

6th Ave. MCA Fund L.P. v Wealth Preserv. LLC

2017 NY Slip Op 32092(U)

September 20, 2017

Supreme Court, Westchester County

Docket Number: 54662/17

Judge: Lewis J. Lubell

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Dispo

To commence the 30 day statutory time period for 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 COUNTY OF WESTCHESTER

-----X
6TH AVENUE MCA FUND I, L.P.,

Plaintiff,

-against -

WEALTH PRESERVATION LLC d/b/a WEALTH PRESERVATION and JAMES HALL,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 54662/17

Sequence No. 1

The following papers were considered in connection with this motion for an Order vacating a confession of judgment:

PAPERS	NYSCEF
ORDER TO SHOW CAUSE/AFFIDAVIT/EXHIBITS A-D/ MEMORANDUM OF LAW	6-14, 16
AFFIRMATION IN OPPOSITION/EXHIBITS A-E	18
MEMORANDUM OF LAW IN OPPOSITION	19
REPLY AFFIDAVIT/EXHIBITS A-B	21
REPLY MEMORANDUM OF LAW	24

Defendants, Wealth Preservation LLC d/b/a Wealth Preservation and James Hall ("Defendants"), move by way of order to show cause to vacate a judgment by confession entered against them on April 10, 2017, in connection with an alleged breach of contract.

At the outset, the Court addresses the following threshold issues.

Section 3218 of the CPLR provides, in pertinent part:

(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 on 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 [emphasis added];

(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. [emphasis added].

Even upon assuming, without so finding, that the inclusion in the underlying Affidavit of Confession of Judgment of multiple counties in which the entry of judgment is authorized (against these non-resident defendants) runs contrary to the dictates of CPLR §3218 ("the county in which authorized" [CPLR 3218[a]; "clerk of the county designated in the affidavit" [CPLR 3218[b]]), such does not render the judgment void as between the defendants/judgment debtors and plaintiff/judgment creditor (see Steward v. Katcher, 283 AD 50, 53 [1st Dept 1953]).

Secondly, the inclusion of a counsel fee award does not, *ipso facto*, render the judgment void. "[T]here is no per se rule barring the use of a confession of judgment with respect to legal fees, [however] an attorney obtaining one must make sure, among other things, that the client understands that the amount is to be agreed upon or fixed by the court" (Katlowitz v. Halberstam, 284 AD2d 306, 307 [2d Dept 2001]). Such a determination cannot be made upon the papers currently before the Court and is more properly left, under these circumstances, to consideration within the context of an otherwise proper and timely plenary action (see infra).

In any event, the motion is denied on procedural grounds,

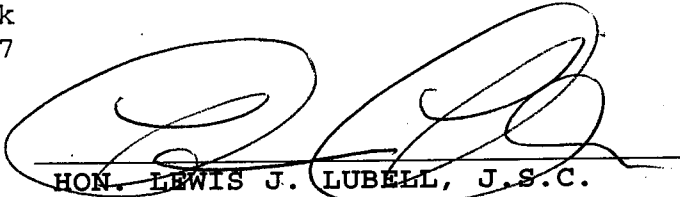
prejudice to the commencement of an otherwise timely and proper plenary action (see Rubino v. Csikoretos, 258 A.D.2d 638 [2d Dept 1999]; Yellowstone Capital LLC v. Pegasus Sustainability Solutions, Inc. d/b/a Hazardous Waste Experts d/b/a Medical Waste Experts and Mark A. Hope, [Sup. Ct. Westchester Co. March 21, 2016 (Wood, J)]; Yellowstone Capital LLC v. Deborah S. Arnold d/b/a Arnold Insurance and Deborah Arnold, [Sup. Ct. Westchester Co. May 5, 2016 (Smith, J.)]; Yellowstone Capital LLC v. Patriot One, Incorporated and David Yurkovich, [Sup. Ct. Westchester Co. Index No. 56013/2016, August 18, 2016 (Jamieson, J)]). There is no viable basis for the Court to deviate from the general rule that "only a third-party judgment creditor has standing to question on motion the validity of a judgment by confession, and that a defendant debtor who seeks to attack such a judgment must proceed by plenary action" (City of Poughkeepsie, 122 A.D.2d 14 [2d Dept 1986] citing Williams v. Mittleman, 259 App Div 697, 699, lv denied 284 NY 822; Mall Commercial Corp. v. Christa Rest., 85 Misc 2d 613; see also Viceroy Capital Funding v. Community Helps Network, LLC [Sup. Ct. Westchester Co. (Lubell, J.) decided November 22, 2016]). In contrast to the Court's determination in OFC, LLC v. Iron Centurian, LLC, (2017 WL 2989222 [N.Y.Sup.], 4-5, 2017 N.Y. Slip Op. 31438 [U]), this Court is not persuaded that all facts essential to reach a determination are undisputed such that this Court can deviate from the well established general rule.

Based upon the foregoing, it is hereby

ORDERED, that the motion is denied without prejudice to the commencement of an otherwise proper and timely plenary action as hereinabove noted.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
September 20, 2017



HON. LEWIS J. LUBELL, J.S.C.

Giuliano McDonnell & Perrone, LLP
Attorneys for Plaintiff
170 Old Country Road, Suite 608
Mineola, NY 11501

Amos Weinberg Esq.
Attorney for Defendants
49 Somerset Drive South
Great Neck, NY 11020-1821