

<b>Bank of Am., N.A. v Hamilton</b>
2018 NY Slip Op 30700(U)
April 19, 2018
Supreme Court, New York County
Docket Number: 155773/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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BANK OF AMERICA, N.A.,

INDEX NO. 155773/2015

Plaintiff,

- v -

JEFFREY HAMILTON,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered that **the motion is granted without opposition.**

Plaintiff, Bank of America moves, pursuant to CPLR 3215, for an order permitting entry of judgment more than one year after defendant Jeffrey Hamilton's default for failure to pay for all goods, services and cash advances provided under a credit agreement, account number ending in 4975, in the amount of \$30,352.13 together with costs and disbursements.

Plaintiff commenced this action by filing the summons and complaint on June 9, 2015. Doc. No. 1.<sup>1</sup> Service was made on defendant on June 18, 2015 by substituted service and completed with a mailing on June 24, 2015. The affidavit of service also indicates an additional mailing pursuant to CPLR 3215. Doc. No. 2.

<sup>1</sup> All references are to the documents filed with NYSCEF in connection with this matter

Plaintiff, by its attorney, Joseph Latona, an associate of the firm of Rubin & Rothman, LLC, avers that, after defendant's time to answer or otherwise appear in this action expired, plaintiff submitted a proposed default judgment to the County Clerk's Office, on or about January 13, 2016, well within the one-year period in which to move for a default. Latona Aff, par. 5. Doc. No. 10.

Latona avers that the proposed judgment was returned by the County Clerk (Doc. No. 14) because an additional notice had not been sent, certain documents were unsigned, and the proposed judgment was not double spaced. According to Latona, the one year in which to seek the default expired by the time he learned the proposed judgment was rejected by the Clerk. Latona Aff. Par. 6.

Latona asserts that plaintiff is not seeking pre-judgment interest and that, therefore, defendant will not be prejudiced by granting the within motion, since the amount sought is the same as it would have been had the original motion been granted. Counsel also argues that plaintiff had clearly not abandoned this action and, further, through its annexed affidavit of merit (Doc. No. 16), shows that it has a meritorious cause of action. Latona pars. 8, 9 and 10.

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, the affidavit of service reflects that defendant was served with the summons and complaint on June 18, 2015 by delivering said papers to a person of suitable age and discretion at

defendant's usual place of abode and additionally a copy of same was mailed first class to defendant at the same address on June 24, 2015. The affirmation of plaintiff's counsel submitted in support of the motion establishes that defendant failed to appear or otherwise answer in this matter. Further, plaintiff submits an affidavit of merit from Beth Ammons, an officer of plaintiff, who avers she has personal knowledge of, and access to, plaintiff's books and business records, including electronic records relating to defendant's account. Appended to the affidavit of merit are copies of transactions made by defendant to the subject account, which set forth amounts of outstanding balances and amounts past due. Doc. No. 16.

Plaintiff has therefore established the facts constituting the claim. Plaintiff also submits proof of the additional mailing pursuant to CPLR 3215(g) and an affidavit of mailing of the within motion and supporting papers. Docs. No. 2,12 and 17. Additionally, plaintiff submits proof that defendant is not in the military. Doc. No. 6.

This Court notes that, even though this motion for default is made well beyond the one year period following service of the summons and complaint on defendant, it is still deemed timely in that the original application for a default judgment was made within the mandated one year period pursuant to CPLR 3215. In *US Bank N.A. v Brown*, 147 AD3d 428 (1<sup>st</sup> Dept 2017), the Appellate Division, First Department held that, within the one year period, "the party [seeking the default judgment] needs only to initiate proceedings, 'and these proceedings manifest an intent not to abandon the case' (*Brown v Rosendale Nurseries*, 259 AD2 256, 257 [1<sup>st</sup> Dept 1999], quoting 7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3215.14)." The Appellate Division further stated that "[p]laintiff clearly and unequivocally indicated that it intended to continue the prosecution of th[e] case at the time it [initially sought to enter a default judgment]" and that "[s]uch a timely application 'even if unsuccessful' will not result in the dismissal of the complaint 'as abandoned

pursuant to CPLR 32159(c)' (*Deutsche Bank Nat'l Trust Co. v Pascarella*, 39 Misc.3d 1227[A] [Sup Ct Suffolk Co 2013]; *see also U.S. Bank N.A. v Poku*, 118 AD3d 980, 981 [2d Dept 2014]).

The Court additionally notes that defendant will not be prejudiced by the delay in that plaintiff is not seeking pre-judgment interest.

Thus, plaintiff is entitled to a judgment against defendant in the amount of \$30,352.13, plus costs and disbursements.

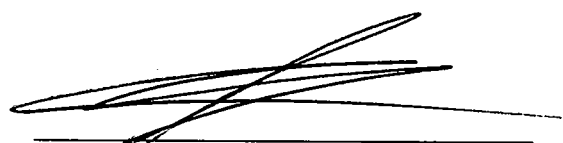
Therefore, in light of the foregoing, it is hereby:

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Bank of America, N. A. against defendant Jeffrey Hamilton, in the amount of \$30,352.13, plus costs and disbursements as taxed by the Clerk of the Court; and it is further,

ORDERED that plaintiff, within 20 days of the posting of this order to NYSCEF, shall serve a copy of the same, with notice of entry, on defendant; and it is further

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

4/19/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: