



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

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October 4, 2017

### LETTER OPINION

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*Counsel for the Defendant*

Re: Lim v. Venketapathi, Case No. CL-2017-11827

Dear Counsel:

Before the Court is the Defendant's Motion to Set Aside Confessed Judgment. For the reasons stated in this Opinion, the Motion is granted and the confessed judgment is set aside.

#### **A. PERTINENT FACTS**

On February 9, 2017, Marie Lim sold DMAX, a stone masonry business, to Indumathi Venketapathi. The purchase price was \$600,000. Ms. Venketapathi paid \$280,000 in cash and signed a Confessed Judgment Promissory Note for the remaining balance of \$320,000.

On July 28, 2017, Ms. Venketapathi sued Marie Lim and Thomas Lim, for fraud, fraudulent inducement, violation of Virginia Blue Sky Laws, business conspiracy, breach of contract, breach of fiduciary duty, conversion and tortious interference with business expectancy. Ms. Venketapathi asserted damages "in the nature of lost revenue, direct costs, incursion of debt, loss of business and economic advantage, loss of goodwill and attorneys' fees." Compl. ¶ 70. Ms.

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Venetapathi also sought punitive damages and an equitable order rescinding the sale of DMAX and “returning the parties to their positions *status quo ante*, as a result of the fraudulent inducement by the Defendants.” *Id.*

On August 11, 2017, Marie and Thomas Lim filed an Answer, Grounds of Defense and Counterclaim.

On August 25, 2017, the instant action was filed, confessing judgment in the amount of \$298,321.21, based on an assertion of default.

On September 15, 2017, Ms. Venketapathi filed a Motion to Set Aside Confessed Judgment and a Memorandum in support of the motion.

On September 22, 2017, Ms. Lim filed an Opposition to Defendant’s Motion to Set Aside Confessed Judgment.

On September 29, 2017, the Court heard argument on Ms. Venketapathi’s motion and took the matter under advisement. The matter is now ripe for decision.

#### **B. POSITION OF THE PARTIES**

The motion to set aside the confessed judgment is based on Virginia Code § 8.01-433, which reads as follows:

Any judgment confessed under the provisions of § 8.01-432 may be set aside or reduced upon motion of the judgment debtor made within twenty-one days following notice to him that such judgment has been entered against him, and after twenty-one days notice to the judgment creditor or creditors for whom the judgment was confessed, on any ground which would have been an adequate defense or setoff in an action at law instituted upon the judgment creditor's note, bond or other evidence of debt upon which such judgment was confessed. Whenever any such judgment is set aside or modified the case shall be placed on the trial docket of the court, and the proceedings thereon shall thereafter be the same as if an action at law had been instituted upon the bond, note or other evidence of debt upon which judgment was confessed. After such case is so docketed the court shall make such order as to the pleadings, future proceedings and costs as to the court may seem just.

Va. Code Ann. § 8.01-433.

The fundamental issue before the Court is whether Ms. Venketapathi has raised “any ground which would have been an adequate defense or setoff in an action at law instituted upon the judgment creditor’s note, bond or other evidence of debt upon which such judgment was confessed.” It must be emphasized here that the merits of the defense are not at issue in this motion; rather, it is sufficient if “the pleadings on their face assert an adequate defense.” FWB Bank v. R S Q. Assocs., 31 Va. Cir. 74, 75 (Fairfax Cir. 1993) (citing NationsBank v. Sarelson, Law No. 111837 (Fairfax Cir. 1992) (footnote omitted).

Ms. Venketapathi relies principally on the Complaint she filed on July 28, 2017 against Marie and Thomas Lim. That complaint alleges, among other matters, that Ms. Venketapathi was fraudulently induced to purchase DMAX. It alleges that “[Marie] Lim refused to effectuate the sale unless Venketapathi signed two notes – a ‘Security Agreement’ obligating Venketapathi to repay \$320,000 and a ‘Confessed Judgment Promissory Note’ (‘Confessed Judgment’) against Venketapathi prepared by counsel for Marie Lim, also in the amount of \$320,000.” Compl. ¶ 40 (emphasis in original). It further alleges that the Lims “made several false representations, omissions and concealments which, individually and collectively, constitute fraud and fraudulent inducement to enter into the SPA and the Security Agreement.” Compl. ¶ 65. It further alleges that the “misrepresentations, omissions and concealments committed by Marie Lim and Thomas Lim were willful, wanton, reckless and intentional and they intended that Venketapathi rely on those misrepresentations, omissions and concealments.” Compl. ¶ 69. It further alleges that as a “direct and proximate result of Defendants’ fraudulent misrepresentations, omissions and concealments, Venketapathi has suffered damages in the nature of lost revenue, direct costs, incursion of debt, loss of business and economic advantage, loss of goodwill and attorneys’ fees.” Compl. ¶ 70. In addition to fraud and fraudulent inducement, the Complaint asserts various other claims, including business conspiracy, conversion and breach of contract.

In Ms Venketapathi’s Memorandum In Support of Motion to Set Aside Confessed Judgment, Ms. Venketapathi asserts both that the confessed judgment “directly and wholly relates” to the purchase of DMAX, and that the Complaint seeks “complete rescission of the agreement to purchase DMAX including the issuance of this confessed judgment note....” Mem. In Supp. Of Mot. To Set Aside Confessed J. at 1.

Counsel for Ms. Lim makes several arguments in opposition. First, counsel asserts that the Confessed Note “specifically waived all of debtor’s rights and defenses to ‘presentment, protest and demand, notice of protest, notice of dishonor, demand and dishonor... in collection hereof.’” Opp’n of Def.’s Mot. To Set Aside Confessed J. at 2 (citing to Exh. A at 5). Second, counsel asserts that Ms. Venkatapathi’s and DMAX’s Complaint sought “to void the sale (not the Confessed Note)” and did not seek injunctive relief with respect to the Confessed Judgment. *Id.* (emphasis in original). Third, counsel asserts that “[t]he DMAX action makes no allegation of fraud regarding the text of the Confessed Note, which is printed in plain English. Nor does it seek to rescind or void it.” *Id.* at 3. (footnote omitted). Finally, counsel asserts that “no defenses specific to the Confessed Note were asserted in either the DMAX Action or the Motion.” *Id.* at 4.

### C. ANALYSIS

There is no question that the Confessed Judgment Promissory Note is directly related to the purchase of DMAX by Ms. Venkatapathi. DMAX was purchased for \$600,000. That \$600,000 purchase had two components: \$280,000 in cash and \$320,000 in the form of the Confessed Note. When the July 28<sup>th</sup> Complaint asserts fraud and fraudulent inducement, the claim applies to the overall purchase of DMAX, to the \$280,000 in cash paid by Ms. Venkatapathi, and to the Confessed Note for the remaining \$320,000. Ms. Lim asserts that the Complaint “did not seek injunctive relief” with respect to the Confessed Judgment. The Court disagrees. The “Request for Relief” seeks “injunctive and declaratory relief rescinding the sale of DMAX to

Venketapathi and returning the parties to the *status quo ante*.” The Court understands the term “*status quo ante*” to encompass the entire transaction, including the purchase of DMAX, the cash payment and the Confessed Note. Moreover, the Court reads the Complaint to assert that Ms. Venkatapathi was fraudulently induced not only to purchase DMAX, but also to pay the \$280,000 in cash, and to sign the Confessed Note, each of which were integral to the transaction.

Ms. Lim asserts that this Court’s Opinion in Fru-Con Constr. Corp. v. Araujo Constr. Co., 78 Va. Cir. 132 (Fairfax Cir. 2009) should lead to a different result. Fru-Con involved a confessed judgment note which the defendant sought to set aside based on an allegation of fraud in a settlement agreement. Fru-Con argued that the allegation of fraud went only to the Settlement Agreement and not to the Confessed Judgment. The Court held that any defense to the Settlement Agreement would also be a defense to the Confessed Judgment because the Confessed Judgment stated that “[t]he Settlement Agreement is incorporated herein by reference.” Fru-Con Constr. Corp. v. Araujo Constr. Co., 78 Va. Cir. 132, 134 (Fairfax Cir. 2009). Ms. Lim argues that the Confessed Note in the instant case did not contain similar language – in other words it did not incorporate either the Stock Purchase Agreement or the Security Agreement – and, therefore, any allegation of fraud with regard to the Stock Purchase Agreement or the Security Agreement would not be attributable to the Confessed Note. The Court disagrees. In the instant case, the Confessed Note is inseparable from the overall transaction, and the allegations of fraud contained in the Complaint go to the entire transaction – including the Confessed Note. See, e.g., the following paragraphs of the Complaint:

