SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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YELLOWSTONE CAPITAL, LLC,
Plaintiff,

– against --

SUN KNOWLEDGE INC., and REENA NANDI,
Defendants.

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To commence the 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.

Index No. EF001023/17

DECISION AND ORDER

Motion Date: March 22, 2017

The following papers numbered 1 to 12 were read and considered on a motion by the Defendants, pursuant to CPLR §3218 and CPLR §5015(a), to set aside and vacate a Judgment, entered on February 8, 2017, and all enforcement obtained thereon.

Confession of Judgment– Affidavit in Support- Weinstein– Exhibits A-C- Judgment 1-5
Notice of Motion- Costello Affirmation- Exhibits A-C- Memorandum of Law 6-9
Affidavit in Opposition- Weinstein- Exhibits 1-9- Memorandum of Law..... 10-12

Upon the foregoing papers, it is hereby,

ORDERED, that the branch of the motion which seeks to set aside and vacate the judgment, pursuant to CPLR §3218, is granted, and the judgment and all enforcement thereof is ordered vacated and set aside; and it is further,

ORDERED, that the remaining branches of the motion are denied, without prejudice to any party seeking appropriate relief in the proper venue.

Factual and Procedural Background

By Secured Merchant Agreement (hereinafter "SMA") dated December 9, 2016, the Plaintiff Yellowstone Capital, LLC (hereinafter "Yellowstone Capital") agreed to purchase future accounts receivable from the Defendant Sun Knowledge Inc. (hereinafter "Sun Knowledge") in the amount of $175,080.00, for $120,000.00. Payments were to be made to Yellowstone Capital in installments equal to 15% of Sun Knowledge's accounts receivable. The SMA is signed by the Defendant Reena Nandi, both as owner of Sun Knowledge and as guarantor. Sun Knowledge's address is listed as 41 Madison Avenue, 25th Floor, Suite 2511, New York, New York. Nandi's address is listed as Westbury, New York (Nassau County).

By Addendum to Secured Merchant Agreement dated December 9, 2016, the parties agreed that payment to Yellowstone Capital was to be by automated clearing house charges ("ACH debits"), taken from an account owned by Sun Knowledge, in the amount of $1,946.00 per business day.

By Affidavit of Confession of Judgment (hereinafter "COJ") dated December 12, 2016, signed by Nandi, Individually and on behalf of Sun Knowledge, Nandi agreed to the entry of a judgment in the event of a default under the SMA in the amount of $175,080.00, less any payments thereon, plus attorney's fees in the amount of 25% of any amount due and owing, plus interest at the rate of 16% from December 9, 2016, or in the highest amount allowed by law. Further, that the judgment could be entered in any of the following courts– the Federal District Court for the Southern District of New York, any New York State Supreme Court in New York County, Westchester County, Rockland County, Erie County and Orange County, and any Civil Court in New York County.

On February 7, 2017, Yellowstone Capital filed the COJ in the Supreme Court, Orange

County.

In an affidavit in support of entering a judgment on the COJ, Avraham Y. Weinstein, an accounts manager for Yellowstone Capital, avers that Sun Knowledge breached the SMA by failing to make all payments thereunder. Weinstein notes that it was agreed that Sun Knowledge would deposit all payments of accounts receivable into a specified [Citibank] account (hereinafter "the Account"), and that Yellowstone Capital would withdraw its payments therefrom by ACH debit. Further, he notes, it was agreed that the SMA would be deemed breached if Sun Knowledge either failed to deposit monies into the Account, or blocked or cancelled Yellowstone Capital's ACH debits from the same. Here, he avers, on February 7, 2017, after making a total of $58,380.00 in payments, Sun Knowledge breached the SMA by stopping any further payments thereunder. Further, he contends despite due notice of its default, Sun Knowledge failed to make any further payments. Currently, he asserts, there is a balance due on the SMA of $116,700.00, plus attorney's fees in the amount of $29,175.00.

On February 8, 2017, a clerk's Judgment was entered against Sun Knowledge and Nandi, joint and severally, in the amount of $146,151.16, *i.e.*, $116,7000.00 in principal owed, $51.16 in interest (at 16%), $225.00 in costs, and $29,175.00 in attorney's fees.

The Defendants made the motion at bar to vacate and set aside the Judgment and any enforcement relief granted thereon, and to enjoin Yellowstone Capital from enforcing the Judgment. Further, they move for an order directing Yellowstone Capital to return all assets and accounts seized from Sun Knowledge's bank account ending in 3472, and for the return of any assets seized by the New York City Marshall.

In support of the motion, counsel for the Defendants, Irene Costello, Esq., asserts that Sun

Knowledge is a family business that provides outsourcing for health care billing, and that Reena Nandi is a licensed psychiatrist with the North Shore Child and Family Guidance Association, Inc.

Costello argues that the SMA is a criminally usurious loan agreement disguised as a purchase of future accounts receivables. Indeed, she notes, although ostensibly a purchase of accounts receivable, the SMA does not include a non-recourse provision. In fact, she asserts, Nandi was compelled to sign both a guarantee of the debt, and a COJ, which permits Yellowstone Capital to unilaterally declare a default. Thus, Costello argues, the documents violate various due process protections that would otherwise be afforded the Defendants.

Costello notes that, on or about February 8, 2017, Yellowstone Capital froze all of the Defendants' accounts, including Nandi's personal accounts, which contained exempt income earned from her employment with North Shore Child and Family Guidance Association, Inc.

Costello argues that the COJ must be set aside and vacated pursuant to CPLR 5015(a)(3) because it arises from a criminally usurious loan, to wit: at the rate of $1,946.00 per business day, the amount owed Sun Knowledge would be repaid in about 90 days, which is equal to interest at the rate of 186.15% per annum. Indeed, she asserts, several courts have found similar agreements to be unenforceable.

Further, Costello argues, the COJ is procedurally defective under CPLR 3218. She notes that the COJ contains only one signature line, although it binds Nandi as both an officer of Sun Knowledge and individually. This, she argues, indicates that Yellowstone Capital was trying to take advantage of Nandi, who is not sophisticated.

Finally, Costello argues, a preliminary injunction preventing any further enforcement of the Judgment should issue because there is a likelihood that the Defendants will prevail on the merits;

there will be irreparable harm if their bank accounts remain frozen, and the equities balance in their favor.

In a memorandum of law, the Defendants assert that OCJ is also defective under CPLR 3218 because it was not filed where the Defendants reside. Here, they assert, Sun Knowledge is a "citizen" of Nevada, and Nandi is a "citizen" of Nassau County, and neither has any connection to Orange County. Indeed, they argue, even viewing the COJ as containing a forum selection clause, such clauses are not enforced when to do so would be unreasonable, unjust or would contravene public policy. Here, they assert, no party has any connection to Orange County, and traveling back and forth to the same is causing an unnecessary waste of time and money.

Further, they argue, the COJ is insufficient on its face because it fails to set forth sufficient facts as to the source of the underlying obligation, and the calculation of the amount due and owing, as is required by CPLR 3218.

In addition, the Defendants assert, the extremely broad enforcement powers granted Yellowstone Capital under the SMA, which allow it to reach the personal accounts of Nandi, reveal that the SMA is actually a usurious loan. Morever, they assert, given the breadth of Yellowstone Capital's enforcement devices, the payment of its loan balance remains secure.

Finally, they note, the COJ allows for an award of attorney's fees without any proof as to reasonableness.

In an affidavit appended to the memorandum of law, Reena Nandi avers that Yellowstone Capital had withdrawn almost $50,000.00 from her personal bank accounts, and that she would be unable to run her businesses, or pay her legal bills. Further, that its actions were harming the good will of her businesses. In addition, she asserts, she was not represented by counsel when she signed

the OCJ, and did not realize that she was signing over her rights.

In opposition to the motion, Avraham Weinstein notes that it was agreed that Sun Knowledge would pay all accounts receivable into a designated account at Citibank (the Account), and that Yellowstone Capital would be paid 15% of same under the SMA. Thus, he asserts, there was risk to Yellowstone Capital because there was no guarantee if and when the purchase balance would be paid off using such a methodology. Indeed, he notes, the failure of Sun Knowledge to earn sufficient daily receipts to make the loan payment was not an event of default under the SMA. Moreover, he asserts, other courts had upheld similar agreements.

Weinstein contends that, given the practicalities of trying to reconcile a daily balance on the Account, the parties agreed that a "good faith approximation" of the correct daily ACH debit was $1,946.00 per day, and that Yellowstone Capital could withdraw that amount. Weinstein notes that, before entering into the SMA, Yellowstone Capital did its due diligence by, *inter alia,* examining various bank accounts owned by the Defendants. The accounts held hundreds of thousands of dollars in deposits. Moreover, he contends, public records indicate that Nandi's personal residence is worth around $3.1 million.

Weinstein argues that the arrangement between the parties is not a usurious loan, and that the same type of arrangement has been approved by the courts in other instances. Indeed, he asserts, this is not the first time that Nandi had entered into such an agreement. Rather, she had entered into several such arrangements. Thus, he argues, there is no merit to the contention that Nandi was somehow confused by the single signature line on the COJ, which otherwise made completely clear that she was signing the document both as the owner of Sun Knowledge and as guarantor.

In a memorandum of law, Yellowstone Capital argues that the Defendants intentionally

defaulted on their obligations under the SMA, to wit: Yellowstone Capital had entered into a similar agreement to the one at bar with another company owned by Nandi– ATN Care Franchising LLC d/b/a GO Telecare (hereinafter "ATN")[1]. On February 6, 2017, ATN and Sun Knowledge sent identical letters to Yellowstone Capital purporting to revoke and rescind the COJs signed by Nandi, and stating that no further payments would be made. Moreover, Yellowstone Capital asserts, it appears that the Defendants thereafter diverted monies to other accounts to avoid their creditors. Indeed, Yellowstone Capital contends, it appears that ATN and Sun Knowledge had defaulted on other loan obligations, which had resulted in various judgments against them.

As to the Defendants' request for a preliminary injunction, Yellowstone Capital argues that they failed to show a likelihood of success on the merits.

First, Yellowstone Capital contends, a motion to set aside a COJ based on fraud must be brought as a plenary action. It may not, as here, be brought as a mere motion.

Further, it argues, the SMA is not a usurious loan, as there was no "loan" and no "interest" charged. Moreover, Yellowstone Capital asserts, repayment was contingent on Sun Knowledge earning sufficient income from accounts receivable.

In addition, Yellowstone Capital argues, the COJ was not procedurally defective, as the Defendants consented to venue in Orange County, and because it was made clear to Nandi that she was signing the COJ in two capacities.

Further, it asserts, the Defendants had failed to demonstrate irreparable harm with competent evidence. Rather, the Defendants rely on an affirmation from counsel, who lacks personal

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[1] *Yellowstone Capital, LLC v ATN Care, et al.,* is currently pending before this Court under Index No. EF001022/17, and is decided herewith.

knowledge of the facts.

Similarly, Yellowstone Capital argues, the equities do not balance in favor of the Defendants, as they had absconded with hundreds of thousands of dollars from various entities, and were now attempting to avoid just debts.

Finally, Yellowstone Capital notes, if the Defendants are granted a preliminary injunction, they are required by CPLR 6312 to file an undertaking. Here, it argues, if a preliminary injunction is granted, the undertaking should be in the amount of the potential Judgment.

Discussion/Legal Analysis

As a threshold issue, the Defendants argue that the COJ should not have been filed in Orange County, and that the Judgment entered thereon should be vacated and set aside on that basis alone. This argument has merit.

In general, confessions of judgments are always closely scrutinized, and in doing so, a liberal attitude should be assumed in favor of the judgment debtor. *Rae v. Kestenberg*, 23 A.D.2d 565 [2nd Dept 1965], *citing*, 4 Weinstein–Korn–Miller, New York Civil Practice, 32–237. Liability under a guaranty must be strictly limited by the terms of the instrument. *Rae v. Kestenberg*, 23 A.D.2d 565 [2nd Dept 1965].

In relevant part, CPLR § 3218 provides:

> (a) Except as provided in section thirty-two hundred one [small installment contracts], 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;
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> > 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;

> 2. if the judgment to be confessed is for money due or to become due, stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due; * * *
>
> (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. * * * 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.
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> In the practice commentaries to CPLR 3218, it is noted:
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> The specification of county is important because it will of course dictate the venue of the confessed judgment. The statute assumes that entry will ordinarily be in the debtor's residence county, apparently enabling entry to be in a designated county only when the debtor is a nonresident. Subdivision (b) buttresses that conclusion. Should it turn out that the debtor is a resident of X county in New York while the affidavit authorizes entry in Y county, the defect should not in this instance be treated as innocent, *i.e.*, should not be considered a mere matter of venue, as in a contested action. Hence the filing in Y county should not be allowed. The main purpose of the affidavit is the protection of third persons (see Commentary C3218:9 below), and the county to which such third person should be able to turn in order to check on the confession is the debtor's residence county if the defendant is a resident."

