

Pro Player Funding LLC v Goodman

2011 NY Slip Op 33185(U)

December 9, 2011

Sup Ct, NY County

Docket Number: 111408/11

Judge: Cynthia S. Kern

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

PRESENT: ~~WALTER~~ CYNTHIA S. KERN
Justice J.S.C.

PART 62

Pro Player Funding

- v -
Center of County of NY

INDEX NO.

111908/4

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

FILED
DEC 12 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/9/11

CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----x
Application of

PRO PLAYER FUNDING LLC,

Petitioner,

Index No. 111408/11

For a Judgment Pursuant to CPLR Article 78,

-against-

NORMAN GOODMAN, CLERK OF THE
COUNTY OF NEW YORK,

Respondent.

-----x
Application of

PRO PLAYER FUNDING LLC,

Index No. 111409/11

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

-against-

NORMAN GOODMAN, CLERK OF THE
COUNTY OF NEW YORK,

Respondent.

-----x

FILED

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1,2</u>
Answering Affidavits and Cross Motion.....	<u>3,4</u>
Replying Affidavits.....	<u>5,6</u>
Exhibits.....	<u>7,8</u>

Pro Player Funding, LLC (“petitioner”) brings two separate petitions seeking orders and judgments directing the clerk of the court to accept and file confessional judgments – one judgment executed in the first action by non-party debtor William Joseph (“Joseph”) and two judgments executed in the second action by non-party debtor Michael Bennett (“Bennett”). The court will consolidate these two motions for disposition. The court grants petitioner’s petitions for the reasons set forth below.

The relevant facts are as follows. Petitioner entered into a Loan Agreement with Joseph where petitioner agreed to lend him money under the terms set forth in the Loan Agreement. The Loan Agreement provided that Joseph was required to execute an affidavit of confession in connection with the note under which Joseph authorized entry of judgment in New York County, New York in the event of a default. Joseph executed such a confessional judgment. Shortly after entering into the agreement, Joseph defaulted on his loan.

Petitioner also entered into two Loan Agreements with Bennett where petitioner agreed to lend him money under the terms set forth in the Loan Agreements. As with Joseph, these agreements also provided that Bennett was required to execute affidavits of confession in connection with the notes under which Bennett authorized entry of judgment in New York County, New York in the event of a default. Bennett executed a confessional judgment with respect to each of the two loans made. Bennett defaulted on both loans.

On August 12, 2011, petitioner presented to the Clerk of the County of New York (“respondent”) the judgment of confession executed by Joseph. Respondent refused to enter the judgment. Petitioner states that the clerk refused to enter judgment on the ground that the terms of the affidavit executed by Joseph stating the sum for which judgment may be entered appeared

usurious on its face because he was charged a 34 percent interest rate per annum on certain portions of the loan. Respondent counters that the reason the clerk did not enter the judgment is because the clerk did not have statutory authority enter the judgment where the interest rate was over 25 percent per annum as doing so would risk violating the usury laws. In any event, respondent refused to enter the judgment of confession presented and also indicated that it would not accept the confessions of judgment executed by Bennett for the same reason that it would not accept Joseph's confession of judgment. Petitioner now brings these Article 78 actions seeking orders directing the clerk to enter the confessional judgment of Joseph and the two confessional judgments of Bennett.

This court has jurisdiction to hear the instant action because CPLR § 7803(1) empowers this court to make a determination as to "whether the body or officer failed to perform a duty enjoined upon it by law" and § 7803(3) empowers this court to determine whether a determination was made in violation of lawful procedure or affected by an error of law. In this regard, the court finds that Clerk of the County of New York failed to perform a duty enjoined upon it by law when it failed to enter the confessional judgment for the reasons set forth below.

CPLR § 3218, which addresses judgments by confession, states the following:

(a) **Affidavit of defendant.** Except as provided in section thirty-two hundred one, a judgment by confession may be entered, without an action, either for money due or to become due, or to secure the plaintiff against a contingent liability in behalf of the defendant, or both, upon an affidavit executed by the defendant;

1. stating the sum for which judgment may be entered, authorizing the entry of judgment, and stating the county where the defendant resides or if he is a non-resident, the county in which entry is authorized;

2. if the judgment to be confessed is for money due or to become due, stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due; and

3. If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, stating concisely the facts constituting the liability and showing that the sum confessed does not exceed the amount of liability.

(b) **Entry of judgment.** At any time within three years after the affidavit is executed, it may be filed with the clerk of the county where the defendant stated in his affidavit that he resided when it was executed, or if the defendant was then a non-resident, with the clerk of the county designated in the affidavit. Thereupon the clerk shall enter a judgment in the supreme court for the sum confessed. He shall tax costs to the amount of fifteen dollars, besides disbursements taxable in an action. The judgment may be docketed and enforced in the same manner and with the same effect as a judgment in an action in the supreme court. No judgment by confession may be entered after the defendant's death.

The First Department has stated that a confessional judgment has "all of the qualities, incidents and attributes of a judgment on a verdict, including a presumption as to its validity." See *Girylyuk v Girylyuk*, 30 A.D.2d 22, 23 (1st Dept 1968).

The court finds that respondent failed to perform a duty enjoined upon it by law when it refused to enter the confessional judgments. Petitioner had undisputedly met all of the conditions required to be present in an affidavit pursuant to CPLR 3218(a) before a judgment could be entered. Joseph and Bennett's affidavits state the sum for which judgment may be entered, authorizes the entry of judgment, authorizes the entry of judgment in New York County and states the facts out of which the debt arose and shows that the sum confessed is due or about to become due. Therefore, pursuant to § 3218(b), respondent was required to enter the judgments since properly executed affidavits were presented to the clerk within three years of execution. Further, as the First

Department has found that confessional judgments are presumed to be valid and there is nothing in CPLR 3218 giving the clerk discretion to reject the terms of the affidavits for underlying substantive reasons, the clerk was without authority to question the validity of the terms and required to enter the judgments for the sum confessed as long as the affidavits included the requirements set forth in § 3218(a). In the event that Joseph or Bennett, the non-party debtors contest the terms of the judgments, each may file a plenary action to vacate the judgment(s).

Respondent's argument that it did not have authority to enter the judgments is without merit. In order to reach the conclusion that the clerk did not have authority to enter the judgments because the interest rate charged by petitioner may be usurious, respondent, by its own admission, had to turn to General Obligations Law § 5-501 and Penal Law §§ 190.40 and 190.42. Respondent argues that General Obligations Law § 5-501 does not expressly permit the interest on a loan at a rate of 34 percent. However, to conduct such analysis going beyond CPLR § 3218 – which directs the clerk to enter the confessional judgment as long as the affidavit meets the requirements set forth in § 3218(a) – is outside the scope of the clerk's duties for the reasons discussed above. Moreover, if respondent were permitted to conduct the legal analysis required to determine that the interest rate charged may violate the usury laws, there would be nothing prohibiting respondent from making the final legal determination of whether the interest rates did actually violate the usury laws.

Accordingly, the court directs respondent to file and enter the confessional judgments executed by non-parties Joseph and Bennett. The court declines to make a determination regarding petitioner's request for attorneys fees and costs at this time as that determination is outside the scope

of this proceeding. This constitutes the decision, order and judgment of this court.

Dated: 12/9/11

CK
J.S.C.

CYNTHIA S. KERN
J.S.C.

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