- “The Letter of Intent also outlined the cost of the business: a \$600,000 purchase price for DMAX – \$25,000 paid in escrow, pre-closing; \$255,000 paid in cash at closing; and a \$320,000 note, payable at the rate of \$6,186.50 per month, for 60 months.” Compl. ¶ 19.
- “The SPA [Stock Purchase Agreement], like the Letter of Intent, defined the purchase price as \$600,000: \$25,000 paid in escrow, pre-closing; \$255,000 paid in cash at closing; and a \$320,000 note issued by DMAX, payable at the rate of \$6,186.50 per month, for 60 months.” Compl. ¶ 25.
- “Lim refused to effectuate the sale unless Venketapathi signed two notes – a ‘Security Agreement’ obligating Venketapathi to repay \$320,000 and a ‘Confessed Judgment Promissory Note’ (‘Confessed Judgment’) against Venketapathi prepared by counsel for Marie Lim, also in the amount of \$320,000. The SPA [Stock Purchase Agreement] simply required that DMAX issue a note for \$320,000.” Compl. ¶ 40.
- “Venketapathi was told at the closing by counsel for Marie Lim, that she was required to sign the personal note Confessed Judgment to complete the transaction.” Compl. ¶ 42.
- “Venketapathi would never have purchased DMAX had she been made aware that: i) Thomas Lim would not actively support the transition to DMAX as he had promised, ii) the debt she would be required to assume would personally hold her liable and be double the amount contemplated in the Letter of Intent and the SPA (through the second

“Confessed Judgment” note and undisclosed substantial loans against DMAX assets), iii) that substantial DMAX assets would not be turned over by Marie Lim.” Compl. ¶ 59.

- “Throughout the duration of the negotiations for the purchase of DMAX, Marie Lim and Thomas Lim made several false representations, omissions and concealments which, individually and collectively, constitute fraud and fraudulent inducement to enter into the SPA and the Security Agreement. Specifically, the Defendants i) promised numerous times, both orally and in writing to support the purchase of DMAX by Venketapathi with transition assistance in the form of employment and cooperation; ii) materially misrepresented, concealed and omitted the financial condition of DMAX prior to sale; iii) materially misrepresented the terms of the loan agreement Marie Lim would accept for the purposes of closing.” Compl. ¶ 65.
- “As a direct and proximate result of Defendants’ fraudulent misrepresentations, omissions and concealments, Venketapathi has suffered damages in the nature of lost revenue, direct costs, incursion of debt, loss of business and economic advantage, loss of goodwill and attorneys’ fees.” Compl. ¶ 70.

Under these circumstances, the claim of fraud and fraudulent inducement applies to the entire transaction, even if the Confessed Note did not explicitly incorporate the Stock Purchase Agreement or Security Agreement. In this respect, *Kalsi v. Patel*, 53 Va. Cir. 302 (Norfolk Cir. 2000) is persuasive authority. *Kalsi* involved motions to set aside confessed judgments associated with the purchase of certain hotel properties. The confessed judgments were related to loans taken out by defendants to pay for the hotel properties. The defendants alleged that they were fraudulently induced to purchase the properties because material information regarding the hotels was concealed from them, and the loans were offered to make the transaction appear more attractive. While the loan agreements were expressly made contingent on the sale of the hotel properties, there was no allegation of fraudulent conduct on behalf of the promissory note payees. Thus, plaintiffs argued that the individual note payees could not be held liable for the fraud. In other words, “Plaintiffs’ argument is premised upon the fact that the loan transaction and the hotel sale transaction were separate...” *Kalsi v. Patel*, 53 Va. Cir. 302, 305 (Norfolk Cir. 2000). Defendants argued, in contrast, that “[b]ecause the loan transaction and sale transaction were contemporaneous, Defendants claim any fraudulent inducement for the hotel would have also fraudulently induced the loan transaction.” *Id.* at 303. The Court set aside the confessed judgments. Here, too, the purchase document and the Confessed Note were executed contemporaneously. Moreover, a critical question in *Kalsi v. Patel* – “whether or not Defendants will be able to prove that the holders of the notes either knew of the alleged fraud or were part of the alleged fraudulent transaction” – would not be applicable in the instant case, since Ms. Lim is a party to both the sale and the confessed judgment. *Id.* at 305.

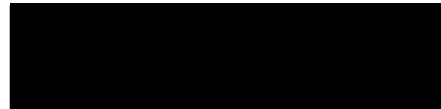
In summary, the Court finds that Ms. Venketapathi has set forth a “ground which would have been an adequate defense or setoff in an action at law” and, therefore, the confessed judgment shall be set aside. Va. Code Ann. § 8.01-433. In accordance with Virginia Code § 8.01-433, the matter shall be placed on the trial docket of the Court. The trial should be scheduled through Calendar Control, and may be heard by any judge of this Court. With respect to Ms. Venketapathi’s

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request that this case be merged with CL-2017-10445, the Court takes no position on merger at this time. Alternatively, Ms. Venketapathi requests that the confessed judgment matter be “dismiss[ed] in its entirety.” Mem. In Supp. Of Mot. To Set Aside Confessed J. at 4. The Court sees no basis for this. By statute, the matter is to be tried, not dismissed.

Ms. Venketapathi’s counsel is to prepare an Order in accordance with this Opinion and, after providing it to Ms. Lim’s counsel to note his objections, submit it to the Court within 14 calendar days.

Sincerely,



Randy I. Bellows  
Circuit Court Judge

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