SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

RICHMOND CAPITAL GROUP LLC,

Plaintiff,

-against-

ORION MEGIVERN D/B/A ORION MECHANICAL and ORION MEGIVERN,

Defendants.

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 151406/2018

Motion No. 1 & 2

The following numbered 1 through 10 were marked submitted on October 9, 2018

Papers Numbered

Notice of Motion, dated July 30, 2018 1

Affidavit of Orion Megivern In Support of Motion, with Exhibits, dated July 30, 2018.....2

Affidavit of Jacob H. Nemon, Esq. In Support of Motion, with Exhibits, dated July 30, 2018 3

Defendant's Memorandum of Law in Support of Motion, dated July 30, 2018.....4

Notice of Cross-Motion, dated September 4, 2018 5

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion and In Support of Plaintiff's Cross-Motion, dated September 4, 2018.....6

Affirmation of Michelle Gregg in Opposition to Motion.....7

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Defendant Orion McGivern is the sole proprietor of Orion Mechanical, which is a small HVAC Business operating out of New York in Tompkins County. Under the Merchant Cash Advance Agreement ("Agreement") between Plaintiff and Defendant Orion Mechanical, Plaintiff purchased $14,500.00 of Orion Mechanical's future receivables at a discounted rate of $10,000. Orion Mechanical was to deliver $299 to RCG per business day by allowing Plaintiff to debit such amounts until it received the purchased amount of receivables.[1]

In accordance with the Agreement, Orion Mechanical made ten daily payments from Elmira Saving Bank of $299 to Plaintiff, for a total of $2,990. As of June 1, 2018, there remained a balance of $11,510.00. According to Defendants, on June 1, 2018, Elmira Savings Bank rejected Plaintiff's daily withdrawal from Orion Mechanical's account. Plaintiff did not contact Defendants to find out why the account was frozen or to give Orion Mechanical a chance to make the payment. Instead, Plaintiff caused its lawyer, Marcella Rabinovich, Esq. to file a Confession of Judgement on June 1, 2018, the same day upon which Plaintiff's withdrawal was rejected by the Bank. Plaintiff also filed an Affidavit of its employee, Michelle Gregg, that stated "'OML initially made Specified Percentage Payments of $00.00 through automatic debits; however, as of June 1, 2018, OML has continuously failed to remit collections on receivables purchased by RCG. This constitutes a default under the Agreement. There remains a balance due and owing of $14,500.00 (the "Default Amount") exclusive of attorneys' fees and interest, as well as blocking and default charges." Plaintiff requested an entry of judgement in favor of the default amount of $14,500.00 plus $225.00 in statutory costs. In support of the entry of judgement, Ms. Rabinovich also submitted an Attorney Affirmation in which she stated that the

[1] Despite the Agreement being for $10,000, Defendants received a wire of $6,837 after the Broker took a commission of $3,163.00.

amount paid was "$00.00" and the Amount Owed was "$14,500.00" Defendants claim that in addition to being patently false, the statements made by Ms. Gregg and Ms. Rabinovich which disregard the payments already made by Defendants violated the Confession of Judgement, which required the Plaintiff submit an affidavit or attorney affirmation together with the judgement application that sets forth any payments Defendant made to Plaintiff under the Agreement. On June 7, 2018, The Clerk entered the Judgement in the amount of $14,785.78.

The record shows that after June 1, 2018, Plaintiff and Defendants engaged in a series of communications. Defendants claims that Plaintiff took advantage of Defendants' desperate condition and fraudulently obtained more money from them by making false promises regarding the entry of the Judgment. Defendant Orion Megivern claims that after Mr. Braun used obscene language in a phone conversation on June 4, 2018 and refused to talk to him after he mistakenly thought Mr. Megivern hung up on him, Ms. Gregg came on the phone and told Mr. Megivern that the Plaintiff would freeze Defendant's bank account and enforce a judgment against all his property unless he wired $1,500.00. After Ms. Gregg purportedly told Mr. Megivern that this $1,500 would stay the enforcement of the supposed judgment for the next week and would eventually be credited to his payments, Defendant wired Plaintiff $1,500 the next morning. Despite Defendants' compliance with Ms. Gregg's demand, Ms. Gregg told Mr. Megivern that Plaintiff would not keep the account unfrozen and that the payment would give Defendants one week to come up with the full amount. If Defendants did not pay the full amount by June 11, 2018, Ms. Gregg told Defendants they would levy any funds in the account. Defendant claims Ms. Gregg did not tell him that a judgement had not yet been entered and despite the agreement between the parties to stay the enforcement of the judgement, Ms. Rabinovich executed and provided to the Marshal an Execution With Notice to Garnishee ("Execution") dated June 4,