McKinney's Consolidated Laws of New York, Book 7B, Siegel Prac. Comm., C3218:8 Contents of the Affidavit; Venue].

Thus, CPLR §3218 reflects a carefully devised scheme providing for entry of judgment by the clerk of the county in which the debtor resides, or if the defendant resides outside the state, in the county designated by the parties. *Terezakis v. Goldstein*, 168 Misc.2d 298 [S. Ct. N.Y. County]. If the requirements set forth in CPLR 3218 are not scrupulously followed, the judgment by confession will be considered invalid. A judgment by confession may be entered only in the county designated in the debtor's affidavit—entry of a judgment by confession in an unauthorized county will render the judgment void pursuant to CPLR 3218[b]. *Irons v. Roberts*, 206 A.D.2d 683 [3rd

Dept 1994]; *Williams v. Mittlemann,* 259 A.D. 697 [2nd Dept. 1940]; *Terezakis v. Goldstein*, 168 Misc.2d 298 [S. Ct. N.Y. County].

Here, the COJ identifies Sun Knowledge as residing in New York County, and Nandi as residing in Nassau County. Thus, the COJ was not properly filed in Orange County.

Contrary to the arguments of Yellowstone Capital, the Court does not read CPLR 3218, or the case law arising thereunder, as permitting a forum selection clause in a COJ that does not comply with the plain language if CPLR 3218(b).

In any event, even if it did, on the facts presented, the Court would not enforce such a clause.

In general, a contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, or invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court. *L.R. Dean, Inc. v. International Energy Resources, Inc.*, 213 A.D.2d 455 [2nd Dept. 1995].

Here, there is no argued or apparent connection between Orange County and any of the parties, their counsel, or any other aspect of the litigation. Indeed, at oral argument, Yellowstone Capital was unable to offer any reason why it filed the COJ in Orange County. Given such, the Court must conclude that Orange County was selected in order to inconvenience the Defendants, and to make any challenge to the Judgment more onerous and expensive.

Finally, it is noted, the relief granted does not require a plenary action.

In general, the party seeking to set aside an affidavit of confession of judgment and to vacate a judgment entered thereon is required to commence a plenary action, especially where it is alleged that the affidavit of confession of judgment was obtained by fraud, duress or overreaching.

Rubashkin v. Rubashkin, 98 A.D.3d 1018 [2nd Dept. 2012]; *Regency Club at Wallkill, LLC v. Bienish*, 95 A.D.3d 879 [2nd Dept. 2012]; *Rubino v. Csikortos*, 258 A.D.2d 638 [2nd Dept. 1999]. However, a challenge to the facial sufficiency of documents submitted pursuant to CPLR 3218 may be brought by mere motion. *Cole-Hatchard v. Nicholson*, 73 A.D.3d 834 [2nd Dept. 2010]; *Corrales v. Walker*, 20 Misc.3d 285 [S. Ct. Nassau County 2008].

Here, the Defendants' argument that the filing of the COJ in Orange County does not comply with CPLR 3218 raises an issue of law that appears on the face of the submissions. The argument does not raise an issue of fact, does not require any inquiry into the merits of the underlying claims, and does not involve the credibility of the parties. Thus, the relief is properly sought and granted pursuant to a mere motion.

In light of the above, the Judgment is ordered vacated and set aside, as is any relief based thereon, or enforcement thereof, for failure to comply with the venue provisions of CPLR 3218.

The balance of the motion is denied, without prejudice to either party seeking appropriate relief in a proper venue.

This concludes the proceedings before the Court in this matter.

Accordingly, for the above stated reasons, it is hereby,

ORDERED, that the branch of the motion which seeks to set aside and vacate the judgment pursuant to CPLR §3218, is granted, and the judgment and all relief granted thereon is ordered vacated and set aside; and it is further,

ORDERED, that the remaining branches of the motion are denied, without prejudice to any party seeking appropriate relief in the proper venue.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2017
Goshen, New York

ENTER

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