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You've Got a Confession (of Judgment). Now What?

By Stephen G. Rinehart and Adam S. Libove

What Is a Judgment by Confession?

A confession of judgment is an affidavit in which a party admits liability to another party, accepts a quantification of damages and agrees that the affidavit may be filed as a judgment upon the occurrence of a stated condition, usually an affidavit from the creditor attesting to the default. A judgment by confession can be a useful tool for a creditor because it avoids costly and time-consuming litigation. The number of confessions filed in New York County has risen dramatically in the wake of the 2008 economic crisis.¹ This, combined with drastic staffing reductions in the Supreme Court and the Clerk's office and the increased use of sophisticated and complicated confessions, has led to more confessions being rejected. This article reviews the legal requirements for filing a judgment by confession, offers some practical guidance to facilitate filing, and reviews certain aspects of the usury law and common law on interest rates with which counsel should be familiar. Finally, this article reviews available litigation options when initial attempts to file a confession prove unsuccessful.

Requirements of CPLR 3218

CPLR 3218 addresses judgments by confession and sets forth the requirements for filing. Unlike some other states where a judgment by confession may be filed upon an attorney's affirmation (often called a "cognovit judgment"), in New York, the defendant must execute an affidavit that states the sum for which judgment may be entered, authorizes entry of judgment, and states the county where the defendant resides or, if the defendant is a non-resident, the county in which entry is authorized.³ The affidavit must also state concisely the facts out of which the debt arose and indicate that the sum confessed is justly due or to become due.⁴ This requirement has been interpreted to mean that "there must be sufficient genuine detail to enable other creditors to investigate the claim and ascertain its validity."⁵ If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, the defendant's affidavit must concisely state the facts constituting the liability and demonstrate that the sum confessed does not exceed the amount of liability.⁶

An affidavit of confession of judgment may be filed with the clerk of the county where the defendant stated in the affidavit that he or she resided when it was executed, or if the defendant was then a non-resident, with the clerk of the county designated in the affidavit, within three years after the affidavit is executed.⁷ In addition to calculating the principal and interest owed on the judgment, the Clerk will tax costs, generally adding a \$210 filing fee.⁸ Under CPLR 3218 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.⁹

The Appellate Division, First Department has held that a judgment by confession has “all of the qualities, incidents and attributes of a judgment on a verdict, including a presumption as to its validity.”¹⁰

A judgment creditor seeking to file a judgment by confession should also file an affidavit of the plaintiff that relates any important events that occurred after the defendant executed the affidavit of confession, including any payments of principal or interest that the defendant made before default. The plaintiff’s affidavit can also include a detailed calculation of the applicable pre-judgment interest, including a per diem rate so that the Clerk can account for the precise day of filing. The interest calculations can also be submitted in the form of an attorney’s affirmation. When presenting the confession for filing, counsel should also have on hand a copy of the promissory note or other instrument setting forth the interest rate because the Clerk will generally ask to review same before filing the affidavit and entering judgment.

Please! File Original Affidavits of Confession of Judgment

Practitioners should be aware that the New York County Clerk’s office generally requires original signatures on the documents it accepts for filing. Confessions of judgment and the accompanying defendant’s affidavit are no exception to this practice. Notably, CPLR 3218 does not expressly require that the defendant’s affidavit of confession be an original. Indeed, two provisions of the CPLR and a New York County Supreme Court decision suggest that the Clerk’s practice may be extralegal.

CPLR 2101(e) states in pertinent part: “Except where otherwise specifically prescribed, copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or filed.”¹¹ Similarly, CPLR 2102(c) provides: “A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court.”¹²

In *Gehring v. Goodman*,¹³ the New York County Supreme Court adjudicated an Article 78 petition seeking an order directing the New York County Clerk to accept for filing copies of affidavits that the petitioner wanted to file, pursuant to CPLR 3218(b).¹⁴ The court noted that “CPLR 3218(b) does not specify that only the original of the affidavit must be accepted for filing and does not proscribe the filing of a copy of the affidavit” and that “CPLR 2101(e) allows the filing of copies of affidavits.”¹⁵ The court went on to say that “[t]here is neither a statute nor rule of the Chief Administrator of the Courts that directs respondent to refuse to accept for filing a copy of an affidavit under CPLR 3218(b).”¹⁶ Citing to McKinney’s Supplemental Practice Commentaries, the court added that the purpose of CPLR 2102(c) is to strip clerks of any

authority to reject papers offered for filing unless the refusal is directed by law, rule, or court order.¹⁷ Based on the foregoing, the court directed the Clerk to accept for filing copies of the affidavits pursuant to CPLR 3218(b).¹⁸

Notwithstanding the *Gehring* decision, based on the New York County Clerk’s current practices counsel is advised to present original affidavits to avoid delay in filing judgments by confession.

Usurers Beware

Usury Defined Under the General Obligations Law, the Banking Law and the Penal Law

The Clerk may refuse to file and enter a judgment by confession if the Clerk believes the interest rate charged therein is usurious.¹⁹ Thus, it is critical to understand the web of New York statutes concerning usury. With certain significant exceptions discussed below, the General Obligations Law caps the maximum interest rate upon a loan or forbearance of any money, goods, or things in action at 6% with the important qualifier “unless a different rate is prescribed in section fourteen-a of the banking law.”²⁰ The Banking Law, in turn, sets the maximum rate of interest at 16% per year.²¹

There are, however, important exceptions to the 16% maximum. For example, loans of \$250,000 or more, except a loan or a forbearance secured primarily by an interest in real property improved by a one- or two-family residence, are exempt from the 16% maximum²² but must still comply with the criminal usury statutes. The criminal laws set the maximum interest rate at 25% per year.²³ Further, a loan of \$2.5 million or more is exempt from both the civil cap of 16% and the criminal cap of 25%.²⁴

When Calculating the Interest Rate for Usury Purposes, Remember to Use the Net Loan Amount

To determine the interest rate on a loan for usury purposes, prepaid interest or discounts may generally be amortized over the entire loan term.²⁵ That is, when calculating the interest rate, the original principal amount is not considered the amount of the loan. Instead, only the net principal amount actually received by the borrower – after deducting points and other fees considered interest and paid from the loan proceeds – is considered as the amount of the loan.²⁶ Failing to heed this rule increases the loan’s interest rate for usury purposes and may cause the loan to be usurious even if the face amount of the loan is nominally below the usury rate.²⁷

Usury Is a Defense Personal to the Borrower

As noted, the New York County Clerk may refuse to enter a confession of judgment if the underlying interest rate is deemed usurious. This practice notwithstanding, the defense of usury is personal to the borrower,²⁸ that is, it may be asserted only by the borrower, not by someone else on the borrower’s behalf. This raises the question of whether the Clerk has standing to reject an

instrument for filing based on usury or, rather, whether such a defense must be raised by the judgment debtor in a plenary action.²⁹ In a recent decision, the New York County Supreme Court held that a determination by the Clerk that an instrument presented for filing contains a usurious interest rate is beyond the scope of CPLR 3218.³⁰

Default Interest Is Not Usury

Another potentially troublesome issue involves default interest – that is, interest that only accrues upon the borrower’s default. As a matter of law, however, a default

interest rate is not usurious.³¹ That said, counsel should be aware that they may encounter difficulties when attempting to file a judgment with a default interest rate in excess of 16% or 25%, despite the fact that default interest is not considered usury. This is because officials in the Clerk’s office may incorrectly deem such default interest usurious.

To Obtain Post-Judgment Interest That Exceeds the Statutory Rate, the Instrument Must Provide for Same “Clearly and Unequivocally”

Another matter to double check before attempting to file a judgment by confession is the post-judgment interest. By statute, after entry in New York state court, interest on a judgment accrues at 9% per year, unless otherwise provided by statute.³² The common law rule is that where the contract provides interest shall be paid at a specified rate until the principal shall be paid, the contract rate governs until payment of the principal, or until the contract is merged in a judgment.³³ Naturally, parties are free to “contract around” this rule but must do so with clear and unequivocal language. The documents should make clear that the default interest applies “until the judgment is satisfied”³⁴ and “survives entry of judgment.”³⁵

When “No” Means Litigate

The Clerk is by law required to accept a judgment by confession that meets the requirements of CPLR 3218.³⁶ However, instruments that reflect complex commercial transactions and reference various agreements may be rejected. A general rule from the context of default judgments is applicable as it relates to judgments by confession – that is, “[i]f anything more than arithmetic is called for, application must be made to the court.”³⁷

When the Clerk rejects a judgment by confession, counsel has at least three options: (1) commence a special proceeding against the Clerk under Article 78 of the

CPLR; (2) file an action for summary judgment in lieu of complaint under CPLR 3213 against the putative judgment debtor; or (3) seek an order to show cause pursuant to CPLR 3218 against the putative judgment debtor. Each mechanism has unique advantages and disadvantages.

Article 78 Proceeding Against the Clerk

The court in the county where the Clerk has its office has jurisdiction to entertain an Article 78 proceeding against the Clerk because CPLR 7803(1) empowers courts to determine whether a body or officer failed to perform a

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duty enjoined upon it by law, and CPLR 7803(3) empowers courts to decide whether a determination was made in violation of lawful procedure or affected by an error of law.³⁸ Recently, in *Pro Player Funding LLC v. Goodman*, the New York County Supreme Court adjudicated an Article 78 petition involving two judgments by confession that the Clerk rejected because they were deemed usurious. After reviewing the requirements of CPLR 3218 discussed above, Justice Kern found that the Clerk “failed to perform a duty enjoined upon it by law when it refused to enter the confessional judgments.”³⁹ The court reasoned that the affidavit properly enumerated the requirements of CPLR 3218, is presumed to be valid, and that “there is nothing in CPLR 3218 giving the clerk discretion to reject the terms of the affidavits for underlying substantive reasons.”⁴⁰ Under such circumstances, the court held “the Clerk was without authority to question the validity of the terms and required to enter the judgments for the sum confessed.”⁴¹

In the authors’ experience, commencing the Article 78 proceeding via order to show cause, with an answer interposed by the Clerk and with one adjournment, the above proceeding will take at least two months. Counsel should be aware that under CPLR 7804, the petitioner must serve the New York State Attorney General⁴² in addition to personal service upon the Clerk.⁴³

Motion for Summary Judgment in Lieu of Complaint

When the Clerk refuses to enter judgment by confession, a creditor can also proceed pursuant to CPLR 3213, which allows a party to commence an action for summary judgment in lieu of complaint upon an instrument for the payment of money only. A promissory note is generally considered such an instrument under CPLR 3213.⁴⁴

A CPLR 3213 action may require personal service upon the putative judgment debtor,⁴⁵ which may be costly and time-consuming, and negates the reason for obtaining the

defendant's affidavit of confession. On the other hand, because it is brought on by motion, plaintiff's counsel can schedule the return date far enough in advance to accomplish personal service, if necessary, and control the time the defendant's answering papers are due.

Order to Show Cause Against the Judgment Debtor Seeking Entry of Judgment

Lastly, a less conventional method of obtaining relief is to seek an order to show cause against the judgment debtor for an order entering judgment against the debtor pursuant to the terms confessed. Surprisingly, such a motion does not require filing an underlying pleading. Rather, counsel need only purchase an index number, submit an affidavit from a representative of the plaintiff attesting to the underlying facts, and annex the operative documents such as the promissory note and the affidavit of confession. At least one New York County justice has signed such an order and allowed notice to the defendant via certified mail.⁴⁶ The downside with such a method is that other New York County justices may refuse to sign the order to show cause on the grounds that the procedures of CPLR 3218 or 3213 are appropriate.

Check the Law of the Filing Jurisdiction Before Drafting

When drafting a confession of judgment, counsel should consider where the lender will enforce the judgment upon the borrower's default and then consult the law of that jurisdiction to ensure that it recognizes judgments by confession.⁴⁷ This is important because some courts have viewed judgments by confession "with judicial distaste."⁴⁸ In some states confession of judgment provisions are invalid⁴⁹ or void as against public policy.⁵⁰ Other states make void confessions of judgment arising out of consumer loans.⁵¹ Knowing ahead of time whether the filing jurisdiction recognizes judgments by confession is critical to protecting the client's interests before the borrower's default.⁵²

Conclusion

A judgment by confession is a powerful vehicle for obtaining relief without litigation, provided that the Clerk accepts it. By closely adhering to the requirements of CPLR 3218, counsel can help ensure that such a judgment is accepted for filing and entry. Careful attention must be paid to the

applicable pre- and post-judgment interest rates to prevent rejection. Loan documents should make unambiguously clear that the default interest rate survives entry of judgment and applies until the judgment is satisfied. Counsel should also make their best efforts to file original affidavits of confession whenever possible. When the Clerk's office does reject a confession, counsel has various means of obtaining judicial relief. Each procedural option should be examined to ensure that counsel considers the necessary cost and time expenditure, as well as what, if any, notice should be provided to the defendant. Finally, when drafting affidavits of confession of judgment, counsel should review the law of the jurisdiction where the plaintiff will attempt to enforce it to ensure that judgments by confession are valid in that jurisdiction. ■

1. See Kevin R.J. Schroth, *How the Recession Has Complicated Judgments by Confession*, Law Journal Newsletters, LJN's Equipment Leasing Newsletter (Apr. 2010) at 1.
2. See *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 176 (1972) ("The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.").
3. CPLR 3218(a)(1).
4. CPLR 3218(a)(2).

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5. *Princeton Bank v. Berley*, 57 A.D. 2d 348, 354 (2d Dep't 1977) ("The statute and its gloss do not require a procrustean dovetailing of detail.")
6. CPLR 3218(a)(3).
7. CPLR 3218(b). The three-year "shelf-life" of affidavits of confession of judgment is sometimes overlooked by practitioners and is important to bear in mind.
8. CPLR 3218(b).
9. *Id.*
10. *Girylyuk v. Girylyuk*, 30 A.D.2d 22, 23 (1st Dep't 1968).
11. CPLR 2101(e) (emphasis added).
12. CPLR 2102(c).
13. 25 Misc. 3d 802 (Sup. Ct., N.Y. Co. 2009).
14. It should be noted that the Clerk's office did not submit any papers in opposition to the Petition. *See id.* at 803.
15. *Id.* at 804.
16. *Id.*
17. *Id.* (citing Alexander, Supp. Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2102, 2009 Pocket Part, at 283).
18. *See id.*
19. As discussed in Part IV below, a recent Supreme Court decision suggests that even making this determination is beyond the Clerk's power when presented with a judgment by confession pursuant to CPLR 3218.
20. N.Y. General Obligations Law § 5-501(1), (2) (GOL).
21. N.Y. Banking Law § 14-a.
22. *See* GOL § 5-501(6)(a).
23. *See* N.Y. Penal Law §§ 190.40, 190.42.
24. *See* GOL § 5-501(6)(b).
25. *See Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 594 n.5 (1981).
26. *See Shifer v. Kelmendi*, 204 A.D.2d 300, 301 (2d Dep't 1994) ("the net advance is to be calculated by deducting the initial discount, but not the pre-paid interest, from the loan amount") (citing *Hammelburger*, 54 N.Y.2d at 594 n.5).
27. *See Band Realty Co. v. N. Brewster, Inc.*, 37 N.Y.2d 460, 462 (1975) (holding that "the courts should not substitute the so-called "present value" method of computing interest, although arithmetically more precise, for the traditional method of computation in determining whether interest is usurious").
28. *See Broad & Wall Corp. v. O'Connor*, 13 A.D.2d 462, 462 (1st Dep't 1961).
29. *See Pro Player Funding LLC v. Goodman*, Index No. 111408/11, NYLJ 1202536337212, at *4 (Sup. Ct., N.Y. Co., Dec. 9, 2011) ("In the event that . . . the non-party debtors contest the terms of the judgments, each may file a plenary action to vacate").
30. *See id.* at *5 ("However, to conduct such analysis going beyond CPLR §3218 . . . is outside the scope of the clerk's duties . . . Moreover, if respondent were permitted to conduct the legal analysis required to determine that the interest rate charged may violate the usury laws, there would be nothing prohibiting respondent from making the final legal determination of whether the interest rates did actually violate the usury laws").
31. *See Solomon v Langer*, Index No. 113701/07, 2008 N.Y. Slip Op. 31651U, at *4 (Sup. Ct., N.Y. Co. June 11, 2008), *aff'd*, 66 A.D.3d 508 (1st Dep't 2009) (internal citations omitted); *see also Hicki v. Choice Capital Corp.*, 264 A.D.2d 710, 711 (2d Dep't 1999) ("It is well settled that the defense of usury does not apply where . . . the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity.") (internal quotations and citations omitted; emphasis added); *Fla. Land Holding Corp. v. Burke*, 135 Misc. 341 (Sup. Ct., N.Y. Co. 1929) ("[W]hen an excessive rate of interest is made payable only in the event of default in payment of the principal on its due date, there is no usury because the debtor may relieve himself of all liability by paying the principal and interest theretofore due.") (citing *Diehl v. Becker*, 227 N.Y. 318, 324 (1919)).
32. CPLR 5004 ("Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.")
33. *See Marine Mgmt., Inc. v. Seco Mgmt., Inc.*, 176 A.D.2d 252, 254 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886 (1992).
34. *Id.* at 254 (" . . . in the absence of a clear, unambiguous, and unequivocal expression that [the borrower] agreed to pay the highest interest rate allowed by law, namely, 25%, until the judgment was satisfied, we decline to depart from precedent establishing the statutory rate of interest of 9% as the proper rate to be applied to the judgment.")
