

**TD Bank, N.A. v Brian D. Primes, Esq., PLLC**

2024 NY Slip Op 32674(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 656325/2022

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. NICHOLAS W. MOYNE **PART** **41M**

*Justice*

-----X

TD BANK, N.A.,

Plaintiff,

- v -

BRIAN D. PRIMES ESQ., PLLC, BRIAN D. PRIMES,

Defendant.

-----X

**INDEX NO.** 656325/2022

**MOTION DATE** 06/13/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is

Plaintiff, TD Bank, N.A. (“plaintiff”), commenced the underlying action on May 17, 2022, to recover for loan payments allegedly due based on a promissory note and a commercial guarantee executed by defendants, Brian D. Primes Esq., PLLC and Brian D. Primes (collectively “defendants”), in 2010 and asserting claims of breach of contract and account stated. Defendants allegedly made partial payments on this account, then ceased, leaving an outstanding balance due and owing of \$43,347.41, plus interest in the amount of \$7,205.31, with \$2,008.65 in late fees, and with \$1,500.00 in miscellaneous fees, for a total amount due and owing of \$54,061.37, plus interest at a rate of 5.50% which began accruing from the date of December 12, 2016. However, plaintiff did not default defendants and accelerate their debt, until plaintiff commenced a prior action in this court, on April 4, 2018 and under Index No. 651596/2018, to recover based on the note (*see* NYSCEF Doc. No. 2). The court dismissed the prior action, in accordance with CPLR § 3215 (c), because plaintiff did not timely move for a default judgment and did not adequately excuse the delay (*Id.*).

Subsequently, plaintiff commenced this action under a new Index Number. In Motion Sequence 001, Prime, individually, moved to dismiss the action against him, pursuant to CPLR §§ 213(4) and 3211(a)(5), on the grounds that the applicable statute of limitations barred the claims against him. In the Decision and Order, issued by the Hon. Lucy Billings and dated September 6, 2022, the court denied the motion to dismiss the complaint as against Prime; finding that as plaintiff had not accelerated defendants' debt until the commencement of the prior action in 2018, this action, commenced May 17, 2022, was thus timely under CPLR § 213 (4) (NYSCEF Doc. No. 24).

In Motion Sequence 002, plaintiff now moves for an order, pursuant to 22 NYCRR 202.27(a), directing entry of a default judgment against defendants for the amount of \$54,061.37, plus 5.50% interest from the date of December 12, 2016, attorneys' fees, and costs.

On June 1, 2022, and June 3, 2022, plaintiff, in accordance with the method of service proscribed by Limited Liability Company Law § 303 and CPLR § 308 properly served the defendants with the summons and complaint for this action (NYSCEF Doc. No. 6, 15). An additional mailing of the Summons and Complaint was subsequently sent on June 9, 2022, and July 6, 2022 (NYSCEF Doc. No. 35). To date, corporate defendant Brian D. Primes Esq., PLLC has not filed an answer or otherwise appeared in this action through counsel and is therefore in default. While defendant Brian D. Primes, individually, has appeared and did file an answer, he has failed to appear at two duly scheduled pre-trial conferences (*see* 22 NYCRR § 202.27[a]).

As set forth by 22 NYCRR § 202.27(a), if plaintiff appears at any call of a calendar or at any conference but defendant does not, the judge may grant judgment by default. Where an action is dismissed pursuant to this statute, the truant party receives no warning other than notice to appear at the conference (*see Campos v N.Y. City Health & Hosps. Corp.*, 307 AD2d 785, 786

[1st Dept 2003]). Further, in the absence of a reasonable excuse for defendant's failure to appear, the court need not determine if the defendant has a potentially meritorious defense (*see Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]). While plaintiff has not provided proof that defendant Primes failed to appear at the two scheduled pre-trial conferences aside from an attorney affirmation, the conference dates were electronically filed on NYSCEF and Primes' previous participation in the action through use of e-filing and/or e-courts (NYSCEF) was recorded (*see New York Dangerous LLC v Librot*, 200 AD3d 467 [1st Dept 2021]; see also *Stewart v Petrolite Inc.*, 210 AD3d 546, 546 [1st Dept 2022]). Based on the proper and timely mailing of the motion in compliance with 22 NYCRR § 202.27(a), plaintiff's subsequent activity, and defendant Prime's failure to reply or proffer a reasonable excuse, the motion for entry of a default judgment based on the defendants' non-appearance is granted.

Accordingly, it is hereby

ORDERED that the motion by plaintiff TD Bank, N.A. is GRANTED; and it is further

ORDERED that plaintiff TD Bank, N.A., with counsel's address at Relin, Goldstein & Crane, LLP, 28 East Main Street, Suite 1800, Rochester, NY 14614, is granted a judgment against defendants, Brian D. Primes Esq., PLLC and Brian D. Primes, having an address at 228 Park Avenue South, #55-163, New York, NY 10003, or with an address at 101 Burns Place, Briarcliff Manor, NY 10510, in the amount of \$54,061.37, the amount owed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant, in the amount of \$54,061.37, plus interest at the rate of 5.50 % from the date of December 12, 2016, to the date of this order, as calculated by the Clerk in the amount of \$ \_\_\_\_\_, together with costs and disbursements in the amount of \$ \_\_\_\_\_, as

taxed by the Clerk upon the submission of an appropriate bill of costs, for the total judgment amount of \$ \_\_\_\_\_, and that the plaintiff have execution thereof.

This constitutes the decision and order of the court.

7/12/2024

DATE

NICHOLAS W. MOYNE, J.S.C.

DATE

CLERK

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE