporation*, 187 AD3d 857 [2d Dept 2020]).

Exceptions to the general rule exist, such as where the court lacks subject matter jurisdiction over the action (*id*) or where the terms of the confession of judgment have plainly not been met (see, CPLR §3218, Practice Commentaries § C3218:23). Alleging a loan was usurious is not such an exception (*Morocho v. Monterroza*, 170 AD3d 710 [2d Dept 2019]), nor is an allegation of fraud (*Scheckter v. Ryan*, 161 AD2d 344 [1st Dept 1990]; *Affenita v. Long Industries, Inc*., 133 AD2d 727 [2d Dept 1987]).

A judgment debtor who seeks to set aside a judgment entered by confession on grounds of fraud or misconduct must proceed by plenary action, not by motion (*Scheckter v. Ryan*, 161 AD2d 344 [1st Dept 1990]; *Affenita v. Long Industries, Inc*., 133 AD2d 727 [2d Dept 1987]; *see also, Cash and Carry Filing Service, LLC v. Perveez*, 149 AD3d 578 [1st Dept 2017] (plenary action required to determine enforceability of underlying agreement leading to the confession of judgment)).

Even where the filing of a confession of judgment is conditioned on defendant's default on the underlying agreement, if the parties dispute whether such a default occurred and there are sharp issues of fact and conflicting affidavits, it is not appropriate to determine the issue on a motion, but through a plenary action (*Midtown Acquisitions, L.P. v. Essar Global Fund Limited*, 162 AD3d 583 [1st Dept 2018]).

Here, the grounds asserted by the defendants for vacatur of the judgment do not fall within an exception to the general rule. In sum and substance, the defendants allege that the underlying agreement with which the COJ is connected was either not breached by them, was a usurious loan and/or was the product of fraud and racketeering. These issues are precisely the type that fall within the general rule that a plenary action must be maintained in order to assert and litigate such claims. Clearly, from the content of the parties' submissions, there are conflicting allegations and questions of fact that cannot be resolved by way of motion in this action. As a result, the defendants' motion must be denied.

Based on the foregoing, it is hereby

ORDERED that the defendants' motion (sequence #1) is DENIED without prejudice to the defendants' commencing a plenary action to pursue their claims.

Dated: December 20, 2024
Poughkeepsie, NY

ENTER:

Hon. Thomas R. Davis, J.S.C.

To: All Parties via NYSCEF

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.