

Bank of Am., N.A. v Coll
2018 NY Slip Op 30549(U)
March 29, 2018
Supreme Court, New York County
Docket Number: 150379/2015
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

BANK OF AMERICA, N.A.,

INDEX NO. 150379/2015

Plaintiff,

MOTION DATE 12/21/17

- v -

MOTION SEQ. NO. 001

STEVEN R COLL,

Defendant.

The following papers, numbered 8-22, were read on this motion for entry of a default judgment.

Notice of Motion-Affirmation in Support-Exhibits A-J-Affs of Service Nos. 8-22

Motion by Plaintiff Bank of America, N.A. ("BANA") pursuant to CPLR 3215 for entry of a default judgment against Defendant Steven R. Coll ("Coll") is denied, with leave to renew.

BANA brought this action to collect on a credit card debt. BANA alleges that Coll "maintained a credit account with [BANA] and agreed to make payments for goods and services charged and/or cash advances made upon such account." (Latona affirmation, exhibit A [Complaint], ¶ 3.) BANA further alleges that "[Coll] failed to make the payments due pursuant to such agreement, and \$40,120.69 is now due and owing to [BANA] from [Coll]." (Complaint ¶ 4.)

BANA commenced this action on January 14, 2015, by e-filing a summons and complaint. The summons has the words "CONSUMER CREDIT TRANSACTION" printed below the caption and states in the top-right corner that "[t]he basis of venue is: DEFENDANT'S RESIDENCE," which appears at the bottom of the summons as "STEVEN R COLL[,] 133 W 17TH ST APT 1A[,] NEW YORK, NY 10011 (the "1A Address"). A licensed process server allegedly served process upon Coll by: (1) on February 17, 2015, leaving a copy of the summons and complaint with "John Doe, CO-OCCUPANT of STEVEN R COLL, a person of suitable age and discretion" at "133 W 17TH ST APT 101, NEW YORK, NY 10011" (the "101 Address"), "[Coll's] "usual place of abode within the state"; and (2) on February 20, 2015, mailing a copy of the summons and

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

complaint to Coll at the 101 Address. (Latona affirmation, exhibit B [Affidavit of Service].)

BANA alleges in an affidavit dated October 8, 2015, that Coll has an account (the “Account”) with BANA ending in 6864. (Aff of Ordonez ¶ 1.) BANA further alleges that Coll’s Account number ended in 3642 “[p]rior to charge-off.” (*Id.* ¶ 3.) BANA further alleges that it is the “successor-in-interest” to FIA Card Services, N.A. pursuant to a merger effective October 1, 2014. (*Id.* ¶ 2.) BANA further alleges that BANA and Coll entered into a credit agreement (the “Agreement”) and that Coll agreed to pay BANA for all goods, services, and cash advances provided pursuant to the Agreement. (*Id.* ¶ 4.) BANA further alleges that the last payment Coll made on the Account was on or about June 30, 2014, in the amount of \$1,069.00, and that Coll is now in default. (*Id.*)

BANA attaches as an exhibit to its affidavit a purported Bank of America “BankAmericard” account statement (the “Statement”), which BANA alleges is “[a] true and accurate copy of the last monthly billing statement for the Account generated prior to charge-off.” (*Id.* at ¶ 4, 3–5.) The name printed at the top of the statement is “STEVEN R COLL.” The Account number, which is redacted, ends in “3642.” The Statement date is “June 20–July 21, 2014.” The Statement lists a “New Balance Total” of \$40,120.69, a “Current Payment Due” of \$1,105.00, a “Past Due Amount” of \$7,089.00, a “Previous Balance” of \$40,478.67, a June 30, 2014 “PAYMENT FROM CARD 9042” of \$1,069.00, a July 17, 2014 “Late Fee” of \$35.00, an “Interest Charge[]” of \$676.02, and a “Total Minimum Payment Due” of \$8,194.00 with a “Payment Due Date” of August 17, 2014. The 1A Address is printed on the bottom-left corner of the first page of the Statement.

As Coll has not answered or appeared in this action, BANA now moves for entry of a default judgment against him. BANA alleges that the instant motion was served on Coll by mail on November 30, 2017, at the 101 Address. BANA argues in its motion papers that it submitted a proposed default judgment on October 22, 2015, within one year of Coll’s alleged default. BANA further alleges that the county clerk declined to enter the judgment as of February 16, 2016, because BANA had failed to obtain an RJI and send Coll an additional notice. BANA then alleges that it provided the county clerk with a copy of the additional notice on April 8, 2016. This additional notice was addressed to the 1A Address. The clerk’s office notified BANA that it was rejecting the additional notice on April 15, 2016, “because the apt # for the mailing address does not match the apt # on the affidavit of service.” (Latona affirmation, exhibit F.) BANA alleges that it then provided the

county clerk with a copy of the additional notice on April 20, 2016, that was addressed to the 101 Address.

BANA then alleges that it submitted another proposed judgment on November 15, 2016, which the clerk rejected on November 16, 2016. BANA further alleges that the clerk rejected the November 15, 2016 submission because: (1) the office required an amended affidavit of service providing the name of the person who received the summons and complaint; (2) official documentation was required showing BANA was the successor-in-interest to FIA Card Services, N.A.; and (3) all Account statements from the opening of the account to the present. BANA then alleges that the clerk then stated in the rejection notice that “if you cannot or do not wish to comply with ALL of the above, you will need an order from a Judge directing clerk to enter your judgment.” (Affirmation of Latona ¶ 9.)

BANA argues in its papers that the Affidavit of Service is sufficient because it shows that Coll was validly served with process pursuant to CPLR 308 (2) and because leaving a copy of the summons and complaint with a “John Doe, CO-OCCUPANT” who “REFUSED NAME” “is not a jurisdictional defect” and “should not prevent the entry of judgment.” (*Id.* ¶¶ 11–12.)

BANA further argues that its affidavit of merit, from Ms. Ordonez, allegedly a BANA officer, “attests to exactly what is required by CPLR 3215 (f) in stating the account, the default and the amount due.” (*Id.* ¶ 14.) BANA then argues that Coll will not be prejudiced by entry of a judgment now. BANA further argues that any delay in the entry of judgment beyond one year from its commencing this action was due to the judgment being rejected by the clerk. BANA further argues that it has not abandoned this matter and has a meritorious cause of action.

DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*,

48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Ave. I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

In the first instance, BANA has failed to show prima facie that process was served upon Coll. The process server's affidavit indicates that process was served upon Coll at the 101 Address, yet the Complaint and the Statement indicate that the Account is associated with the 1A Address. Further, the clerk's office put BANA on notice of this discrepancy in its April 15, 2016 notice indicating that the apartment number on the April 8, 2016 letter allegedly accompanying an additional mailing did not match the Affidavit of Service, i.e., that it listed the 1A Address, not the 101 Address.

This Court cannot presume on the documents provided in the instant motion that the 1A Address is the same as the 101 Address. Further, this Court cannot presume that an "occupant" of the 1A Address was Coll's "co-occupant" and therefore a person of suitable age and discretion with whom the summons and complaint could validly be left to effectuate service of process upon Coll. (*See Caesar v Harlem USA Stores, Inc.*, 150 AD3d 524 [1st Dept 2017]; *Bank of New York v Willis*, 150 AD3d 652, 654 [2d Dept 2017].) It is Plaintiff's burden to explain why the Complaint, Statement, and April 8, 2016 letter of additional mailing refer to the 1A Address while the Affidavit of Service of process, affidavit of service of the instant motion, and the April 20, 2016 letter of additional mailing refer to the 101 Address. Plaintiff has offered no such explanation. As such, BANA has not shown prima facie for the purposes of the instant motion that Coll was served with the summons and complaint.

Assuming for the sake of argument that BANA did show prima facie that process was served upon Coll, the Court notes that pursuant to CPLR 3215 (c) BANA did take proceedings for entry of a default judgment within one year of what would have been Coll's default. BANA has shown for the purposes of the instant motion that it sought a default judgment directly from the clerk for a sum certain on or about October 22, 2015. Further, these proceedings and BANA's follow up thereon "manifest an intent not to abandon the case but to seek a judgment." (*Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 257 [1st Dept 1999]; *see also US Bank Nat. Ass'n v Brown*, 147 AD3d 428, 428 [1st Dept 2017].)

As BANA fails to show that Coll was served with process, the Court need not reach the adequacy of BANA's proof of the facts constituting its claim.

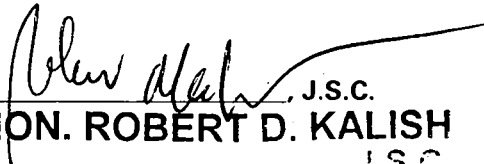
CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Bank of America, N.A. pursuant to CPLR 3215 for entry of a default judgment against Defendant Steven R. Coll is denied, with leave to renew.

The foregoing constitutes the decision and order of the Court.

Dated: March 29, 2018
New York, New York


J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE