

Worldwide Asset Purch., LLC v Smith
2017 NY Slip Op 31248(U)
June 6, 2017
Supreme Court, Suffolk County
Docket Number: 20381/05
Judge: Thomas F. Whelan
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ORDERED that defense counsel, Mitchell L. Pashkin, Esq., is directed to pay the sum of \$2,500.00 herein awarded to the petitioner, which amount the Court hereby finds to be the appropriate and reasonable award to be imposed by reason of defense counsel's engagement in frivolous conduct in pursuing the application to vacate under the circumstances described above, within thirty (30) days after the petitioner's service of a copy of this order with notice of its entry.

In August of 2005, the petitioner commenced this special proceeding for an order confirming a June 14, 2004 arbitration award in the amount of \$23,712.91 in favor of the petitioner against the respondent, Rosemary A. Smith. By order dated October 28, 2005, this court granted the unopposed petition, as the respondent failed to appear herein by answer. That order was docketed as a judgment by the Clerk on November 9, 2005. Following an assignment of the judgment by the petitioner to Galaxy Portfolio, LLC in 2015, the plaintiff's counsel issued an Income Execution in March of 2016 which the Suffolk County Sheriff executed upon the respondent's employer in November of 2016.

In response to the service of that Income Execution, the respondent retained attorney Mitchell L. Pashkin, Esq., to interpose a motion (#002) to vacate said Income Execution and other proceedings had herein including the post judgment issuance of the income execution. In the Order to Show Cause dated December 2, 2016 [Molia, J], by which the respondent's motion (#002) was interposed, the relief requested was premised upon the following grounds: 1) that the October 28, 2005 order confirming the arbitration award that was docketed as a judgment on November 9, 2005 was void due to a lack of personal jurisdiction over the respondent; 2) that said order and judgment and the respondent's underlying default in answering was subject to vacatur under the discretionary excusable default grounds contemplated by CPLR 5015(a)(1) with leave to appear by answer; and 3) that the income execution was void due to a failure to notify the respondent of the assignment of judgment and because it was issued by a dissolved corporation. These grounds were enlarged in the supporting affirmation of respondent's counsel to include a non-noticed claim for a vacatur of the October 28, 2005 order, docketed as a judgment on November 9, 2005, for lack of "subject matter jurisdiction" by virtue of a purported lack of standing or capacity to sue on the part of the petitioner.

In support of her motion to vacate (#002), respondent Smith advanced the following factual averments in an affidavit dated November 29, 2016:

1. Within the last 2 weeks my employer informed me of its receipt of the Income Execution attached as Exhibit A. Sometime prior to this I had received this Income Execution from the Sheriff.
2. Before I received this Income Execution, I had no knowledge that I had been sued or there was a judgment (Exhibit B) against me.
3. Before I received this Income Execution, I never heard of World Wide Asset Purchasing, LLC or its attorney, Harris Beach PLLC.

4. My attorney informs me that Worldwide Asset Purchasing, LLC and its former attorneys, Fabiano & Associates, P.C. obtained the Judgment against me pursuant to a Petition (Exhibit C) filed in August of 2005 to confirm an Arbitration Award (Exhibit D) issued in June of 2004.

5. I was never served with the Petition to confirm Arbitration Award. I never was served with any court papers before I received the Income Execution issued attached as Exhibit A. Nobody ever came to my house to try to serve me with any papers. There were never any papers affixed to my door, I never received any legal papers in the mail before I received the Income Execution attached as Exhibit A.

The petitioner on behalf of itself and its assignee, Galaxy Portfolio LLC [hereinafter Galaxy], appeared in opposition to the respondent's motion for vacatur of the judgment (#002), which opposition was set forth in cross moving papers (#003) by the petitioner. The affirmative relief sought therein was an order directing the Clerk to correct, *nunc pro tunc*, the name of the assignee set forth in an Assignment of Judgment issued by the plaintiff in December of 2015, that was filed with the County Clerk on January 19, 2016 to reflect the true and intended identity of the assignee, or leave to file an amended assignment, *nunc pro tunc*, to reflect the true and correct name of the assignee as Galaxy Portfolios, LLC. In support of these alternate demands for relief, the petitioner's counsel averred that under a written assignment dated February 19, 2015, the petitioner assigned its judgment to Galaxy Portfolio, LLC, the successor by purchase to the petitioner, but the original of said assignment was lost and thus never filed with the Clerk. In December of 2015, a new Assignment of Judgment was executed by the petitioner. Due to a clerical error, however, this assignment erroneously named the petitioner as the assignee rather than Galaxy. It was, however, filed with the Clerk on January 19, 2016 even though the petitioner, World Wide Assets, was listed as both the assignor and assignee.

The petitioner's opposition to the respondent's motion-in-chief (#002) consisted of documentation and an affirmation of the petitioner's original counsel who successfully prosecuted the petition for confirmation of the June 14, 2004 arbitration award in the amount of \$23,712.91 in favor of the petitioner and secured a money judgment thereon by docketing the October 28, 2005 confirming order as a judgment in November of 2005. The documentation put before the court included a September 9, 2005 affidavit of service by a process server which reflected that respondent Smith was served with the notice of petition, petition and other initiatory papers on September 3, 2005 by personal delivery of such papers to her at her home pursuant to CPLR 308(1).

In his December 6, 2016 affirmation, the petitioner's former counsel averred that in response to such service, respondent Smith contacted him by phone in order to arrange a payment schedule and thereafter appeared at his office and executed a document under oath entitled "Affidavit of Confession of Judgment" dated September 21, 2005, which bears the caption and index number of this special proceeding. Therein, the respondent submitted to the jurisdiction of this court with respect to this special proceeding and agreed to pay the petitioner the sum of \$200.00 a month beginning on

September 30, 2005, until the amount owed under the arbitration award was paid in full. Continuing, the petitioner's original counsel avers that respondent Smith paid a total of \$1,000.00 on the debt. However, the payments made were untimely and otherwise not in keeping with the terms of the Affidavit of Confession of Judgment.

The foregoing factual averments of the petitioner's original counsel regarding his initial telephone contact with respondent Smith in September of 2005 and her execution of the Affidavit of Confession of Judgment dated September 21, 2005 *under oath* in the offices of plaintiff's original counsel together with the content of such affidavit and the factual averments set forth in the September 9, 2005 affidavit of the petitioner's process server, flatly contradict several of the factual averments set forth in the respondent's November 26, 2016 supporting affidavit wherein she claimed that: 1) "Before I received this Income Execution, I had no knowledge that I had been sued or there was a judgment (Exhibit B) against me"; 2) "Before I received this Income Execution, I never heard of World Wide Asset Purchasing, LLC"; and 3) "I was never served with the Petition to confirm Arbitration Award" and "I never was served with any court papers before I received the Income Execution issued attached as Exhibit A."

The respondent's reply to the petitioner's opposition to the respondent's motion-in-chief (#002) took the form of an unsworn and unaffirmed Memorandum of Law by defense counsel, Mitchell L. Pashkin, Esq. Therein, defense counsel failed to address, let alone challenge in any manner, the factual averments set forth in the September 7, 2005 affidavit of the petitioner's process server evidencing personal service of process upon the petitioner on September 3, 2005 pursuant to CPLR 308(1). In addition, the reply Memorandum of Law failed to address or challenge the content or authenticity of the September 21, 2005 "sworn to" Affidavit of Confession of Judgment, in which, the respondent submitted to the jurisdiction of this court with respect to this special proceeding and agreed to pay the petitioner the sum of \$200.00 a month beginning on September 30, 2005 until the amount owed under the arbitration award was paid in full. Also not addressed nor contested by defense counsel were the factual averments set forth in the affirmation of the petitioner's original counsel in which he detailed the circumstances surrounding the respondent's contacts with his office following service of process, including her execution of the September 21, 2005 Affidavit of Confession of Judgment and her payment of monies towards the outstanding balance for a short time after the execution of said Affidavit. Instead, the reply Memorandum was dedicated to contesting the petitioner's cross moving (#003) demands for a nunc pro tunc correction of the assignment filed with the Clerk in January of 2016 and to the respondent's claim that the court lacked subject matter jurisdiction because the petitioner, a foreign corporation, was not authorized to do business in New York.

In an order dated March 31, 2017, this court denied the respondent's motion for a vacatur of the judgment and other proceedings held herein. The court determined that there was no basis for a vacatur on the grounds that the court lacked personal jurisdiction over the respondent because the respondent failed to specifically rebut the facts asserted in the process server's affidavit regarding his service of the notice of petition and petition upon her pursuant to CPLR 308(1) and because the issue was waived by the content of the Affidavit of Confession of Judgment in which she submitted to the jurisdiction of this court (*see* page 5 of the March 31, 2017 order). The court also found no basis for a vacatur of the judgment due to a purported lack of subject matter jurisdiction due to a lack of

standing on the part of the petitioner that was premised upon petitioner's status as a foreign corporation doing business without authority, as such lack of authority, if any, is not jurisdictional in nature. Instead, it is a matter concerning a lack of capacity to sue, which is an affirmative defense that was waived by the respondent's failure to raise it in a timely served answer or pre-answer motion (*see id.*, at pages 5-6). Finally, the court found that the respondent failed to establish any basis for a discretionary vacatur of the judgment and proceedings had herein, as no reasonable excuse nor any meritorious defense was advanced in the moving papers (*see id.*, at page 6).

In its March 31, 2017 order, the court addressed the petitioner's cross motion (#003) for nunc pro tunc relief from the incorrect Assignment of Judgment filed with the Clerk in January of 2016 and granted those portions thereof wherein it sought leave to file with the Clerk an amended Assignment of Judgment reflecting the proper and intended assignee as Galaxy Portfolio, LLC (*see id.*, at pages 6-7). The court went on to address several matters of grave concern that were readily apparent from the papers put before the court by the respondent and her counsel.

The first of these matters were the factual averments advanced under oath by respondent Smith in the November 29, 2016 affidavit she put before this court in support of her motion (#002) regarding her purported lack of any knowledge of the existence of this special proceeding anytime prior to the Sheriff's service of the Income Execution dated March 14, 2016. The court noted that such averments were flatly contradicted by those advanced in her September 21, 2005 Affidavit of Confession of Judgment and by the factual averments regarding the in-hand, personal delivery of the notice of petition and petition advanced in the September 9, 2005 affidavit of the petitioner's process server. The court also noted that factual averments set forth in the November 29, 2016 affidavit of the respondent were flatly contradicted by the factual averments set forth in the December 6, 2016 affirmation of the petitioner's original counsel concerning the respondent's telephone contact with him five days after the notice of petition and petition were served upon her and the circumstances surrounding her execution of the September 21, 2005 Affidavit of Confession of Judgment.

The court noted that the forgoing circumstances implicated conduct on the part of the respondent that may have been aimed at misleading the court. Such conduct included the putting forth, under oath, delusive factual averments regarding the respondent's purported absence of any knowledge of this action for a period of twelve years following its commencement and the purported lack of service of process upon the respondent. Also noted was that the failure of respondent Smith to address the petitioner's testimonial and documentary evidence that directly refuted the factual averments set forth in the respondent's November 29, 2016 affidavit in any manner. Such a failure was found to have transformed the implication that false facts were put before this court into a presumption. The court went on to advise the respondent it might direct a referral of the record of this proceeding to appropriate law enforcement officers for purposes of determining whether any crimes were committed.

Also noted as a matter of grave concern to the court, was the conduct of defense counsel in failing to address, let alone explain or refute, the sharp contradictions in the factual averments advanced by his client in her November 29, 2016 affidavit in support of her motion (#002) that arose

from the unchallenged factual averments set forth in the affidavits/affirmations and documentation submitted by the petitioner in opposition to the respondents' motion, including the September 21, 2005 Affidavit of Confession of Judgment (*see id.*, at page 8). The court noted that the reply papers submitted by counsel took the form of an unsworn and unaffirmed "Memorandum of Law" which was silent with respect to petitioner's submissions regarding the respondent Smith's participation in the proceeding in September of 2005. By virtue of this conduct, the factual averments set forth in the petitioner's opposing papers, including the affirmation of its original counsel, the affidavit of its process server and those set forth in the September 21, 2005 Affidavit of Confession of Judgment, were found to have been essentially admitted by the respondent and her counsel.

In light of the foregoing, the court went on to proclaim that defense counsel was under a duty to advise the court of the inability to challenge the content of the petitioner's opposing submissions and to withdraw so much of the respondent's motion (#002) that was predicated upon the flatly contradicted factual averments set forth in the November 29, 2016 supporting affidavit of the respondent (*see id.*, at page 9). Moreover, because the seemingly unvarnished averments served as the principal predicate for respondent's application to vacate the judgment due to a purported lack of personal jurisdiction, defense counsel's continuing pursuit of the remedy of a vacatur based upon the lack of personal jurisdiction rendered the pursuit of that remedy without any basis in fact or in law and thus constituted frivolous conduct within the meaning of 22 NYCRR Part 130-1.1(c)(1) and (3). In addition, the court suggested that the conduct on the part of defense counsel in submitting the respondent's November 26, 2016 affidavit containing the false factual averments of his client spread doubt upon the veracity of the certification that defense counsel engaged in a pre-motion, reasonable inquiry into the non-frivolous nature of the contentions advanced in the moving papers, which certification was executed by defense counsel and affixed to the legal back of the moving papers as contemplated by 22 NYCRR Part 130-1.1-a.

In the concluding paragraphs of its March 31, 2017 order, the court went on to declare that upon its own motion pursuant to 22 NYCRR § 130-1.1(d), counsel for the respective parties were directed to show cause why an order should or should not be made and entered imposing such sanctions and/or costs, if any, against the respondent's counsel pursuant to 22 NYCRR § 130-1.1(c), as the court might find to be appropriate, by counsels' respective submissions of an affirmation and/or affidavit on that issue to the Chambers of the undersigned and by serving a copy of the same on each other on or before May 12, 2017. Counsel for the respondent and counsel for the petitioner both complied with this directive and the court has read and considered the respective submissions with due deliberation. For the reasons set forth below, the court finds that defense counsel, Mitchell L. Pashkin, Esq., is liable for the payment of \$2,500.00 to the petitioner's counsel for reimbursement of reasonable counsel fees expended in defending those portions of the respondent's motion (#002) to vacate the judgment and other proceedings had herein due to a purported lack of personal jurisdiction over the respondent.

Conduct is frivolous within the purview of 22 NYCRR § 130-1.1(c) if : (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the

litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of a legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. An award of costs or the imposition of sanctions may be made either upon motion of a party in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard (*see* 22 NYCRR § 130.1[d]).

Here, the court reiterates its finding that defense counsel, Mitchell L Pashkin, Esq., engaged in frivolous conduct as that term is defined in 22 NYCRR § 130-1.1(c)(1) and (3) since the respondent's motion (#002) to vacate the judgment and other proceedings had herein, to the extent premised upon a purported lack of personal jurisdiction were: 1) completely without merit in law and could not be supported by a reasonable argument for an extension, modification or reversal of existing law; and 2) premised upon the respondent's assertion of material factual statements that were false. This finding is predicated upon the following circumstances: 1) attorney Pashkin's failure to address in his opposing/reply memorandum of law dated March 3, 2017, the assertion of material facts by his client regarding her purported lack of knowledge of the existence of this special proceeding and the purported lack of service of process upon her, the falsity of which, became known to attorney Pashkin upon the petitioner's production of the Affidavit of Confession of Judgment executed by the respondent in September of 2005 and its production of the affidavit of the process server detailing his in-hand personal delivery of the notice of petition and supporting papers upon the respondent pursuant to CPLR 308(1); 2) the failure of attorney Pashkin to withdraw so much of the motion to vacate that which was premised upon a purported lack of personal jurisdiction after learning of the falsity of the material facts asserted by his client which he put before this court as a basis for that application; and 3) attorney Pashkin's failure to advance a reasonable justification for this conduct in his May 10, 2017, affirmation submitted to the court in response to its March 31, 2017 directive.

Left for determination is the issue regarding the imposition of sanctions against attorney Pashkin and/or an award of costs in favor of the petitioner, including attorney's fees incurred in defending the respondent's unsuccessful motion to vacate the 2005 judgment entered herein. Upon due consideration of the submissions of counsel in response to the March 31, 2017 directive of the court and of the circumstances of the case, the court finds that attorney Pashkin must compensate the petitioner for costs in the form of reimbursement for reasonable attorneys' fees it incurred in defending those portions of the respondent's motion (#002) wherein she sought an order vacating the judgment entered herein in November of 2005 and other proceedings had herein, on personal jurisdictional grounds (*see Webb v Greater New York Auto. Dealers Ass'n., Inc.*, 144 AD3d 1134, 42 NYS3d 324 [2d Dept 2016]; *Paar v Bay Crest Assoc.*, 140 AD3d 1137, 35 NYS3d 190 [2d Dept 2016]).

Rejected as unmeritorious are the petitioner's demands for an award of counsel fees in the amount of \$9,000.00. In her affirmation submitted in response to the court's March 31, 2017 directive, the petitioner's counsel advises that her firm accepted a contingency fee on the file and accordingly

no detailed time sheets were kept. Counsel nevertheless estimates that thirty hours of work were expended and that an hourly rate of her fee is fixed at \$300.00. While the amount of \$9,000.00 may properly reflect the thirty hours of work the petitioner's counsel expended in preparing the cross moving papers (#003) in response to the respondent's motion (#002) to vacate the judgment and other proceedings had herein, not all of the time expended by counsel was dedicated to defending those portions of the respondent's motion (#002) to vacate that have been found have rested upon frivolous conduct. Interposition of the petitioner's cross motion (#003) containing opposition to the respondent's motion rather than opposing papers alone was necessary to secure relief in favor of the petitioner alone and played no role in defending against the portions of the respondent's motion-in-chief that was frivolously interposed and/or advanced by the respondent and her counsel. Accordingly, the court discounts one half of the \$9,000.00 fee amount as not attributable to frivolous conduct on the part of attorney Pashkin. Out of the remaining \$4,500.00 portion of the petitioner's fee, more than half thereof was dedicated to defending against the respondent's demands for vacatur of the judgment on the ground of a lack of personal jurisdiction over her.

The court thus finds, pursuant to 22 NYCRR § 130-1.2, that an award of costs in the amount of \$2,500.00 in favor of the petitioner is appropriate under the circumstances of this case, as such award is limited to the attorney's fees incurred by the petitioner in defense of those portions of the respondent's motion wherein she sought a vacatur of the judgment and all other proceedings due to the purported lack of personal jurisdiction over said respondent. Defense counsel shall remit payment of the sum of \$2,500.00 awarded costs in the form of counsel fees in favor of the petitioner's counsel pursuant to 22 NYCRR § 130-1.1.(1) and (2) as directed above.

Dated: June 6, 2017



THOMAS F. WHELAN, J.S.C.