2018 to levy funds from Defendants' bank accounts at Elmira Savings Bank. In the Execution, it states that a judgement was entered in the Court on June 4, 2018 and a request was made to Elmira Savings Bank to freeze $15,808.10 plus interest, statutory fees and poundage.

Defendants claim that after Orion Mechanical's accounts were frozen, they desperately sought to obtain a "paid in full" letter. It was at this point that Defendants state Ms. Gregg fraudulently induced Defendants to execute a "Settlement Agreement" and direction letter to the Marshal to release the Judgement amount of $15,808.10 ("Direction Letter") in exchange for Plaintiff giving Defendants a "paid-in-full" letter. On June 8, 2018, Ms. Gregg sent Orion Megivern an e-mail with two PDF Files and wrote "Please sign these forms…this will save you time when we un freeze your account. One of them [sic] will need to be notarized." According to Defendant Megivern's affidavit, he contacted Ms. Gregg to unfreeze the account and obtain a "paid in full" letter and was told that the only way to do such was to sign the "standard documents" that she had sent. In his affidavit, Defendant Orion Megivern states he was not aware that the "forms" were a "Settlement Agreement" and the Direction Letter, but thought they were an attempt by Ms. Gregg to resolve the dispute.[2] According to Defendants, the Settlement Agreement misrepresented the Judgement amount as being $53,352.15 in order to allow Plaintiff to attach excessive funds without any account for the amounts already paid for by Orion Mechanical.

On June 11, 2018, the Marshal made multiple levies on Defendant's account at Elmira Savings Bank for the amounts of $12,950.00, $439.62 and $63.80, totaling levies of $13,453.42. Defendants also claim that Ms. Gregg fraudulently obtained a payment of $3,611 for "collection

[2] Defendant claims he never received a countersigned copy of the Settlement Agreement and that he revokes an offer to enter into the Agreement and rescinds the Settlement Agreement because it was fraudulently induced, made under duress and the result of a mutual mistake.

fees" in order to deliver a "paid in full" letter, which they never received. According to Defendants, Plaintiff has not provided a paid in full letter or filed a satisfaction of judgment. When Defendant e-mailed Ms. Gregg saying "I just wanted to make sure you received everything? Also…would I be able to get paid in full receipt when you have time", Ms. Gregg replied "YES AND YES …LOL"

Defendants' Motion and Plaintiff's Cross-Motion

Defendants therefore moved for an Order (1) modifying the Judgement of Confession, (2) directing Plaintiff to pay restitution to Defendants for $8,161.00, (3) directing the clerk to enter satisfaction of Judgement and imposing a penalty of $100.00 on Plaintiff for failure to file a satisfaction of judgment within 20 days of the Judgement's full satisfaction and (4) imposing sanctions and costs, including Defendants' attorney's fees and disbursements for the motion, upon Plaintiff, its employee Michelle D. Gregg, and its attorney, Marcella Rabinovich, Esq.

In its cross-motion before this Court, Plaintiff requested an Order imposing sanctions and costs, including Plaintiff's attorneys' fees and disbursements for the motion, upon Defendants Orion Megivern D/B/A Orion Mechanical and Orion Megivern, its counsel, Carter Leyard & Milburn LLP. Plaintiff also opposed Defendants' motion on the grounds that Defendants released Plaintiff from claims under the Settlement Agreement, the Defendants' motion is barred by the preclusion doctrine, Defendants' claims of fraud and unconscionability are baseless and that Defendants' bid for equity must fail because Defendant has unclean hands and is a fraud.

