

First Amer. Inv. Co., LLC v Dominguez
2012 NY Slip Op 30754(U)
March 22, 2012
Sup Ct, New York County
Docket Number: 116326/2007
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 116326/2007

FIRST AMERICAN INVESTMENT CO.,

VS.

DOMINQUEZ, NESTOR

SEQUENCE NUMBER : 001

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

Motion to/for _____

No(s). _____

No(s). _____

No(s). _____

Upon the foregoing papers, It is ordered that this motion is

motion and cross-motion are decided in accordance
with accompanying memorandum decision.

FILED
MAR 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/22/12

Saliann Scarpulla
J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
FIRST AMERICAN INVESTMENT COMPANY, LLC,
AN ASSIGNEE OF CITIBANK

Plaintiff,

Index No.: 116326/2007
Submission Date: 10/05/11

- against-

NESTOR DOMINGUEZ,

DECISION AND ORDER

Defendant.

-----X
For Plaintiff:
Lacy Katzen LLP
P.O. Box 22878
130 East Main Street
Rochester, New York 14692

For Defendant:
The Langel Firm
225 Broadway, Suite 700
New York, NY 10007

Papers considered in review of this motion to strike defendant's answer and cross-motion to amend answer and dismiss:

Notice of Motion 1
Aff in Support 2
Notice of Cross-Motion 3
Aff in Support and Opp 4
Aff in Opp 5
Reply Aff 6

HON. SALIANN SCARPULLA, J.:

In an action to recover an unpaid credit card debt, plaintiff First American Investment Company, LLC ("First American") moves to strike defendant Nestor Dominguez's ("Dominguez") answer pursuant to CPLR 3126(3). Dominguez cross-moves for leave to amend the answer and to dismiss the complaint for lack of standing.

First American commenced this action against Dominguez, by service of a summons and complaint, on or around December 24, 2007, alleging that Dominguez owed a \$31,578.42 balance, plus interest, on a Citibank credit card, account number 5410658449227006. Dominguez, proceeding *pro se* at the time, responded to the complaint in a letter dated January 2, 2008, addressed to First American's attorneys. First American is treating this as Dominguez's answer.

Almost two years later, on or around October 14, 2010, First American served Dominguez with a Notice to Admit and First Set of Interrogatories. First American received no response to these discovery demands, nor to subsequent follow-up letters requesting responses.

First American now moves to strike Dominguez's "answer" as a result of his failure to comply with discovery demands, and to enter judgment in the amount of \$31,578.42 with interest from June 28, 2007. First American asserts that Dominguez's failure to respond to discovery demands is willful, and as such striking the answer is the appropriate remedy.

In opposition, Dominguez, now represented by counsel, opposes the motion to strike and cross-moves to amend the answer to assert the defense of lack of standing and to dismiss the complaint on that ground. Dominguez argues that the complaint should be dismissed because First American cannot prove standing as an assignee of Dominguez's credit card debt, and that lack of standing requires dismissal of the action. In addition,

Dominguez argues that even if First American could establish standing, striking the answer is not appropriate, and Dominguez should be given the opportunity to amend his answer and defend himself in this action.

In opposition to the cross-motion and in further support of its motion, First American argues that the motion to strike Dominguez's answer should be granted because Dominguez failed to respond to discovery requests willfully and in bad faith without justification or excuse for his failure. First Amendment further argues that leave to amend should not be granted because it is "being requested for the sole purpose of circumventing plaintiff's motion to strike." Lastly, First American argues that it does have standing as the assignee of the account, and that it has submitted sufficient documentary proof.

Discussion

In New York, the courts have a strong policy of resolving matters in litigation on the merits. Thus, a default which is not intentional may be excused when there is a reasonable excuse for the default and a meritorious defense to the action. Here, Dominguez has established both a reasonable excuse for his default and a meritorious defense.

First, Dominguez avers that, while he was representing himself, he relied upon the poor advice of a friend. This friend represented to Dominguez that he was experienced in debt settlement. Dominguez relied upon this friend's advice in responding to the complaint and discovery demands made by First American. Thus, while Dominguez's

friend's advice may have been less than exemplary, it is clear that Dominguez never intended to default in this action. In addition, and as stated more fully below, Dominguez has a meritorious defense to this action.

To collect a debt which has been assigned, the assignee has the burden to prove that it possesses legal standing to bring its lawsuit. *See generally V.W. Credit, Inc. v. Alexandrescu*, 13 Misc. 3d 1207A (Civ. Ct. Queens Co. 2006); *Citibank (S.D.), N.A. v. Martin*, 11 Misc. 3d 219 (Civ. Ct. N.Y. Co. 2005). Here, in an attempt to meet this burden, First American submits, annexed to its attorney affirmation: (1) a signature page of a Bill of Sale, Assignment and Assumption Agreement, dated May 6, 2006 between Citibank (South Dakota), N.A. and New Century Financial Services, Inc. ("New Century"); (2) a signature page of a Bill of Sale, Assignment and Assumption Agreement, dated June 12, 2006, between New Century and First American Receivables Company, LLC ("FARC"); (3) the Bill of Sale by FARC to First American, dated June 25, 2005, signed only by FARC; and (4) an untitled, undated document which is identified in First American's attorney affirmation as "[a] copy of an extract from a schedule of accounts transferred by and pursuant to the two assignments and the FARC-[First American] bill of sale." None of the documents submitted by First American's attorney are authenticated by a person capable of doing so.

Each of the bills of sale refer to annexed agreements which purportedly describe the accounts assigned. However, First American fails to provide those agreements, or any

other documentation to support its assertion that Dominguez's account was, in fact, assigned from Citibank to New Century, from New Century to FARC and from FARC to First American. "For plaintiff to establish standing it must provide a complete chain of assignments from the original creditor to itself." *Rab Performance Recoveries, LLC v. Scorsonelli*, 2009 N.Y. Misc. LEXIS 2512, 242 N.Y.L.J. 16 (Rich. Co. Sup. Ct. 2009).

Therefore, because First American fails to meet its burden of proving that it possesses legal standing to bring this lawsuit, Dominguez's cross-motion to amend the answer to include the defense of lack of standing, and to dismiss the complaint on that ground is granted. *Citibank (S.D.), N.A. v. Martin*, 11 Misc. 3d 219 (Civ. Ct. N.Y. Co. 2005).

In accordance with the foregoing, it is

ORDERED that plaintiff First American Investment Company, LLC's motion to strike the answer is denied; and it is further

ORDERED that defendant Nestor Dominguez's cross-motion for leave to amend his answer is granted; and it is further

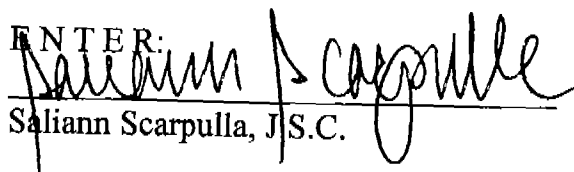
[* 7]

ORDERED that defendant Nestor Dominguez's cross-motion to dismiss the complaint is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 22 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

ED

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NEW YORK
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