

Discover Bank v Zika
2016 NY Slip Op 31695(U)
July 26, 2016
Supreme Court, New York County
Docket Number: 160602/14
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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DISCOVER BANK,

Plaintiff,

- against -

DECISION AND ORDER

Index No.: 160602/14

Mot. Seq. No. 001

VALERIE A. ZIKA,

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
NOT. OF MOT. AND AFF. AND MEMO. OF LAW IN SUPPORT	1-3 (Exs. A-D)

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

In this action to recover the unpaid balance on two student loans made to defendant Valerie A. Zika by plaintiff Discover Bank’s predecessor-in-interest, plaintiff moves, pursuant to CPLR 3215, for a default judgment against defendant based on her 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, which is unopposed, is denied, and the complaint is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the captioned action against defendant on or about October 27, 2014. Ex. A. In its complaint, plaintiff alleged that its predecessor-in-interest loaned defendant certain

monies as student loans and that defendant owed plaintiff a balance of \$52,127.73. Ex. A.

On November 11, 2014, a process server served the summons and complaint on defendant personally at 120 West 116th Street, Apt. B, New York, New York, 10026. Ex. B. An additional mailing of the summons and complaint was made to defendant on November 18, 2014. Ex. C.

Defendant failed to join issue, but plaintiff did not file its motion for a default judgment until April 8, 2016. See NYSCEF Doc. No. 5.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendant. In support of the motion, plaintiff submits an attorney affirmation; a memorandum of law; the summons and complaint; the affidavit of service; an affirmation of additional mailing; an affidavit of military investigation; and two purported affidavits of Kacey Bailey, a Litigation Support Specialist for Discover Products Inc., the servicing agent for Discover Bank, with attachments, explaining, inter alia, how plaintiff acquired defendant's debt. Ex. D.

POSITION OF THE PLAINTIFF:

Plaintiff argues that it is entitled to a default judgment against defendant pursuant to CPLR 3215 due to defendant's failure to answer the complaint, which was properly served, and that it is owed a total of \$52,127.73, plus costs and disbursements.

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 personally served with process on November 11, 2014. Ex. B. Since defendant’s 20-day period in which to answer expired on December 1, 2014, plaintiff had until December 1, 2015 to move for a default judgment. *See* CPLR 3215(c). However, plaintiff did not file the instant motion until April 8, 2016, over four months after the expiration of its time in which to do so. 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. However, since Bailey’s purported affidavits are not in proper form, they cannot be considered by this Court. Specifically, they lack a caption, and do not set forth the state and county in which they were executed. Since plaintiff cannot provide sufficient proof of the facts constituting the claim without the purported affidavits or a complaint verified by one with personal knowledge of the facts (*see* CPLR 3215[f]), and the complaint herein is not verified, plaintiff fails to satisfy all of the criteria in 3215(a).

Further, the exhibits included in the motion are annexed to the memorandum of law and not to the attorney affirmation. This, too, is improper. See CPLR 2214 (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 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: July 26, 2016

ENTER:



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