

**Takat Gems USA, Inc. v Flex Funding, LLC**

2020 NY Slip Op 30238(U)

January 15, 2020

Supreme Court, Kings County

Docket Number: 519643/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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TAKAT GEMS USA, INC., d/b/a TAKAT GEMS  
USA, AHMED RAYAZ & MITULKUMAR MAHENDRABHAI  
PATEL,

Plaintiffs, Decision and order

- against -

Index No. 519643/19

FLEX FUNDING, LLC, d/b/a FLEX FUNDING &  
CUSTOM CAPITAL FUNDING,

*ms # 2*

Defendants, January 15, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved seeking to vacate a confession of judgement filed. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On June 19, 2019 the defendant Flex Funding LLC, a merchant cash advance funding provider entered into a contract with plaintiffs. Pursuant to the agreement the defendants purchased \$749,500 of plaintiff's future receivables for \$500,000. The parties further agreed that the defendant would be able to obtain a daily amount of \$7,000 until the amount was fully paid. Moreover, the parties also agreed the \$500,000 would be transferred to the plaintiffs in four installments, one per week over a period of a number of weeks. The first two installments were made and prior to the third installment which was due on July 10, 2019, the defendants allege they became aware the plaintiffs had sought funding from other funders in breach of the agreement. Indeed, on August 5, the plaintiffs were informed the

third installment would not be forthcoming although daily amounts were deposited until a week later when on August 14, 2019 all payments by the plaintiffs ceased. On August 23, 2019 the defendants filed confessions of judgement against the plaintiffs.

The plaintiffs now move seeking to vacate the confession of judgement asserting the confession of judgement was filed in an improper manner and without sufficient basis.

#### Conclusions of Law

It is well settled that to vacate a judgement based upon a confession of judgement a plenary action must generally be commenced (Regency Club at Wallkill LLC v. Beinish, 95 AD3d 879, 942 NYS2d 894 [2d Dept., 2012]). A plenary action has been filed and consequently the motion is proper.

Turning to the merits of the motion, to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]). Thus, whether the plaintiffs are entitled to an injunction must necessarily turn upon whether the plaintiffs have sufficiently demonstrated the confession of judgement is improper.

First, the defendants argue the motion is improper since a

debtor such as the plaintiffs in this case lack standing to vacate a confession of judgement. However, a judgement debtor may challenge a confession of judgement (see, Cash and Carry Filing Service, LLC v. Perveez, 149 AD3d 578, 50 NYS3d 277 [1<sup>st</sup> Dept., 2017] "Defendants may challenge the judgement by confession only by trial in a plenary action, and not by motion"). It is further true that a debtor lacks standing to challenge the affidavit of confession of judgement since such affidavit is intended to benefit third party creditors (Regency Club at Walkill, supra). Alternatively, a third party creditor need not commence a plenary action to challenge the judgement (City of Poughkeepsie v. Albano, 122 AD2d 14, 504 NYS2d 183 [2d Dept., 1986]). However, the plaintiffs' action challenging the confession of judgement is proper.

It is well settled that pursuant to CPLR §3218(b) a confession of judgement may be filed "with the clerk of the county where the defendant stated in his affidavit where he resided when it was executed" (id) and that deliberately filing such judgement in any other county renders the judgement void as to a bona fide creditor whose judgement was not procured upon the confession (Williams v. Mittlemann, 259 AD 697, 20 NYS2d 690 [2d Dept., 1940]). However, a judgement debtor cannot seek to vacate a confession of judgement on the grounds it was filed in the wrong county (Steward v. Katcher, 283 AD 50, 126 NYS2d 290 [1<sup>st</sup>

Dept., 1953])). Thus, the plaintiffs cannot challenge the county chosen by the defendants as improper.<sup>1</sup>

However, the crux of the plaintiffs argument is that the defendants improperly filed the confession of judgement. The defendants argue the plaintiffs anticipatorily breached the agreement by seeking funding elsewhere which permitted the defendants to refuse to supply any more funds. Specifically, the defendants assert the defendants "learned from numerous cash advance companies that Takat was seeking funding from them. This act is nothing short of a declaration by Takat that it intended not to fulfil a contractual duty, to wit, the prohibition against obtaining funding from another cash advance company" (see, Affirmation in Opposition, ¶ 43). However, Paragraph 2.10 of the agreement states that "Merchant shall not enter into any arrangement, agreement or commitment that relates to or involves the Receipts, whether in the form of a purchase of, a loan against, collateral against or the sale or purchase of credits against, Receipts or future check sales with any party other than FLF" (id). Clearly, the agreement does not prohibit merely talking to other parties, without actually entering into such

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<sup>1</sup> It should be noted that an amendment to CPLR §3218(b) which took effect August 30, 2019, a few weeks after the confession of judgement was filed in this case, changed the language to state any confession of judgement can be filed "'but only' with the clerk of the county where the defendant's affidavit stated that the defendant resided when it was executed or where the defendant resided at the time of filing" (see, CPLR §3218). Future cases will determine whether that change likewise now affords a judgement debtor the ability to vacate a confession of judgement filed in the wrong county or whether such filing is void even as to the debtor.

agreements. Further, it is gross speculation for the defendants to deem the merchant breached the agreement because such conversations, if they even took place, would ultimately lead to a breach of the agreement. The agreement between the parties in this case specifically provides that a breach occurs upon the plaintiffs entering into another agreement with other funders. Moreover, it is conceivable the plaintiff could anticipatorily breach the agreement by indicating an intent to enter into such contracts. However, mere speculation or rumor that the plaintiffs have sought information from other funders without more is not a breach of contract and does not comprise an anticipatory repudiation of the contract. Thus, when the defendants informed the plaintiffs they would no longer extend any further funding, there was no basis for such a determination. That decision led the plaintiffs to appropriately stop further financing. Consequently, there are surely questions whether the filing of the confessions of judgement was proper.

Therefore, based on the foregoing, the motion seeking to vacate the confession of judgement is granted.

So ordered.

ENTER:



DATED: January 15, 2020  
Brooklyn N.Y.

Hon. Leon Ruchelsman  
JSC

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