

**Funding Metrics, LLC v A & A Fabrication & Polishing Corp.**

2018 NY Slip Op 32634(U)

October 17, 2018

Supreme Court, Westchester County

Docket Number: 57737/2017

Judge: Terry J. Ruderman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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  
FUNDING METRICS, LLC, d/b/a Lendini,

Plaintiff,

-against-

DECISION and ORDER  
Motion Sequence No. 1  
Index No. 57737/2017

A & A FABRICATION AND POLISHING  
CORPORATION and AMADA HENDERSON,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with defendants' motion to vacate the judgment by confession entered in this matter:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavit, Exhibits A - B and Memorandum of Law	1
Affirmation in Opposition, Exhibits A - G and Memorandum of Law	2
Reply Affirmation and Memorandum of Law <sup>1</sup>	3

Plaintiff Funding Metrics, LLC is a Delaware LLC registered to do business in New York as Lendini. On January 26, 2017, it entered into an agreement with A & A Fabrication and Polishing Corporation, denominated a Merchant Agreement, by which Lendini purchased from defendant A & A Fabrication future account receipts with a face value of \$56,000.00, for payment of the purchase price of \$40,000.00, in exchange for which A & A Fabrication would provide future receivables to Lendini through daily weekday payments of \$424.24, calculated as

<sup>1</sup> Plaintiff's proposed Affirmation in Response and Objection is an impermissible sur-reply and has not been considered by this Court.

16.99 % of its average daily sales. The agreement defines events of default, and provides that if a defined default occurs, the full uncollected purchase amount would be immediately due and payable to Lendini, along with costs and attorney's fees. Along with that agreement, Amada Henderson, individually and on behalf of A & A Fabrication, executed an Affidavit of Confession of Judgment on January 26, 2017, authorizing entry of judgment in favor of plaintiff and against defendants in the amount of \$56,000.00, less any payments made in accordance with the agreement, with interest, and attorneys fees in the amount of 25% of the amount due.

In the affidavit, Henderson, individually and on behalf of A & A Fabrication, specifically consents to the entry of judgment in the Federal District Court for the Southern District of New York, and Supreme Court of the State of New York in Westchester County and Nassau County; it adds that if the entry of judgment is outside the jurisdiction of the foregoing courts, defendants consent to entry of judgment in any state or federal court within the United States.

After performing under the agreement by making payments of \$21,212.00, defendants defaulted by blocking collection of further receivables, leaving a balance of \$34,788.00. Based on the confession of judgment, plaintiff then sought and obtained entry of judgment in this Court in the total amount of \$44,152.24, which included costs and interest, as well as attorney's fees as confessed in the amount of \$8,697.00.

Defendants now move to vacate the confession of judgment, on the grounds that (1) the judgment was entered in violation of Business Corporations Law § 1314 and in the absence of subject matter jurisdiction.

#### Analysis

Initially, as plaintiff correctly observes in opposing this motion, a plenary action, rather than a motion, is required under these circumstances. "A person seeking to vacate a judgment

entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief” (*Posner v Posner*, 277 AD2d 298 [2d Dept 2000]). Professor David Siegel, in his New York Practice treatise, elaborates that

“If the vacatur is sought by another creditor of the debtor, a mere motion will do. But if the debtor seeks it, she can use the simply motion procedure only if the judgment has been entered in violation of the affidavit’s terms, such as where it states a time that has not arrived or a contingency that has not occurred. If the entry is valid on its face and the debtor’s objection is based on some extrinsic factor, like fraud or misrepresentation, it has been held that a plenary action is required to do the vacating; that a mere motion won’t do”

(Siegel, New York Practice § 302, at 565 [6th ed 2018]). Notably, defendants have not established that the Clerk acted improperly in entering the judgment by confession, and therefore a plenary action is required. Even if a motion is permissible to interpose a claim that the judgment was entered in violation of due process, defendants have failed to establish that such a claim is viable here.

Not only is a plenary action necessary here, but in fact, defendants commenced such a plenary action on August 8, 2017 (*see A & A Fabrication and Polishing Corp. v Funding Metrics, LLC* [Supreme Ct Westchester County, Index No. 61770/2017]). Their subsequent stipulation of discontinuance of that action, dated April 9, 2018, also precludes this motion.

In any event, the substantive ground proposed by defendants does not justify vacating the entered judgment. Defendants rely on Business Corporations Law § 1314, which limits the circumstances in which a foreign or non-resident corporation may bring an action or special proceeding against a foreign corporation, such as where the litigation concerns a contract to be performed within this state, the cause of action arose within this state, or the subject matter of the litigation is situated in this state.

However, that statute does not preclude the judgment entered here, entered based on a

confession of judgment. By such a document, a person “agree[s] to the entry of judgment upon the occurrence or nonoccurrence of an event” (*see* Black's Law Dictionary [10th ed. 2014]), giving the holder a remedy that does not require proof of the nature of the transaction or allow for interposing defenses (*see Soler v. Klimova*, 5 AD3d 294 [1st Dept 2004]). Therefore, in entering the judgment, the court does not inquire into the underlying transaction, including with regard to such matters as the home state of the corporate plaintiff.

Moreover, while the Business Corporations Law § 1314 applies to “maintaining actions or special proceedings,” the statute providing for judgments by confession does not require commencement of an action; it clearly states that “a judgment by confession may be entered, *without an action*, . . . upon an affidavit executed by the defendant” (CPLR 3218 [emphasis added]).

Furthermore, plaintiff states that it maintains an office in this state, which would in any event render inapplicable paragraph (b) of Business Corporations Law § 1314 (see Business Corporations Law § 1314[c] [“Paragraph (b) does not apply to a corporation which was formed under the laws of the United States and which maintains an office in this state”])).

Defendants’ argument that this Court must look to California law is rejected as meritless, as is their argument that CPLR 3218 is unconstitutional. All other arguments not discussed herein have been considered and rejected.

Based upon the foregoing, it is hereby,

ORDERED that defendants’ motion to vacate the confession of judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
October 17, 2018

  
HON. TERRY JANE RUDERMAN, J.S.C.