Decision

In its motion papers, Plaintiff has no reservations about demanding the Court hold the Defendants to their obligations and preserve Plaintiff's ability to exercise its own rights under the

Law and the parties' Agreement. The Plaintiff relies on its rights to file the Confession of Judgment after Defendants missed just one payment, citing the Agreement between the parties and the language of the Confession of Judgment. While Plaintiff may have such right under the Agreement, the Plaintiff does not have the right under any agreement or the law to commit a fraud on the court. The Court will not do as Plaintiff wishes and simultaneously hold Defendants in strict compliance with their obligations while ignoring the Plaintiff's duties under the law. The Court will also not be used as a vehicle for fraud, regardless of any rights that the Plaintiff clings to. The Plaintiff hopes that the fraud it has perpetrated on this Court can be concealed under the guise of a wordy Settlement Agreement and the Defendants' purported waiver of their rights. The Court hereby shatters any such hope by the Plaintiff, as the Judgement by Confession is vacated and Plaintiff will be required to pay Defendants $8,161.00 in restitution.

The Court recognizes that the Appellate Division has found that a debtor seeking to vacate a confession of judgment must proceed with a plenary action. *See Malhado v Cordani*, 153 A.D.2d 673, 544 N.Y.S.2d 674 (App. Div. 2d Dep't, 1989); *Engster v Passonno*, 202 A.D.2d 769, 608 N.Y.S.2d 740 (App. Div. 3d Dep't., 1994). However, the Court believes that the interests of justice, fairness and public policy far outweigh such requirement. As the Court of Appeals has held, "A court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice." *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 318, 991 NYS2d 519, 527, 15 NE3d 274, 282 (2014). *See also Bessa v Anflo Indus., Inc.*, 148 A.D.3d 974, 976, 51 N.Y.S.3d 102, 105-106 (App. Div. 2d Dep't., 2017). The Court of Appeals also has noted that "fraud on the court involves willful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information in the judicial process 'so serious that it undermines . . .

the integrity of the proceeding.'" *CDR Creances S.A.S. v. Cohen,* 23 N.Y.3d at 318, 15 N.E.3d at 282, 991 N.Y.S.2d at 527 (2014) (quoting *Baba-Ali v. State of New York,* 19 N.Y.3d 627, 634, 975 N.E.2d 475, 951 N.Y.S.2d 94 (2012)). To show fraud on the court, ". . . the nonoffending party must establish by clear and convincing evidence that the offending 'party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action.'" *Bessa v Anflo Indus., Inc.*, 148 A.D.3d 974, 976, 51 N.Y.S.3d 102, 106 (App. Div. 2d Dep't., 2017) (quoting *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d at 320, 15 N.E.3d at 284, 991 N.Y.S.2d at 529 (2014)). The Court hereby finds that the Plaintiff acted in such manner and therefore committed a fraud on the court, for which there must be consequences.

The record is replete with evidence that Plaintiff made false statements and misrepresentations to the Court which necessitate the vacatur of the Judgement. In the Affidavits of Ms. Gregg and Ms. Rabinovich, both stated that Defendants had not paid one dollar under the Agreement, while in fact Defendants had paid $2,990.00 as of June 1, 2018. Plaintiff did not wait even twenty-four hours after the Bank rejected its withdrawals before filing the Confession of Judgment. Defendants also made numerous efforts to resolve the dispute after June 1, 2018, which clearly rebuts Plaintiff's statement in the Affidavit of Michelle Gregg that "OML initially made Specified Percentage Payments of $00.00 through automatic debits; however, as of June 1, 2018, OML has continuously failed to remit collections on receivables purchased by RCG. This constitutes a default under the agreement." While Plaintiff may have the right to file a Confession of Judgment after the first instance of default under the Agreement between the parties, the Plaintiff does not have the right to make false statements and representations to this Court when seeking the entry of Judgment.

The Confession of Judgment clearly required Plaintiff to deduct any amounts already paid by the Defendants from the amount of the proposed Judgement. Plaintiff did not deduct any such amount and instead procured a Judgment from this Court based on sworn statements in the full amount of the loan with $14,785.78, and imposed a Marshal Levy for the amount of $15,808.00. The filing of the Confession of Judgment also violated CPLR §3128, which requires an affidavit by the Defendant "stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due." Plaintiff also perpetuated a fraud when it provided an Execution to the Marshal that stated a judgement had been entered in the Court on June 4, 2018, when in fact the Judgment was not entered until June 7, 2018. Again, Plaintiff falsely represented that it was due $14,785.78, without accounting for any of the payments already made by Defendants.

The Court finds that Plaintiff's actions in making false statements to the Court were meant to undermine the truth-seeking function of the judicial system and essentially made the Court an unwilling participant in its fraud, which the Court will not allow under any circumstances. Defendants have proven by clear and convincing evidence that the Plaintiff acted knowingly to try and hinder the Court's adjudication of the case and the Defendants' defense. Plaintiff repeatedly made false, sworn statements to the Court that resulted in the Court entering a Judgment for an inflated amount, extorted money from Defendants based on empty promises and heavily pressured Defendants to enter into a Settlement Agreement to prevent Defendants from shedding light on Plaintiff's deceitful acts. Therefore, based on the fraud committed on this Court by Plaintiff, the Judgement and Confession by Judgment are hereby vacated. Any lesser sanctions would not suffice to correct the offending behavior since Plaintiff's fraud was central

to the substantive issues in the case and Plaintiff's lack of scruples in this case warrant this heavy sanction.

Under CPLR §5015 which allows for restitution when a judgment or order is set aside or vacated, the Court orders Plaintiff to pay Defendant in restitution in the amount of $8,161.00.

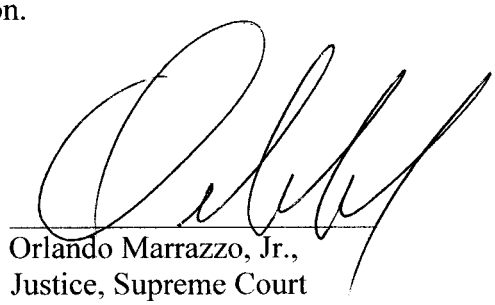
The Court rejects Plaintiff's argument that Defendants' Motion is barred by the Settlement Agreement reached between the parties since such Settlement Agreement contained a release section that bars Defendants from claims against Plaintiff from any and all causes of action, including for fraud.[3] While the Appellate Division has held that "in general, a valid release constitutes a complete bar to an action on a claim which is the subject of the release", the Appellate Division has held that a release may be invalidated for any of the "traditional bases" for setting aside written agreements, including duress, illegality, fraud or mutual mistake. *See Pacheco v 32-42 55th St. Realty, LLC*, 139 A.D.3d 833, 833, 33 N.Y.S.3d 301, 302 (App. Div. 2d Dept., 2016) (quoting *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276, 952 NE2d 995, 929 N.Y.S.2d 3 (2011)). A release that includes both known and unknown injuries must be "fairly and knowingly made." *Id.* The Court hereby finds that the release in the Settlement Agreement is invalidated on the bases of fraud and duress and therefore it is not a bar to Defendants' Motion. As shown by the Record, Plaintiff made promises to

[3] Debtors, and their respective predecessors, successors, affiliates, parents, subsidiaries, and assigns, along with Debtors' shareholders, principals, members, owners, directors, managers, officers, agents, affiliates, and representatives, hereby fully and finally release, acquit and forever discharge RCG, its predecessors, successors, affiliates, parents, subsidiaries, and assigns, along with RCG's shareholders, principals, members, owners, directors, managers, officers, agents, attorneys, and representatives, of and from any and all actions, causes of action, torts, intentional torts, claims, demands, controversies, disputes, liabilities, obligations, debts, liens, damages, costs, losses, attorneys' fees, expenses and compensation, of every nature whatsoever, whether known or unknown, from the beginning of time up to and through the date of the full execution and exchange of this Agreement, including, but not limited to, those that could have been raised in this Action.

Defendants that signing the "standard documents" was the only way to obtain a "paid-in-full" letter and would help fasten the process of unfreezing Defendants' account. The Record also shows that Plaintiff told Defendant it would hold off enforcing the Judgment if Defendants were to wire Plaintiff $1,500 and later $3,611 in fees to obtain the "paid in full" letter. Such promises were nothing but false statements and therefore the Court holds that the Settlement Agreement is vacated on the basis of fraud. The falsity of these statements is further bolstered by Ms. Rabinovich's response to Defendant's inquiry regarding getting paid back, to which she said "LOL". Such a response shows that Plaintiff did not plan to uphold its promises to Defendants and therefore procured the Settlement Agreement using fraud and duress.

Therefore, Defendants' Motion is granted and Plaintiff's Cross-Motion is denied. Plaintiff is to pay Defendants $8,161.00 in restitution.

Dated: November 28, 2018
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice