

TD Bank, N.A. v Excelsior Syndication of N.Y. LLC
2016 NY Slip Op 30554(U)
March 28, 2016
Supreme Court, New York County
Docket Number: 163126/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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TD BANK, N.A.,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 163126/15

Seq. No.: 001

EXCELSIOR SYNDICATION OF NEW YORK LLC,
and WONWOO CHANG, Individually,

Defendants.
----- X

HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motions:

PAPERS

NUMBERED

NOT. OF MOT. AND AFF. ANNEXED

1-2 (Exs. A-B)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff TD Bank, N.A. moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint in the amount of \$37,854.81, that portion of a judgment entered against defendants Excelsior Syndication of New York LLC and Wonwoo Chang in the Superior Court of New Jersey, Bergen County on April 28, 2010 which remains unsatisfied. Defendants do not oppose the motion. After a review of the papers, and after a review of the relevant statutes and case law, the motion is **denied and the proceeding is dismissed without prejudice.**

FACTUAL AND PROCEDURAL BACKGROUND:

On April 28, 2010, plaintiff TD Bank, N.A. obtained a "final judgment by default" in the amount of \$97,854.81 against defendants Excelsior Syndication of New York LLC ("Excelsior")

and Wonwoo Chang (“Chang”) in the Superior Court of New Jersey, Bergen County. Ex. A to Plaintiff’s Motion.¹ Although “Yang Chen, Individually” was also named as a defendant in the caption of the New Jersey action, the final judgment by default was not entered against that individual. Id.

Pursuant to a May 14, 2010 settlement agreement between plaintiff and defendant Yang Chen only, the judgment was partially satisfied in the amount of \$60,000. This is reflected by plaintiff’s Exhibit B, a partial satisfaction of judgment filed with the Clerk of the Superior Court of New Jersey, Bergen county on December 20, 2012. Ex. B to Plaintiff’s Motion. Thus, the judgment remains unsatisfied against Excelsior and Chang in the amount of \$37,854.81. Plaintiff’s counsel represents that payment of the judgment has been demanded but it has gone unpaid. Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, seeking to recover the unpaid balance of the final judgment by default from Excelsior and Chang.

PLAINTIFF’S CONTENTIONS:

Plaintiff argues that it is entitled to summary judgment in lieu of complaint since \$37,864.81 remains outstanding on the judgment, payment of the judgment was demanded from defendants and it has not been paid, and it is counsel’s belief that there is no defense to the action.

CONCLUSIONS OF LAW:

A party may move for summary judgment in lieu of complaint where an action is based upon a judgment. *See Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). A motion for summary

¹In her affirmation in support of the motion, plaintiff’s counsel does not provide any detail regarding the facts giving rise to the New Jersey action.

judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). A movant's service of a summons and motion pursuant to CPLR 3213 requires a defendant to serve answering papers by the time set forth in the notice of motion, and "the minimum amount of time the plaintiff must give the defendant to appear and oppose the motion is dependent upon the date and method of service" which is calculated pursuant to CPLR 320. *Goldman v Saltzman*, 13 Misc3d 1023, 1025 (Sup Ct Nassau County 2006). Under CPLR 320(a), unless service is made in person, a defendant must appear within 30 days after service is complete. Pursuant to CPLR 3213, a plaintiff may schedule a motion hearing date beyond the minimum time and then require that responding papers be served within that extended period, not exceeding 10 days before the return date. However, because service is not complete until ten days after proof of service is filed with the clerk of the court (CPLR 308[2]), "the minimum amount of time between service of the summons and motion papers and the return date is 40 days." *Goldstein v Saltzman*, 13 Misc3d *supra* at 1025, n.1.

Here, plaintiff served the summons and motion on Excelsior via the Secretary of State on January 13, 2016. Chang was served by leaving papers with a person of suitable age and discretion at his actual place of business on January 15, 2016.² Since, as noted above, the minimum amount of time between service of the summons and motion and the return date is 40 days, the motion had to be returnable as to Excelsior no earlier than February 22 and as to Chang no earlier than February 24. *See Goldstein v Saltzman*, 13 Misc3d *supra* at 1025, n.1. Further, since plaintiff requested that answering papers be served one week before the return date, the defendants were entitled to an additional seven days each to respond to the motion. *See Goldstein v Saltzman*, 13 Misc3d *supra* at

²The affidavits of service are not annexed as exhibits to the motion but are efiled.

1026, n.3. However, since plaintiff set the return date as February 19, 2016, defendants were clearly not afforded with appropriate time to respond to the motion.

Where, as here, defendants have not been provided with the statutorily required time in which to respond to a motion brought pursuant to CPLR 3213, a court lacks the jurisdiction to hear the motion and it must be denied without prejudice and the action must be dismissed. *See Goldstein v Saltzman*, 13 Misc3d *supra* at 1027, citing *National Bank of Canada v Skydell*, 181 AD2d 645 (1st Dept 1992).

In addition to denial of the motion for the foregoing reasons, there are other issues which must be addressed by plaintiff if it seeks to re-file this motion. First, the supporting papers annexed to plaintiff's motion do not "contain proof of the essentials of the plaintiff's cause of action." *Mercantile Bank of Chicago v Wismer*, 48 Misc2d 275 (1st Dept 1965). Specifically, although plaintiff seeks to recover an allegedly unpaid judgment, it does not state how the debt arose. Additionally, although plaintiff claims that it demanded that defendants pay the judgment (Plaintiff's Aff. In Supp., at par. 6), it annexes no proof of any such demand to its papers.

Also unexplained is the alteration of the caption. The caption of plaintiff's action in New Jersey Superior Court was *TD Bank, N.A. v Excelsior Syndication of New York LLC and Wonwoo Chang and Yang Chen, Individually*. Exs. A and B to Plaintiff's Motion. However, the caption of this action is *TD Bank, N.A. v Excelsior Syndication of New York LLC, and Wonwoo Chang, Individually*. Plaintiff provides no explanation why the caption has been changed to name Chang, instead of Chen, individually, and the court file does not indicate that a motion has been made to amend the caption in this manner.

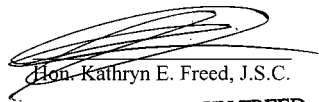
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff TD Bank, N.A. for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied, and the action is dismissed without prejudice; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: March 28, 2016

ENTER:

A handwritten signature in black ink, appearing to read "Kathryn E. Freed", is written over a horizontal line.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT