Markowits v Friedman
2013 NY Slip Op 32490(U)
September 13, 2013
Supreme Court, Kings County
Docket Number: 502667/2013
Judge: David I. Schmidt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART COM 2

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SARA MARKOWITS, ALEXANDER MARKOWITS, PARKSHORE HOME HEALTH CARE, LLC d/b/a RENAISSANCE HOME HEALTH CARE and RENAISSANCE HHA LLC,

Plaintiffs,

-against-

BARRY FRIEDMAN, RACHEL FRIEDMAN, ASHER FENSTERHEIM, ESQ., FAIGY WERTZBERGER, FRANK CONWAY, SUSAN D. OSTERER, JOHN and JANE DOES 1-5,

Defendants.

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Index No. 502667/2013
PARTIAL DECISION and ORDER

HON. DAVID I. SCHMIDT

SCHMIDT, DAVID, J.:

In this action arising from a transaction involving the sale of membership interests in limited liability companies, plaintiffs Sara Markowits, Alexander Markowits, Parkshore Home Health Care, LLC d/b/a Renaissance Home Health Care (Parkshore) and Renaissance HHA LLC (Renaissance), move, by order to show cause dated May 24, 2013, for an order, *inter alia*: (i) directing the Clerk of the Court to vacate the Confession of Judgment docketed against plaintiff Alexander Markowits (Markowits) on February 7, 2013 in the office of the County Clerk for the Supreme Court of the State of New York, County of Kings, Index No.: 2343/2013 (the Confession of Judgment or Judgment); (ii) enjoining defendants Barry Friedman (Friedman), Rachel Friedman (together with Barry Friedman, the Friedmans), and Asher Fensterheim, Esq. (Fensterheim) from enforcing the Confession of Judgment as against plaintiffs pending resolution of the within action; and (iii) enjoining the Friedmans from violating the non-compete and

non-solicitation provisions contained in the various agreements of sale.[1]

For the following reasons, the application is denied insofar as it seeks to vacate the Confession of Judgment.[2] Other temporary relief granted to plaintiffs by the order to show cause dated May 24, 2013 is continued to the next hearing date, scheduled for October 2, 2013.[3]

I. Factual Background

A. The March 2010 Agreements

In March of 2010, the Friedmans entered into certain agreements pursuant to which they

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[1] Plaintiffs additionally seek an order directing the Friedmans to forthwith pay all costs and settlement sums to be paid pursuant to the settlement agreement of the Qui Tam action filed under seal by the United States Attorney and the New York State Attorney General. However, the relief sought has been rendered moot in light of the settlement payment made by Friedman. *See* affirmation of Asher Fensterheim dated August 23, 2013 (Fensterheim aff.), ¶ 10.

[2] Given that Fensterheim, who is appearing pro se in this action and who represented the Friedmans in the underlying transaction at dispute in this litigation, was recently hospitalized, this decision and order only addresses the first branch of the Order to Show Cause, which plaintiffs represented was the most urgent and was the only issue that was argued at the hearing. The balance of plaintiffs' motion for injunctive relief will not be decided until defendants have an opportunity to submit their opposition to the remaining branches of the instant Order to Show Cause. However, as plaintiffs have, in the intervening time, brought an order to show cause, seeking, among other things, an order to disqualify the Abrams, Fensterman firm from representing defendants in the instant action based on an alleged conflict of interest, the court will not require defendants' counsel to serve an opposition addressing the balance of the instant application, until there is a determination on the disqualification motion.

[3] Pending the hearing on the order to show cause, the court granted plaintiffs temporary relief, including, *inter alia*, enjoining defendants: (i) from taking any action to enforce the Confession of Judgment against any of the plaintiffs; and (ii) from hiring, engaging, or using any persons who were employees of Parkshore and/or Renaissance, "excluding defendants Frank Conway and Faigy Wertzberger," in any entity or business in which the Friedmans are owners of or are affiliated with directly or indirectly and from competing directly or indirectly with the business of Parkshore and/or Renaissance.

agreed to sell their 100% interest in Parkshore and Renaissance to Markowits.[4] The terms of the parties' agreement were memorialized in a Membership Interest Purchase Agreement (MPA), and Membership Interest Put and Call Agreement (MPCA), executed simultaneously on March 17, 2010. *See* affirmation of Israel Goldberg, dated May 23, 2012 (Goldberg aff.), Exs. C, D. Pursuant to the MPA, the Friedmans agreed to sell 9.9% of their interest in Parkshore and Renaissance to Markowits. Pursuant to the MPCA, the Friedmans agreed to sell to Markowits the remaining 90.1% of their interest in Parkshore and Renaissance. The total purchase price was between $13 and $14 million dollars. During the negotiations, the Friedmans were represented by Fensterheim.

B. The June 2011 Modification

On June 2, 2011, the parties executed a Memorandum Agreement modifying the terms and conditions of the MPA and MPCA (the June 2011 Modification). *Id.*, Ex. E. The 2011 Modification adopted the provisions of the MPA and MCPA except to the extent that it contained terms inconsistent with those agreements. *Id.*

The Memorandum Agreement called for Markowits to sign a promissory note in the principal sum of $5,350,000 in favor of the Friedmans (the Promissory Note). *Id.*, ¶ 1. The Promissory Note provides for monthly payments over a 3-year period and contains an acceleration clause that could be exercised at the holder's option in the event of a default under its terms. *Id.*, Ex. H. Relatedly, Markowits signed a Confession of Judgment (the confession of

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[4] Parkshore is a Licensed Home Care Services Agency that provides hands-on care to patients, including help with bathing and the administration of medications. Renaissance is a licensed home health care agency, providing nursing care, medical social work and physical therapy. *See* affirmation of Alexander C. Markowits, dated May 23, 2013 (Markowits aff.), ¶¶ 11, 12.

judgment that is at issue on this application) to secure his obligations under the Promissory Note. *Id.*, Ex. I. It provides, in relevant part, that:

> Alexander C. Markowits being duly sworn deposes and says: that deponent is Defendant herein.
>
> The Defendant hereby confesses judgment herein and authorizes entry hereof against Defendant in the sum $5,350,00.
>
> * * *
>
> This Confession of Judgment is for a debt justly to become due to [Friedman] arising from the following facts:
>
> In connection with a transaction pursuant to which [Friedman] has granted to Parkshore Home Health Care LLC ("Parkshore") an option to acquire from [Friedman] a 90.1% membership interest in Parkshore, as part of the consideration for the granting of such option, [Markowits] has executed and delivered to [Friedman] [Markowits'] Promissory Note in the principal amount of $5,350,000, a copy of which Promissory Note is attached hereto. The obligation subject to this Affidavit of Confession of Judgment is payable as provided in the aforesaid Promissory Note."

Id.

There is also an arbitration agreement, dated May 19, 2011, executed by Friedman and Markowits, in which they agreed "that should any disputes arise between them concerning the sale by Friedman to Markowits of the membership interests of [Parkshore and Renaissance] relating directly or indirectly to the aforementioned transaction, such disputes shall be submitted to [binding] arbitration before [Rabbi] Chaim Kohn Rov Khal Gur Flatbush ('Beth Din') for determination pursuant to the rules and procedures of the Beth Din." *Id.*, Ex. E. Significantly, however, the arbitration agreement states that it "shall not preclude the filing and entering by Friedman in the appropriate Court of the Confession of Judgment being signed by Markowits in

favor of Friedman." *Id.*

C. The February 2012 Letter Agreement

On February 29, 2012, by letter agreement, the parties agreed to a modification of the payment schedule set forth in the Promissory Note. *See* affirmation of Barry Friedman, dated August 9, 2012 (Friedman aff.), Ex. D. In the February 29, 2012 agreement, Markowits agreed to make a partial pre-payment against the Promissory Note in the amount of $2 million with the remaining balance due on the maturity date. *Id.* The parties further agreed that Markowits would satisfy the $2 million partial pre-payment by making an initial $1.5 million payment within 5 business days and the balance ($500,000) "in four equal consecutive monthly installments on the 15th day of each month commencing March 15, 2012." *Id.* Although the parties modified the payment terms of the Promissory Note, they also agreed that "[i]n all other respects the terms and conditions of the Promissory Note shall remain and continue the same." *Id.*

According to the Friedmans, Markowits allegedly failed to make all of the additional pre-payments as required by their letter agreement. On July 13, 2012, the Friedmans, through their counsel, wrote to Markowits notifying him that he was in default under the terms of the Promissory Note and that they were exercising their option to declare the entire unpaid principal balance plus interest due and payable forthwith. *Id.*, Ex. E. Approximately seven months later, in February 2013, Fensterheim filed the Confession of Judgment and sent Markowits notice of entry of the Judgment. Goldberg aff., Ex. B.

The Friedmans acknowledge that Markowits made a payment in partial satisfaction of the Promissory Note that is not reflected in the Confession of Judgment. Friedman aff., ¶ 12. To rectify this, the Friedmans say that they are prepared to cause a partial satisfaction of the amount

confessed to in the Confession of Judgment to be filed. *Id.*

II. Discussion

On this application, Markowits seeks, among other things, an order directing the Clerk to vacate the Confession of Judgment. In support, Markowits argues that, as filed, the Confession of Judgment is defective on its face, in that: (i) a copy of the Promissory Note referenced in the Confession of Judgment is not attached; (ii) it was improperly (if not fraudulently) notarized; and (iii) it is not adjusted to credit sums previously paid and therefore misstates the confessed amount. Markowits also contends that the Confession of Judgment was released prematurely contrary to the parties' agreement. *See* emergency affirmation of Israel Goldberg, dated May 23, 2013 (emergency aff.), ¶¶ 2, 3.

As an initial matter, the argument that Markowits makes against the Judgment's facial sufficiency does not help him because:

> "the statutory requirement that an affidavit of confession of judgment [state] concisely the facts out of which the debt arose and [show] that the sum confessed is justly due (CPLR 3218 [a] [2]) is designed for the protection of third persons who might be prejudiced in the event that a collusively confessed judgment is entered, and not for the protection of the defendant. Therefore, the defendant may not challenge the judgment by confession on the ground that the specificity requirements of CPLR 3218 (a) (2) were not satisfied."

Regency Club at Wallkill, LLC v Bienish, 95 AD3d 879, 879 (2d Dept 2012) (inner citations and quotation marks omitted); *County Nat'l Bank v Vogt*, 28 AD2d 793, 794 (3d Dept 1967), *affd* 21 NY2d 800 (1968) (same).

Thus, whether defendants herein complied with the technical requirements of CPLR 3218 is essentially irrelevant. *See Giryluk v Giryluk*, 30 AD2d 22, 25 (1st Dept 1968) ("any alleged

deficiency in the statement of confession is not available to the [judgment debtor]"). Accordingly, the mere fact that the Friedmans' counsel neglected to attach the Promissory Note referenced in the Confession of Judgment cannot overcome the Judgment's "presumption of validity," particularly where the attack on its sufficiency is made by the judgment debtor, Markowits. *Giryluk*, 30 AD2d at 23.[5]

For the same reason, Markowits' contention that the Confession of Judgment was fraudulently notarized, does not avail. *See McDaniel v Sangenino*, 67 AD2d 698, 699 (2d Dept 1979) ("To permit judgments by confession to stand where they were entered on unsworn statements would permit collusive judgments by confession without an effective sanction . . . against the defrauding judgment debtor. However, the defendant debtor himself cannot impeach a judgment entered upon a statement which he signed but which he did not make under oath"), citing *Mullin v Bellis*, 90 NYS2d 27, 28 (1949) ("defendant cannot impeach a judgment which is based upon his signed statement even though it be unverified or unacknowledged."). Here, Markowits does not dispute the genuineness of his signature on the Confession of Judgment, and in fact, admits that he signed it. Markowits aff., ¶ 65. Under settled law, that admission is a sufficient reason to permit the Confession of Judgment to stand.

Next, the court turns to Markowits' argument that the Confession of Judgment was prematurely released. In making this argument, Markowits asserts that it was the understanding of the parties that the Confession of Judgment was to be held in escrow. In addition, Markowits

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[5] At the hearing, counsel for Markowits argued that plaintiff Sara Markowits qualifies as a third party with standing to attack the facial sufficiency of the Confession of Judgment (even if her husband, the judgment debtor, does not), since property they jointly own is encumbered by the Confession of Judgment. However, these contentions were not made in the papers and were not supported by any authority.

contends that he was not in default of his obligations under the Promissory Note at the time the notice of default dated July 13, 2013 was sent. Indeed, at a settlement conference held on August 19, 2013, Markowits denied ever being in default of his payment obligations under the Promissory Note. As a result of Markowits' representations, the court ordered the parties to submit supplemental papers on the limited issue of whether Markowits had defaulted on making payments pursuant to the Promissory Note and February 29, 2012 letter agreement, prior to July 13, 2012, the date that Fensterheim sent Markowits a notice of default.

At this juncture, the court notes that Markowits' counsel did not submit papers supporting that position. Instead, Markowits uses his supplemental papers to advance a new argument in support of vacating the Confession of Judgment, namely, that the document (as was the entire transaction) was procured by fraud. Moreover, as noted by the Friedmans' counsel, Markowits fails completely to address the issue of his default or provide any proof to the contrary.

On the other hand, the papers submitted by the Friedmans bolster their contention that at the time the notice of default was sent on July 13, 2012, Markowits was in default of his obligations under the Promissory Note. *See* Fensterheim aff., Exs. A-C. As discussed previously (*supra*, Part I.C.), pursuant to their February 29, 2012 letter agreement, Markowits agreed to make a partial prepayment against the Promissory Note in the amount of $2 million, and that he would accomplish this by making an initial $1.5 million payment within 5 business days and the balance "in four equal consecutive monthly installments on the 15th day of each month commencing March 15, 2012." The Friedmans contend that Markowits failed to make a June 15, 2012 payment, the fourth and final payment, allowing the Friedmans to hold Markowits in default and accelerate the debt pursuant to the terms of the Promissory Note. Thus, contrary to

Markowits' assertion otherwise, the notice of default sent on July 13, 2012, was not premature.

In view of the un-rebutted proof of Markowits' default, his argument that the Confession of Judgment was prematurely filed because it was to be held in escrow, is unavailing. Even if the court were to credit the existence of an escrow agreement, Markowits does not specify or otherwise explain what specific act or event triggered the escrow agent's duty to deliver the Confession of Judgment for filing (*see* Markowits aff., ¶ 65) – if not the event of default. Presumably, a default would be a sufficient trigger to release the Confession of Judgment from escrow. *See* CPLR 3218 (a) ("a judgment by confession may be entered, without an action, either for money due or to become due ...."). Indeed, what other purpose is there for taking and holding a confession of judgment.[6]

In sum, none of Markowits' arguments in support of vacating the Confession of Judgment on the ground that the document is facially defective, succeed. Accordingly, the application for such relief is denied.[7]

As to the new argument raised by Markowits, *i.e.*, fraudulent inducement of the transaction, defendants object that this was not originally raised as a basis to grant the relief in the order to show cause and supporting papers and was improperly raised in Markowits' supplemental affirmation. The court granted permission to the parties to submit supplemental papers only for the purpose of proving whether or not the July 13, 2012 notice of default was

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[6] Accordingly, the court need not, at this juncture, rely on the testimony given by Rabbi Moshe Milstein to establish whether the conditions for filing the Confession of Judgment had been met or whether the agreements had been fraudulently induced.

[7] It is worth noting that the requested relief, although denominated as a request for an injunction, is, in reality, akin to a motion for summary judgment in that Markowits argues that the Confession of Judgment must be vacated because it is facially defective.

premature. As a result, plaintiffs' claim of fraudulent inducement is more properly addressed in the context of defendants' pending motion to compel arbitration in which, as plaintiffs' counsel has acknowledged, this issue forms the core of their opposition. The court is advancing the hearing on that motion, currently scheduled for October 10, 2013 to October 2, 2013.

Finally, given that the Friedmans acknowledge that the confessed amount does not reflect the amount actually owed, in light of an approximately $2 million payment made by Markowits (*see* Friedman aff., ¶ 12), defendants are ordered to file a partial satisfaction in the amount of $1,900,000.00, which is the amount Markowits' counsel states that the Judgment should be have been reduced by (*see* Goldberg aff., ¶ 44), within 10 days from service of a copy of this decision and order with notice of entry. *See Career Empl. Servs. v Autotron Automotive Prods.*, 142 AD2d 541 (2d Dept 1988) (where confession of judgment had been filed that did not credit partial payments pursuant to the parties' express agreement, court did not order vacatur, but instead, only ordered the filing of a partial satisfaction). If there were additional payments made by Markowits that should also be credited against the Judgment amount, the Friedmans are directed to file a partial satisfaction for those amounts as well.

The foregoing constitutes the (partial) decision and order of this court.

Dated: September 13, 2013

ENTER: forts with
Duplicate copy.
10/15/13

J.S.C.

HON. DAVID I. SCHMIDT

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