

Cascade Capital, LLC v Valdes
2018 NY Slip Op 33239(U)
December 14, 2018
Civil Court of the City of New York, Bronx County
Docket Number: CV-15066/14
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
 COUNTY OF BRONX: PART 34C

 CASCADE CAPITAL, LLC,
 Plaintiff

HON. SABRINA B. KRAUS

DECISION & ORDER

-against-

Index No.: CV-15066/14

MELISSA VALDES
 Defendant
 _____ X

BACKGROUND

Plaintiff commenced this action against Defendant pursuant to a summons and complaint filed on October 14, 2014, seeking \$2878.08 for sums alleged due from a credit card.

Service is alleged to have been made by personal delivery on November 17, 2014, and proof of service was filed on December 4, 2018.

ALLEGED FACTS

Plaintiff alleges that *prior* to the service of the complaint, a stipulation of settlement was entered between the parties out of court. The stipulation was filed with the court by Plaintiff on November 24, 2014. The stipulation is not signed by Defendant, but signed by Adam Black Esq. as attorney for Defendant.

Defendant never answered or appeared. No notice of appearance was ever filed by Mr. Black on behalf of Defendant.

Plaintiff acknowledges that Defendant made all but \$200 of the payments that were due pursuant to the terms of the out of court stipulation, and asserts the last payment was received in August 2016.

PENDING MOTION

Plaintiff now moves for an order for a default judgment. Plaintiff does not specify either in the notice of motion or the supporting affidavit the dollar amount of the judgment sought but requests a judgment “.. for the amount demanded in the complaint minus credits for payments made ..”.

The stipulation provides for Plaintiff to issue a notice of default and affords Defendant an opportunity to cure prior to Plaintiff’s ability to seek judgment. Plaintiff did not serve Adam Black with the motion papers.

THE NOTICE OF DEFAULT IS DEFECTIVE

Plaintiff annexes its purported notice to cure/ notice of default to the moving papers. For the reasons stated below, the court finds that the notice is defective.

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 goal is particularly important here, where the notice was not served on Defendant’s attorney but only on Defendant herself.

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.

**The Stipulation Was Not Filed with the Court by Defendant
as Required by CPLR § 2104**

CPLR § 2104 provides

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.
With respect to stipulations of settlement and notwithstanding the form of the

stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

(Emphasis added). The provisions of the CPLR are applicable in Civil Court (NYCCCA § 2102). The above highlighted sentence of CPLR§ 2104 was enacted pursuant to a 2003 amendment.¹

In this action, the Stipulation was not filed with the court by the Defendant, and therefore does not comply with CPLR § 2104. The Court of Appeals has held that an out of court stipulation that fails to comply with the literal terms of CPLR § 2104 will rarely be enforced [(*Bonnette v Long Is. Coll. Hosp.* 3 NY3d 281, 285-286 (2004))].

As held by the Court of Appeals, literal enforcement of CPLR § 2104 “support(s) our State’s strong policy promoting settlement ... (*Bonnette* at 286).” In *Bonnette*, it was undisputed that the parties had reached an oral agreement settling the case, however, the Court of Appeals found the stipulation was not enforceable because it did not comply with CPLR § 2104. The Court held:

If settlements, once entered, are to be enforced with rigor and without a searching examination into their substance, it becomes all the more important that they be clear, final and the product of mutual accord. These concerns obviously lie at the heart of CPLR 2104, a neutral statute enacted to promote certainty in settlements, which benefits all litigants.

¹ “CPLR 2104 was amended in 2003 to provide ‘[w]ith respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.’ At the same time, CPLR 8020 was amended to require the defendant to pay the County Clerk \$35 with the filing. The legislative history of these amendments makes clear that their purpose was to generate revenue (N.Y. C.P.L.R. 2104 (McKinney)(Practice Commentaries, Thomas F Gleason, C2104:5).” However, the additional fee required upon the filing of a stipulation [see CPLR § 8020(d)] is not applicable to Civil Court [NYCCCA § 1911(m)(ii)].

Literal enforcement in this case would have eliminated any confusion as to whether counsel had formally appeared for Defendant in this matter as a notice of appearance would have been required at the time the stipulation was filed.

Based on the failure to comply and the lack of formal appearance, it is not clear whether the stipulation is enforceable. However, the court need not reach this issue, as the motion is denied based on the defective notice to cure/ notice of default and Plaintiff's failure to serve the attorney that executed the stipulation on behalf of Defendant with a copy of the motion.

This constitutes the decision and order of the Court.

Dated: Bronx, New York
December 14, 2018

Sabrina B. Kraus, JCC

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