35. *Banque Nationale De Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154, 155 (1st Dep't 1998) ("Since the loan documents do not constitute a clear, unambiguous and unequivocal expression that defendant agreed to pay the default rate until the judgment was satisfied, and the judgment of foreclosure provided only that the default rate was to be applied from default and going forward from the date of computation of the amount owed without specifying that such rate was to survive entry of the judgment, no reason exists to depart from the rule that the statutory rate applies once a judgment is entered.")
36. *See Pro Player Funding LLC*, Index No. 111408/11, NYLJ 1202536337212, at *4.
37. *Gen. Elec. Tech. Servs. Co. v. Perez*, 156 A.D.2d 781, 784 (3d Dep't 1989).
38. *See Pro Player Funding LLC*, Index No. 111408/11, NYLJ 1202536337212, at *3.
39. *Id.* at *4.
40. *Id.*
41. *Id.*
42. CPLR 7804(c).
43. CPLR 311(4).
44. *See, e.g., Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983).
45. *See generally* CPLR 308, 310, 311, 311-A (outlining the methods of personal service upon a natural person, partnership, corporation and limited liability corporation).
46. *See, e.g., Pro Player Funding LLC v. Allen*, Index No. 101348/2011 (Sup. Ct., N.Y. Co. Feb. 28, 2011) (Tingling, J.) (short-form order).
47. This is because another state may refuse to give a sister state judgment full faith and credit. *See Kwatra v. Mehta*, Index No. 107486/09, 2009 NY Slip Op. 31992(U) at *2 (Sup. Ct., N.Y. Co. Aug. 31, 2009) ("No other state can vacate this State's judgments. At most, they can only refuse to give it full faith and credit in their own state."). Notwithstanding the Full Faith and Credit Clause of the United States Constitution, U.S. Const., Art. IV, §1, sister state judgments are subject to collateral attack based on lack of personal or subject matter jurisdiction. *See Nat'l Exch. Bank v. Wiley*, 195 U.S. 257, 269-70 (1904); *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U.S. 287, 294 (1890); *see also Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 580 (1991) ("Cognovit judgments entered in other jurisdictions cannot automatically be denied full faith and credit; rather, enforceability must depend on the facts of each case. More particularly, it must be determined that the judgment debtor made a voluntary, knowing and intelligent waiver of the right to notice and an opportunity to be heard.")
48. *Tara Enters., Inc. v. Daribar Mgmt. Corp.*, 369 N.J. Super. 45, 56 (App. Div. 2004) ("Entry of judgment by confession has long been viewed with judicial distaste. Such judgments have been described as the loosest way of binding a man's property that was devised in any civilized country.") (internal citations and quotations omitted).
49. *See, e.g., Gene's Gulf v. Walnut Equip. Leasing Co.*, 391 So. 2d 753, 754 (Fla. Dist. Ct. App. 5th Dist. 1980) ("In Florida, confession of judgment provisions are invalid, although contracts are not necessarily invalid in their entirety because of the inclusion of such provision where the clause is severable.") (citing, *inter alia*, Fla. Stat. § 55.05); KRS § 372.140 (2011) ("Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and any release of errors, given before an action is instituted, is void.")
50. *See, e.g., Wright v. Robinson*, 468 So. 2d 94, 97 (Ala. 1985) ("It is well settled that, in Alabama, agreements to confess judgment are void as against public policy.") (citing Section 8-9-11, Alabama Code (1975)).
51. *See, e.g., Burns Ind. Code Ann. § 24-4.5-3-407* ("A debtor may not authorize any person to confess judgment on a claim arising out of a consumer loan. An authorization in violation of this section is void.")
52. For example, "[i]n New Jersey, sister state judgments by confession are entitled to full faith and credit." *In Sik Choi v. Hyung Soo Kim*, 50 F.3d 244, 248 (3d Cir. 1995) (citing, *inter alia*, *United Pac. Ins. Co. v. Estate of Lamanna*, 436 A.2d 965, 968-74 (N.J. Super. Ct. Law Div. 1981)).