

<b>1270 Morris LLC v Caballero</b>
2017 NY Slip Op 30207(U)
February 2, 2017
Civil Court of the City of New York, Bronx County
Docket Number: 7428/16
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: PART 35

\_\_\_\_\_ X  
1270 MORRIS LLC ,

Plaintiff,

**HON. SABRINA B. KRAUS**

-against-

DORIS CABALLERO

Defendant,

\_\_\_\_\_ X

**DECISION & ORDER**  
**Index No.: 7428/16**

**BACKGROUND**

Plaintiff commenced this action, by motion for summary judgment in lieu of complaint, to enforce an out of court agreement previously entered between Plaintiff’s counsel and Defendant, pertaining to Plaintiff’s claim for rent arrears from Defendant’s tenancy at 1270 Morris Avenue, Unit 2S, Bronx, New York 10456 (Subject Premises). Defendant has appeared *pro se* and filed opposition papers asserting improper service, failure by Plaintiff to return her security deposit, and failure by Plaintiff to ever provide her with an accounting of how they arrived at the amount claimed due.

On February 2, 2017, the court heard argument and reserved decision.

**ALLEGED FACTS**

Plaintiff alleges that Defendant was the tenant of record pursuant to a residential lease agreement for the Subject Premises for a one year period from May 1, 2011 through April 30, 2012, and that Defendant failed to pay rent due for August 2011 through April 2012 at a rent of \$1500.00 per month.

There is no information in the record as to when Defendant vacated the Subject Premises or under what circumstances she did so, nor is any accounting or statement provided as to what payments were made and received by the parties during her tenancy. The amount alleged due in the moving papers would only total \$12,000.00, there is no explanation as to how the figure of \$13,413.74 was arrived at.

Prior to the commencement of this action, on or about February 10, 2015, counsel for Plaintiff prepared a document labeled “Stipulation”, bearing an caption of a proceeding alleged to be pending in this court. The stipulation provided in pertinent part:

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, that the above-entitled action is hereby settled upon the following terms and conditions:

1. That the Defendant agrees to pay \$7000.00 which is a full and fair settlement of all parties’ claims as follows:

a) \$100.00 per month, by the 15<sup>th</sup> day of each month, commencing March 15<sup>th</sup>, 2015 and each month thereafter until the balance is paid in full.

2. That said payments shall be made payable to “Kavulich & Associates, P.C.” attorneys for Plaintiff and sent to its offices at 181 Westchester Avenue, Suite 500C, port Chester, NY 10573 (Attn: Recovery Dept.). **Defendant agrees to place the above file number on said payments.**

3. That upon receipt and negotiation of the monies, Plaintiff shall provide Defendant with a General Release.

4. That in the event of default in the payments provided herein, Plaintiff shall be entitled to entry of judgment against the Defendant in the amount of \$13,413.74.00 (sic) plus interest thereon from April 15, 2012, plus costs less any payments made by Defendant.

(“Stipulation” attached to complaint).

Defendant made payments totaling \$300.00 and thereafter defaulted on the terms of the agreement. Plaintiff’s counsel sent two letters to Defendant regarding her defaults. The letters were dated June 24, 2015 and November 13, 2015, acknowledged that counsel was acting as a

debt collector, and stated that if payment was not received, Plaintiff would pursue all remedies available under the law.

This motion and action followed. For the reasons set forth below, the motion is denied and the action is dismissed.

### **DISCUSSION**

#### ***The Summons served herein is fatally defective***

Plaintiff moves for relief pursuant to CPLR § 3213, seeking entry of a judgment in the amount of \$13,113.74, plus interest from April 15, 2012.

CPLR § 3213 provides in pertinent part:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. **The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion.**

The summons herein failed to comport with the statutory requirement, and it failed to give the Defendant any information about filing answering papers to the motion. Rather the summons used was a standard form summons.<sup>1</sup>

The summons should have provided language along the lines of:

You are hereby summoned and required to submit to plaintiff's attorney your answering papers on this motion within the time provided in the notice of motion annexed hereto. In case of your failure to submit answering papers, summary judgment will be taken against you by default for the relief demanded in the notice of motion.

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<sup>1</sup> The court further notes only the first page of the notice of motion appears to have been filed with the court. The court file did not contain the balance of the papers or any supporting papers. It is not clear from the affidavit of service if the supporting papers were ever served and filed. On the date the motion was submitted, the court allowed counsel to file a courtesy copy of the supporting papers which was used to make the determination herein.

(2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:202; *see also practice commentaries to CPLR 3213 summons should not be phrased merely to require the defendant to serve answering papers "within" a certain period; it should specifically advise the defendant to serve "answering papers" at least X days prior to the return day set by the notice of motion*).

The defect in failing to comply with the statute and failing to advise the Defendant as to the requirement and time for serving answering papers is a fatal defect requiring dismissal of the action [*Segway of New York, Inc. v Udit group, Inc.* 120 AD2d 789 (2<sup>nd</sup> Dept., 2014); *Malament v Kim* 22 Misc3d 1110(A)].

Based on the foregoing, although Defendant submits opposition papers specifically refuting the claims by the process server in the affidavit of service, no traverse hearing is required.

***The use of a stipulation purporting to resolve an action which did not exist was misleading and counsel is cautioned to avoid repeating such conduct in the future***

The attorney for Plaintiff had the *pro se* individual execute a "stipulation" out of court, with a caption referring to Bronx Civil Court, identifying Ms. Caballero as a "defendant" in and purporting to settle an action which did not exist. As this action is dismissed, the court need not reach the issue of whether this "stipulation" is enforceable or void as a matter of public policy (*see eg 686 W 204<sup>th</sup> Street LLC v Athanasios* 44 Misc3d 143(A); *Grasso v Matarazzo* 180 Misc2d 686;). However, the court finds it appropriate to caution counsel against such conduct in the future.

Counsel should bear in mind, for example 15 USCA § 1692(e), regarding false or misleading representations by debt collectors. 15 USCA § 1692(e) provides that a debt collector may not use any false deceptive, or misleading representations or means in connection

with the collection of any debt and would appear to include use of any written “stipulation” which creates a false impression as to settling a pending court action, which in fact does not exist.

In conclusion, the motion is denied and the action is dismissed.

This constitutes the decision and order of the Court.

Dated: Bronx, New York  
February 2, 2017

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Sabrina B. Kraus, JCC

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