

SUPREME COURT-STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY
Present: HON. ROBERT M. BERLINER
Justice of the Supreme Court

-----X
ANN COLE-HATCHARD and DORIS COLE-HATCHARD,

Plaintiff(s),

-against-

JAMES NICHOLSON and DONNA NICHOLSON,

Defendant(s).

O R D E R

Index No.:

1521/09

Motion Date:

06/05/09

-----X
The following papers, numbered 1-33, were read on this motion by the Court appointed receiver of the assets of defendant James Nicholson, and various entities owned and/or controlled by him, for an Order vacating the judgment entered against the defendants, which judgment was obtained by confession of judgment:

Order to Show Cause/Affirmation-1-2
Receiver-Memorandum of Law-13
Receiver-Supplemental Memorandum of Law-14
Plaintiff-Affirmation in Opposition-16
Plaintiff-Memorandum of Law-29
Plaintiff-Affirmation in Opposition-30
Plaintiff-Memorandum of Law-31
Receiver-Supplemental Affirmation-32
Receiver-Reply Memorandum of Law-33
Filed Papers/Exhibits-3-12; 15; 17-28

In addition to the above submissions, the Court heard oral argument on June 1, 2009 from all parties.

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

The saga of defendant James Nicholson is, by now, well known. He has gained notoriety as Rockland County's "Bernard Madoff", in that, it is alleged, in his capacity as a financial advisor/investment counselor, he stole tens of millions of dollars from an estimated 400 investors via the use of the now well known Ponzi scheme made famous (or infamous) by the aforementioned Mr. Madoff. The plaintiffs allege that they are two of the many swindled by Nicholson.

As a result of his nefarious activities, in or about February 25, 2009, Nicholson became the subject of both a civil enforcement action commenced by the Securities and

Exchange Commission(the "SEC"), and a criminal prosecution. He was arrested on February 25, 2009, and this Court believes he has been incarcerated ever since that date.

The SEC action is pending in the United States District Court for the Southern District of New York, under the caption SEC v. Nicholson, et. al., the other defendants being various entities under which Nicholson allegedly did business. The case is being managed by the Hon. Richard M. Berman, United States District Judge.

On March 3, 2009, Judge Berman signed an Order which appointed Lee S. Richards as Receiver(the "Receiver") for the estates of all the defendants in the SEC action. Among the many powers given to the Receiver in said Order was the following, at Article 1 D.9:

"To bring such legal action based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his/her duties as Receiver."

Cloaked with this authority, the Receiver has moved, pursuant to CPLR 5015, to vacate a certain judgment obtained against James Nicholson in this action. The judgment was obtained by confession of judgment. And while the judgment is against both named defendants, the Receiver has standing only to vacate as against James.

(It should be noted that a separate motion was brought by Donna Nicholson to vacate the judgment as against her. In fact, there has been presented to this Court a stipulation vacating the judgment as against Donna. However, under this Court's interpretation of a stay order issued by the District Court, this Court is prohibited from acting on her application, and therefore this Court cannot "so order" the stipulation submitted by the parties. It should also be noted that at some point the Receiver sought to "intervene" in that motion, but all that was rendered moot by the stay order. It should also be noted that this Court finds it can adjudicate this motion, as actions brought by the Receiver are not affected by the stay order. Therefore, for purposes of the rest of this decision, any reference to the defendant shall be to James only).

The judgment in question was obtained via a confession of judgment executed by the defendant. There is no dispute that he signed it, and the execution and recording of the judgment in the Rockland County Clerk's office both occurred on February 20, 2009, five days before the defendant was arrested. While it is alleged that the confession of judgment was prepared by the plaintiffs' attorney, its execution was supervised, and was notarized by Stephen J. Cole-Hatchard(hereafter "Stephen"), the husband of plaintiff Ann and the

son of plaintiff Doris. It is the conduct and actions of Stephen which, in large measure, are the basis of the Receiver's application. It should be noted that at all times relevant herein, Stephen was an attorney at law, duly licensed in the State of New York, and a full time detective with the Town Of Clarkstown (Rockland County) Police Department.

As a threshold issue, the Court shall address an argument proffered by the plaintiff in opposition to the motion, to wit: the bringing of this motion is not the proper mechanism to obtain this relief. Rather, the relief sought by the Receiver can only be obtained in a plenary action. Since it does appear that that argument would be correct in an action brought by the debtor to set aside the judgment, the plaintiffs argue, in effect, that the Receiver "stands in the shoes" of the debtor, and has no more rights than he would have, i.e. if the defendant must start a plenary action to set it aside, so must the Receiver. It is just as undisputed that a third party can seek to set aside by motion, and therefore, the Receiver opines, it has brought the correct proceeding. County National Bank v. Vogt, 28 A.D.2d 793, aff'd 21 N.Y. 2d 800.

The Court agrees that proceeding by motion is appropriate. The Receiver is not the debtor; the Receiver is an officer of the Court appointed by the Court to administer the assets of the debtor. In that capacity, this Court finds that he has the same status as a third party creditor, for example, and therefore this motion is appropriate.

The Receiver offers a number of reasons why the judgment should be vacated:

1) The Confession is invalid because Stephen Cole-Hatchard, who acted as the notary on the underlying affidavit, had a direct interest in the subject matter of the judgment;

2) Stephen Cole-Hatchard obtained the confession of judgment in breach of the public trust in that in his capacity as a police officer, he obtained confidential information concerning Nicholson's imminent arrest which placed he and his family in a more advantageous position. Knowing that Nicholson was about to be arrested, he obtained the confession of judgment, and therefore placed his family members in a supposedly preferred position over the other 400 or so investors. In fact, this Court knows of no other investor who obtained any judgment or lien from Nicholson before his arrest and incarceration. In any event, since the stay went into effect on March 3, 2009, no investor could move against Nicholson.

3) The confession of judgment is, in itself, defective, since it fails to meet the stringent requirements of CPLR §3218.

In order for this Court to uphold the validity of the confession, it must be demonstrated that CPLR §3218(a) has been complied with. Since the judgment was for

money due, then the affidavit in support must state "...concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due:..." This Department has consistently held that confessions of judgments are always closely scrutinized and in judging them a liberal attitude should be assumed in favor of the judgment debtor. Rae v. Kestenberg, 23 A.D. 2d 565, Ripoli v. Rodriguez, 53 A.D. 2d 638. As Professor Siegel notes in his Commentaries under the statute and his treatise on civil practice, the purpose of the affidavit in support of the confession is to protect third party creditors, and further states that "These other creditors are entitled to see the complete picture of the transaction from the affidavit itself, sufficient to enable them to investigate the claim and ascertain its legitimacy." (emphasis supplied). Siegel, Practice Commentaries to CPLR §3218.

In determining whether or not the affidavit is sufficient on its face, there are no hard and fast rules except for the statutory requirements and some general guidelines. Each case is fact specific, and while each side cites numerous cases in support of its' respective position, there is, of course, no case in which the fact pattern matches the exact fact pattern here.

In scrutinizing the affidavit, it is clear to this Court that it fails the litmus test of CPLR 3218. The Court finds the affidavit deficient in a number of ways and, in this Court's opinion, would not present a true picture to a third party of the facts and circumstances which created the alleged debt here. For example:

1) The plaintiffs now concede that Donna Nicholson should not have been a party to the proceeding. There was not even an allegation in the affidavit as to why she was named in the first place.

2) There is no explanation as to why the action was brought against James Nicholson personally, as opposed to his various entities. There is not one shred of evidence that any money was ever given to James Nicholson personally to invest. It is interesting to note that the plaintiffs rely on statements made by the Receiver in his report that the money was converted by Nicholson for his personal use to justify the judgment against him, but how could the plaintiffs have known that on February 20, 2009? The plaintiffs allege that they had no "inside information" at the time the affidavit was signed, so on what legal theory could they, at that time, believed there was any personal liability owed by Nicholson? At the very least, the theory upon which they were seeking personal liability should have been explained.

3) It is obvious from a reading of the submissions that very little of the money invested was invested in the personal names of the plaintiffs. Rather, it appears that the bulk of the

funds were invested in the names of various infant children of Ann and Stephen Cole-Hatchard, yet there is no indication in the affidavit as to that effect. Why did the affidavit not name the children's trustee as plaintiff?

4) It is patently obvious that the amount stated in the affidavit was not the amount invested by the plaintiffs. In fact, only approximately 25% of the amount indicated was money actually "lost" by the Cole-Hatchard family; the balance consisted of fictitious profits. However, the wording of the affidavit would have you believe that the full amount sought was all invested money, which, of course, the Cole-Hatchards knew not to be the case. They indicate that, not being exactly sure of the amount they were owed, they relied on the defendant's statement as to what was due them. While this Court has no knowledge of the financial expertise or naivete of the plaintiffs, the Court is hard pressed to believe that they believed that that amount was actually the amount they invested, which is what the affidavit states. At the very least, the affidavit should have distinguished between the amount actually invested and the alleged profit in the account. In fact, this Court finds it particularly telling that the plaintiffs are willing to have this Court consider a *nunc pro tunc* amendment of the confession to reflect only the amount actually invested. Even if this Court was so inclined to do so, which it is not, the plaintiffs have failed to affirmatively seek said relief in the form of a cross motion, and therefore the Court cannot do so.

In light of the above, the Court finds that as a matter of law, the confession of judgment fails to meet the statutory requirements, and the application to vacate the judgment is GRANTED. The Rockland County Clerk is directed to mark said judgment vacated. However, the Court is mindful of the fact that this decision and order has serious repercussions. Therefore, in order to give both sides an opportunity to pursue any remedies in an appellate court, the Court, on its own, will stay the enforcement of this order for 15 days from the date hereof. Should there not be any stay obtained from any appellate court, then this order shall take effect.

Based on the findings herein, the Court need not address the other issues raised by the Receiver in support of his application. Both sides have made accusations against the others, proscribing evil motives and/or self interests in making their arguments. The Court, in making this ruling, does so based strictly on its' interpretation of the facts and the law, without passing judgment on the actions of any one party or parties or their counsel.

To: Richards Kibbe & Orbe LLP
Feerick Lynch MacCartney PLLC
Blank Rome LLP
Stahl & Zelmanovitz, Esqs.

Dated: New City, New York
August 31, 2009

Ent: _____



ROBERT M. BERLINER J. S.C.