

Barclays Bank Del. v Espinoza
2017 NY Slip Op 30915(U)
May 5, 2017
Civil Court of the City of New York, Bronx County
Docket Number: CV-013133-15/BX
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 34-C

BARCLAYS BANK DELAWARE X

Plaintiff,

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index No.: CV-013133-15/BX

DENNIS M ESPINOZA
Defendant
_____ X

BACKGROUND

This action was commenced by **BARCLAYS BANK DELAWARE** (Plaintiff) against **DENNIS M. ESPINOZA** (Defendant) seeking \$1768.17, based on the allegation that Defendant entered into a credit card agreement with Plaintiff and failed to pay amounts due under said account.

The summons and complaint were filed on September 25, 2015.

On October 30, 2015, Defendant appeared *pro se* and filed an answer asserting defenses including that he disputed the amount of the debt and unjust enrichment. The action was originally on the court’s calendar on November 23, 2015, when it was resolved pursuant to a stipulation providing that Defendant would pay \$1350, at the rate of \$50 per month, commencing January 2016.

PENDING MOTION

On May 5, 2017, Plaintiff moved for an order entering judgment against Defendant based on his alleged default in making payments due under the stipulation. Defendant failed to appear and the motion was marked submitted on default.

Plaintiff asserts that Defendant paid \$350.00 towards the stipulated amount and thereafter defaulted. The moving papers do not specify when the payments were made or when the default occurred.

Paragraph 4 of the underlying stipulation of settlement provides for a notice to cure and provides in pertinent part:

Should any payment not be received by the due date ... and the payment not received within 10 days after written notification to defendant ... plaintiff shall have the right to enter judgment, without further notice, for the suit amount, less any payments received, together with costs and disbursements.

Plaintiff annexes its purported notice to cure to the moving papers. For the reasons stated below, the court finds that the notice to cure is defective, and denies the motion, without prejudice to renewal upon service of a Notice of Default, that complies with the CPLR and this order.

CPLR 2101 (c) provides:

Caption. Each paper served or filed shall begin with a caption setting forth the name of the court, the venue, the title of the action, the nature of the paper and the index number of the action if one has been assigned. In a summons, a complaint or a judgment the title shall include the names of all parties, but in all other papers it shall be sufficient to state the name of the first named party on each side with an appropriate indication of any omissions.

The notice of default is a paper served on Defendant pursuant to this action. Plaintiff is therefore required to identify it as such, by including a caption and index number.

This requirement is reinforced in the court rules for the Civil Court of the City of New York, § 208.4 of which provides in pertinent part:

The party causing the first paper to be filed shall obtain an index number and communicate it forthwith to all other parties to the action. Thereafter such number shall appear on the outside cover and first page, to the right of the caption, of every paper tendered for filing in the action. Each such cover and first page also shall contain an indication of the county of venue and a brief description of the nature of the paper. **In addition to complying with the provisions of CPLR 2101**, every paper filed in court shall have annexed thereto appropriate proof of service on all parties where required ... N.Y. Ct. R. 208.4 (McKinney)(Emphasis added).

Clearly, the intent of the statute is that it be clear to a defendant when a paper is served that it is in reference to this lawsuit. This is a reasonable requirement, particularly in consumer credit cases, where many defendants, like the defendant in this case are *pro se* and without the benefit of counsel.

Here, as a condition precedent to plaintiff's right to enter judgment pursuant to the stipulation of settlement, plaintiff was required to serve defendant with a notice of cure. It is essential that the party seeking a default judgment comply with the notice to cure provisions contained in a stipulation of settlement because it provides the defaulting party notice and an opportunity to cure the defects before the aggrieved party can enter judgment for what is typically a higher amount (*see 542 Holding Corp. v. Prince Fashions Inc.*, 46 AD3d 309, 310 [1st Dept 2007] [citations omitted] [“[t]he purpose of a notice to cure is to specifically apprise the [defendant] of claimed defaults in its obligations under the [stipulation of settlement] and of the [default provisions] of the [contract] if the claimed default is not cured within a set period of time”]; *see also Manhattan College v. Akinbola–Lee*, 2008 N.Y. Slip Op 50337(U) [Nassau Dist Ct]; *J.T.M. Group v. Fleischman*, 2001 N.Y. Slip Op 40456(U), 1 [App Term, 9th & 10th Jud Dists]).

CACV of Colorado, LLC v. Atekha, 24 Misc. 3d 1250(A) (Civ. Ct. 2009).

The “notice” annexed to Plaintiff’s moving papers has no caption and does not bear the index number of this action, it is in the form of a letter. It is not clear from the face of the document that it specifically refers to this action, and it fails to meet the CPLR requirements for a paper served on a party.

Based on the foregoing, the motion is denied without prejudice to renewal upon service of a proper notice to cure.

This constitutes the decision and order of the court.

Dated: Bronx, New York
May 5, 2017

Hon. Sabrina B. Kraus, JCC

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