

FIA Card Servs., N.A. v Tivy

2016 NY Slip Op 31015(U)

May 25, 2016

Supreme Court, New York County

Docket Number: 102443/12

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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FIA CARD SERVICES, N.A.,

Plaintiff,

- against -

DECISION AND ORDER

Index No.: 102443/12

Mot. Seq. No. 001

MATTHEW J. TIVY,

Defendant.

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFS. IN SUPPORT	1-2 (Exs. A-G)

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

In this action to recover for breach of contract and for an account stated, plaintiff FIA Credit Card Services, N.A. moves, pursuant to CPLR 3215(a), for a default judgment against defendant Matthew J. Tivy based on his failure to answer or otherwise appear in this action. After a review of the motion papers, which are unopposed, as well as a review of the relevant statutes and case law, **the motion is denied and the complaint is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the captioned action against defendant on or about January 24, 2013. Ex. A. As a first cause of action, plaintiff alleged that defendant breached its agreement to make payments pursuant to a credit card it issued to defendant and that plaintiff was thus owed \$29,435.55

plus interest at the rate of “00% per annum” from December 26, 2012. Ex. A. As a second cause of action, plaintiff alleged that, by accepting plaintiff’s statements without objection, an account was stated between the parties and that plaintiff thus owed the amount damages claimed in the first cause of action. Id.

On February 16, 2013, plaintiff served the summons and complaint on “John Doe”, a relative of defendant and a person of suitable age and discretion, at defendant’s usual place of abode, in accordance with CPLR 308(2). Ex. B. A follow up mailing was sent to defendant on February 22, 2013. Ex. B.

When defendant failed to join issue, plaintiff did not move for a default judgment. Rather, it sought to enter a default judgment with the Clerk of the Court on April 15, 2013. Ex. C. On June 11, 2013, the Clerk rejected the proposed judgment for several reasons, including, inter alia, that:

1. The affidavit of service was missing the true name of “John Doe”, relative of defendant, who was served with process;
2. The complaint and affidavit of facts did not a) provide sufficient facts of the causes of action alleged in the complaint; b) explain how plaintiff calculated that defendant owed \$29,435.55; c) provide the dates the statements of account were sent to defendant, the amounts of the statements, and proof that defendant retained the statements without objection; and d) failed to explain why plaintiff was seeking interest from December 26, 2012 and;
3. The credit card agreement and statements of account were not efiled.

Ex. C.

Plaintiff now moves, for the first time, pursuant to CPLR 3215(a), for a default judgment against defendant. In support of the motion, plaintiff submits an attorney affirmation; the affidavit of Beth Ammons, an officer of Bank of America, N.A. (BANA), which merged with plaintiff in 2014 (Ex. D), attesting to the charges owed by defendant and annexing a copy of the last monthly

billing statement for defendant's account; the summons and complaint; the affidavit of service; the Clerk's June 11, 2013 notice of rejection of the proposed judgment; proof of the merger between plaintiff and BANA; a non-military affirmation relating to defendant; and a proposed judgment.

POSITION OF THE PLAINTIFF:

Plaintiff argues that it is entitled to a default judgment against defendant pursuant to CPLR 3215(a) due to defendant's failure to answer the complaint, which was properly served. It further asserts that the Clerk's instruction to identify the "John Doe" who was served at defendant's usual place of abode was unreasonable. Additionally, it maintains that Ammons' affidavit is sufficient to establish its entitlement to a default judgment on its breach of contract cause of action. Plaintiff states that it does not seek a default judgment on its account stated cause of action.

LEGAL CONCLUSIONS:

Plaintiff's motion for a default judgment is denied since it failed to move for such relief within one year of defendant's default in answering the complaint. CPLR 3215 (c) provides that:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall* dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. (*emphasis added*).

[T]he policy behind this statute is “to prevent plaintiffs from unreasonably delaying the termination of an action.” (*Reyes v Dunbar*, 124 Misc2d 958, 959 [1984], quoting Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3215 [last available in 1992]; *see also* Thirteenth Annual Report of NY Judicial Council, 1947, at 215.)

Portfolio Recovery Assocs., LLC v Ploski, 36 Misc3d 186, 189 (Sup Ct Westchester County 2012).

A court properly exercises its discretion in dismissing a complaint where a plaintiff fails to seek a default judgment within one year after defendant’s default in answering the complaint and plaintiff makes no showing of sufficient cause why the complaint should not be dismissed. *See Ewart v Maimonides Med. Ctr.*, 239 AD2d 543, 544 (2d Dept 1997); *Herzbrun v Levine*, 23 AD2d 744 (1st Dept 1965).

As noted above, defendant was served with process on February 16, 2013 (Ex. B). Since defendant’s time to answer expired in March of 2013, plaintiff had until March of 2014 to move for a default judgment. *See* CPLR 3215(c). Thus, plaintiff still had approximately nine months to move for a default after the Clerk rejected its proposed judgment on June 11, 2013. Ex. C. However, plaintiff did not move for such relief until February of 2016, nearly two years after its time to do so had expired. Since plaintiff did not “take proceedings” within one year of defendant’s default, it has the burden of demonstrating why its complaint should not be dismissed. However, no such showing has even been attempted here. Thus, the complaint must be dismissed pursuant to CPLR 3215 (c).

Even assuming that the complaint were not dismissed pursuant to CPLR 3215 (c), the motion would nevertheless be denied on other grounds. CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default

judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, plaintiff has submitted proof of the summons and complaint and proof of service of the same. Exs. A, B. Although the Clerk previously rejected plaintiff’s proposed judgment in part because service was effectuated on “John Doe”, a relative of defendant, plaintiff correctly asserts that such individual did not need to be identified. *See Northern Star LLC v CSG Office Assistants, Inc.*, 2010 NY Slip Op 30578(U) (Sup Ct New York County 2010). However, since Ammons’ affidavit fails to provide sufficient proof of the facts constituting the claim, plaintiff fails to satisfy all of the criteria in 3215(a).

In her affidavit, dated November 30, 2015, Ammons represents that she is an officer of BANA and that she annexes defendant’s last monthly statement, dated 2012, to her affidavit. However, she does not state whether she worked for Fia Credit Card Services, N.A. prior to its merger with BANA in 2014. Ex. D. If she did not, then it is questionable how she would have personal knowledge of defendant’s account or the agreement between plaintiff and defendant.

Although plaintiff alleges a claim for breach of contract, a copy of the credit card agreement allegedly breached is neither annexed to, nor referred to by, Ammons’ affidavit. Additionally, although the Clerk requested on June 11, 2013 that plaintiff provide details regarding how the amount owed by defendant was calculated, and why interest owed by plaintiff was to accrue from December 26, 2013, neither of these subjects were addressed by Ammons. Although, as noted

above, plaintiff states it is not seeking a default judgment on its account stated claim, and thus not submitting all statements on the account, it overlooks that such statements are clearly relevant to the calculation of damages on the breach of contract claim.

Finally, Ammons' affidavit, executed in the State of North Carolina, contains no certificate of conformity. See CPLR 2309(c).

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


ORDERED that plaintiff's motion seeking a default judgment against defendant pursuant to CPLR 3215(a) is denied; and it is further,

ORDERED that the Clerk of the Court shall mark this matter dismissed pursuant to CPLR 3215(c); and it is further,

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

Dated: May 25, 2016

ENTER:


KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT