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| EBF Partners, LLC v Yaz & Yash LLC |
| 2017 NY Slip Op 31600(U) |
| July 19, 2017 |
| Supreme Court, Westchester County |
| Docket Number: 65598/16 |
| Judge: Mary H. Smith |
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DECISION AND ORDER

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

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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EBF PARTNERS, LLC,

Plaintiff,

MOTION DATE: 6/23/17
INDEX NO.: 65598/16

-against-

YAZ & YASH LLC D/B/A Y&Y and NAVPREET SINGH,

Defendants.

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The following papers numbered 1 to 8 were read on this motion by defendants for an Order vacating a filed confession of judgment, etc.

Papers Numbered

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| Order to Show Cause - Affidavit (Singh) - Exhs. (A-C) - Affirmation (Weinberg) - | |
| Memorandum of Law | 1-5 |
| Answering Affirmation (Movahed) - Exhs. (A-D) - Memorandum of Law | 6-8 |

Upon the foregoing papers, it is Ordered that this motion by defendants for an Order vacating the filed October 17, 2016, confession of judgment and, upon vacature, "if the usury issue was not reached, compelling plaintiff to arbitrate the parties' claim and dispute," is denied.

Plaintiff EBF Partners, LLC is a limited liability company existing under the laws of

Delaware, with its place of business located in New York City. On September 14, 2016, defendant Yaz & Yash LLC d/b/a Y&Y ("Yaz") had entered into a 9-page agreement ("Agreement") with plaintiff whereby Yaz sold its future receivables and sale proceeds, with an agreed face value of \$31,740.00, to plaintiff for the purchase price of \$23,000, and had granted plaintiff a security interest in and lien upon all accounts. There is no dispute that plaintiff in fact had paid the stated full purchase price to defendant Yaz. Pursuant to the Agreement, defendant Yaz had agreed to conduct its business in good faith and to deposit all of its sale proceeds into a designated business account; plaintiff was authorized to debit from this business account 20 percent of Yaz's sales proceeds until such time as plaintiff had received the full purchased amount. The Agreement expressly provides that defendant will be in default under the Agreement if among other things it interferes with plaintiff's right to collect the payments or in any way violates any term of the Agreement.

In addition to the Agreement, defendant Singh, Yaz's owner, had executed a September 15, 2016, personal guaranty of Yaz's performance under the Agreement, with defendants' joint and several liability. This guaranty had been executed and notarized in Indiana.

Also, on September 15, 2016, defendant Singh had executed, both in his capacity as owner and principal of defendant Yaz and on his individual behalf, a 3-page Affidavit of Confession of Judgment ("Affidavit" or "Confession of Judgment"). Same had been notarized in Florida without acknowledgment, and without an accompanying Certificate of Conformity. This Affidavit expressly provides for the entry of judgment against defendants jointly and severally for the outstanding purchased receivables, plus legal fees in the sum of 25% of said total sum. This Affidavit expressly further provides that both defendants and

plaintiff consent to the entry of judgment in:

any court, state or federal sitting in the State of New York, including, but not limited to the Supreme Court of the State of New York, County of Westchester ... If for any reason, the entry of judgment is outside the jurisdiction of the aforementioned court(s), [both] Defendant[s] consent to the personal jurisdiction, the entry of judgment, and execution thereon in any court, state or federal ...

According to plaintiff, defendant Yaz partially had performed under the Agreement leaving, as of September 23, 2106, an outstanding balance owed plaintiff in the sum of \$31,018.65. On that date, plaintiff maintains that defendants had breached the Agreement by placing a stop payment on all debits of the specified percentage from Yaz's specified deposit account. On October 5, 2016, plaintiff had filed the Affidavit of Confession of Judgement against defendants, seeking entry of judgment, plus interest from September 14, 2016, and attorney's fees in the sum of \$7,754.66. Judgment had been entered by the County Clerk, on October 17, 2016, in the total sum of \$39,250.71.

Defendants have filed the instant June 5, 2017, Order to Show Cause, under the index number assigned to the entered confessed judgment, seeking to vacate said judgment, arguing that there are "facial irregularities in the entry of the confession of judgment, and the text of the parties' contract." Defendant Singh enumerates and details in his supporting affidavit the many alleged inadequacies and inconsistencies within the parties' Agreement, as well as between the Agreement and the supporting affidavit that plaintiff had submitted to the Clerk in support of entry of the judgment, which defendants contend require vacature of the Judgment of Confession.

As an initial matter, the Court rejects as being completely unsupported by any legal analysis and cited legal authority defendants' implied argument that defendants necessarily

are entitled to vacature of the entered Judgment of Confession because plaintiff, a limited liability corporation formed under Delaware law, is not registered in New York, and it "appears to be doing business in New York without the requisite registration required by Limited Liability Law, §808." The burden properly had been upon moving defendants to establish their entitlement to prevail on this argument, which they have failed to do.

As a second initial matter, defendants' motion is denied in part as being procedurally improper. A confessed judgment is valid only if it conforms to the strict requirements of CPLR 3218. See Hynes v. Skarvelis, 6 Misc.3d 1038(A) (Sup. Ct. Kings Co. 2005). CPLR 3218, subdivision (a), paragraph 1, provides that a judgment of confession properly may be entered upon a supporting affidavit executed by a defendant in favor of a plaintiff which states the sum for which defendant agrees judgment may be entered, which authorizes the entry of that judgment and which states the county in which defendant resides or in which entry is authorized. CPLR 3218, subdivision (a), paragraph 2, further states that the required affidavit shall "stat[e] concisely the facts out of which the debt arose and show[] that the sum confessed is justly due or to become due." The Affidavit is sufficient under the statute if it adequately sets out the facts giving rise to the underlying debt. See Girylyuk v. Girylyuk, 30 A.D.2d 22, 25 (1st Dept. 1968), affd. 23 N.Y.2d 894 (1969).

The subject executed Affidavit of Confession of Judgment, on its face, complies with the requirements of CPLR 3218, and thus this Court finds that plaintiff properly had presented same for filing, and that the Clerk properly had accepted and entered judgment thereon. Indeed, defendants concede in their supporting Memorandum of Law that "[t]his motion has nothing to do with CPLR 3218(a)(2)."

Generally, a defendant seeking an Order setting aside an Affidavit of Confession

of Judgment or, as here, vacating a Judgment by Confession, must be challenged by way of commencement of a plenary action. See Regency Club at Wallkill, LLC v. Bienish, 95 A.D.3d 879 (2nd Dept. 2012); Rubino v. Csikortos, 258 A.D.2d 638 (2nd Dept. 1999); Scheckter v. Ryan, 161 A.D.2d 344 (1st Dept.1990). Only if the Affidavit of Confession of Judgment is defective on its face, or it had been entered without authority or in violation of its terms, may same be vacated by the simple expedient of a motion. See County Nat. Bank v. Vogt, 28 A.D.2d 793 (3rd Dept. 1967); Rae v. Kestenberg, 23 A.D.2d 565 (2nd Dept. 1965); Fabrizio, Radmin, Buksbaum & Co. v. Giordano, 17 Misc.3d 1126(A) (Nass. Co. Dist. Co. 2007); cf. Ripoll v. Rodriguez, 53 A.D.2d 638 (2nd Dept. 1976).

Contrary to defendants' argument, the entered Judgment of Confession is not being challenged based upon "facial irregularities" but rather, as stated by defendants, based upon alleged inadequacies and inconsistencies within the parties' Agreement, as well as between the Agreement and the supporting affidavit. Indeed, pages 3 through 12 of defendant Singh's submitted 12-page affidavit is devoted to addressing the foregoing.

Nor does the Court find, contrary to defendants' argument, that their unproven claim that the interest rate charged for this commercial agreement is criminally usurious permits any basis for finding that the Confession of Judgment is facially defective, permitting defendants to obtain relief by simple motion. In any event, the Court credits plaintiff's argument that the underlying Agreement had not been a loan but rather a merchant agreement, and thus outside the ambit of the usury statutes.

This Court thus concludes that it had been patently improper for defendants to have filed this motion under the previously assigned index number; defendants had been required to have commenced a plenary action in order to challenge the Confession of

Judgment, which they fatally have failed to do.

This Court also finds no merit to defendants' strained argument that the subject executed Confession of Judgment, which expressly states that same could be filed with the clerk in any one of three named venues, including the Clerk of Westchester County, is fatally defective as violative of CPLR 3218, subdivision (b). CPLR 3218, subdivision (b), states that a Confession of Judgment "may be filed with the Clerk of the county where the defendant resided when it was executed or, if the defendant was then a non-resident, with the clerk of the county designated in the affidavit." Emphasis supplied. While defendants maintain that the use of the word "the" in said statute necessarily prescribes "the singular, or only one," defendants cite no controlling New York authority interpreting said statute in said limited fashion, or holding that the specification of more than one venue in a Confession of Judgment is violative of CPLR 3218, subdivision (b). This Court finds no legitimate basis for agreeing with defendants' afore contention, especially since the intended legislative purpose in restricting the county in which the Affidavit of Confession of Judgment could be entered to that which is stated in the Affidavit is met by the subject Affidavit of Confession of Judgment.

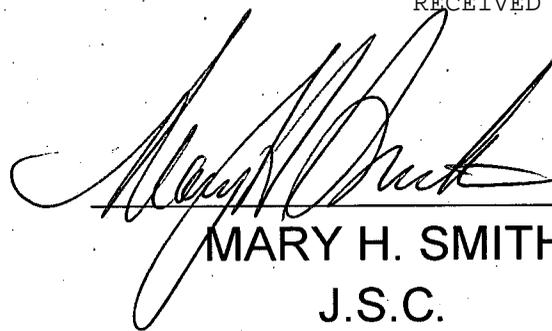
Further, the Court rejects defendants' argument that the Westchester County Clerk had been without authority to accept for filing the Affidavit of Confession of Judgment which had been notarized in Florida without a certificate of conformity or any acknowledgment. The absence of a certificate of conformity and/or acknowledge is a mere irregularity, not a fatal defect, which can be ignored, as here, in the absence of a showing of actual prejudice. See Deutsche Bank Natl. Trust Co. v. Naughton, 137 A.D.3d 1199, 1200 (2nd Dept. 2016); Gonzalez v. Perkan Concrete Corp., 110 A.D.3d 955 (2nd Dept.

2013); Fredette v. Town of Smithtown, 95 A.D.3d 940, 942 (2nd Dept. 2012); Betz v. Daniel Conti, Inc., 69 A.D.3d 545 (2nd Dept. 2010).

Further, while Article VI of the parties' Agreement does provide for the alternative mechanism of dispute resolution by way of arbitration, defendants had failed to send plaintiff, in accordance with the Agreement's terms, a certified mail, written Notice of Intent to Arbitrate; consequently, defendants have waived their right to seek arbitration.

Finally, while defendants now take exception to the provision agreed upon in the Affidavit of Confession of Judgment granting plaintiff attorney's fees equal to 25% of the total outstanding purchased receivables, defendants not incorrectly arguing that only the Court can determine the reasonableness of attorney fee awards, this Court finds nothing unreasonable about what amounts to a \$7,754.66 attorney fee award herein, on the entered \$31,018.65 judgment given that plaintiff's counsel actually had drafted the parties' underlying Purchase and Sale Agreement, as well as the Security and Guaranty, the Affidavit of Confession of Judgment, in addition to the proposed judgment. Cf. Headquarters Rest Corp. v. Reliance Vending Co., 133 A.D.2d 444, 446 (2nd Dept. 1987); Mead v. First Trust & Deposit Co., 60 A.D.2d 71 (4th Dept. 1977).

Dated: July 19, 2017
White Plains, New York



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