

STATE OF NEW YORK : COUNTY OF ERIE
 SUPREME COURT

S.O.S. CAPITAL INC.,

Plaintiff,

vs.

Index # 803512/2018
 MEMORANDUM
 DECISION

SORRELLS ENTERPRISES, LLC, SORRELLS
 MANAGEMENT LLC, TED E’S KITCHEN, LLC
 NORTH TEXAS MAUI WOW!, DOC POPCORN,
 DIPPIN DOTS, TED E’S KITCHEN, A BUNCH
 OF NUTS, KICKIN TEXAS CHICKEN and
 JOHNNIE COWAN SORRELLS, JR.,

Defendants.

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Hon. Catherine Nugent Panepinto, J.S.C.

This is a merchant agreement v. loan dispute. Defendants moved by a Show Cause Order asking this Court to dismiss Plaintiff’s action pursuant to §5015(a)(3) because the underlying agreement is an allegedly usurious loan, and enter judgment against Plaintiff for \$251,736.55, the amount of the alleged illegal loan. Alternatively, Defendants request a transfer of venue to New York or Nassau County. Defendants submitted an attorney affirmation, and Defendant affidavit with exhibits. Plaintiff opposes the motion; arguing Defendants, as judgment debtors, cannot challenge a judgment against them via Show Cause Order, and the agreement at issue is not a loan. Plaintiff submitted an attorney affirmation with exhibits; a Plaintiff affidavit with exhibits; and a memorandum of law with exhibits. The parties’ lawyers presented oral arguments July 19, 2018 and this Court reserved judgment.

As a preliminary matter, this Court declines to transfer venue. The subject agreement, signed by Defendants, expressly states venue is proper in any New York court. Moreover, judgment was entered in Erie County; thereby venue in Erie County is proper.

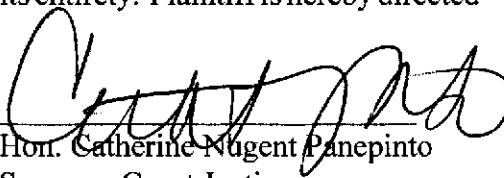
Having established the subject confession of judgment has been entered in a New York Court, it is well established that judgments cannot be vacated by motion or show cause order brought by one or more judgment debtors. Instead, a plenary action is required. See, *Bufkor, Inc. V. Wasson & Fried, Inc.*, 33 AD2d 636 (4th Dept., 1969); as well as a shit ton of cases decided by my colleagues here in Buffalo. (See generally, Justice Jerry Moriarty, Cattaraugus County)

On this procedural basis alone, this Court is compelled to deny Defendants' show cause order. The proper course is to do so without prejudice to the Defendants' right to commence a plenary action seeking the same or similar relief as was requested herein. Albeit, this Court discerns no merit to the argument the subject merchant agreement is a loan. As the parties well know, in March of this year the First Department Justices ruled conclusively that agreements such as the one at issue are not loans.

The court properly dismissed the complaint seeking to vacate the judgment by confession. The evidence demonstrates that the underlying agreement leading to the judgment by confession was not a usurious transaction. *Champion Auto Sales, LLC, v. Pearl Beta Funding, LLC.*, 159 AD3d 507 (1st Dept., 2018); citing *Giventer v. Arnou*, 37 NY2d 305, 309 (1975); *Feld v. Apple Bank for Sav.*, 116 AD3d 549, 553 (1st Dept., 2014).

Hence, a prospective plenary action brought by Defendants with the same set of facts and agreement as presented is highly discouraged, especially as it may warrant the imposition of attorneys' fees. This Court declines to so award at this stage in the litigation largely because of defense counsel's good humor and Massapequa accent.

Defendants' action is hereby denied in its entirety. Plaintiff is hereby directed to submit the appropriate order on notice.


Hon. Catherine Nugent Panepinto
Supreme Court Justice

Dated: August 23, 2018
Buffalo, New York