

**New Jersey Higher Educ. Student Assistance v
Burke**

2017 NY Slip Op 31519(U)

July 17, 2017

Supreme Court, New York County

Docket Number: 151004/2016

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED, J.S.C.
Justice

PART 2

-----X

NEW JERSEY HIGHER EDUCATION STUDENT ASSISTANCE
AUTHORITY

INDEX NO. 151004/2016

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

TARA BURKE,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12
were read on this application to/for Default Judgment

Upon the foregoing documents, it is

ordered that the motion is denied with leave to renew on proper papers.

Plaintiff New Jersey Higher Education Student Assistance Authority commenced this action against defendant Tara Burke to collect on a promissory note for a student loan on February 8, 2016. Docs. 1, 5.¹ Plaintiff served defendant with process on February 27, 2016. Doc. 2; Doc. 4, at par. 2; Doc. 5. Subsequent service was made on defendant pursuant to CPLR 3215 on March 21, 2106. Doc. 4, at par. 2; Doc. 5. To date, defendant has failed to answer or otherwise appear in this action. Doc. 4, at par. 3. Plaintiff now moves, pursuant to CPLR 3215, “for [a] default

¹ Unless otherwise noted, all references are to the document numbers corresponding to the documents filed by plaintiff with NYSCEF in connection with this motion.

judgment [against defendant] pursuant to section 3215 of the CPLR fixing the attorney fee.” Doc.

3. Defendant does not oppose the motion, which was filed on March 23, 2017. Doc. 3.

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).

Although plaintiff has established proof of service of the summons and complaint and defendant’s default in answering, this Court denies the motion because plaintiff failed to submit sufficient “proof of the facts constituting the claim.” CPLR 3215 (f); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). It is error to issue a default judgment “without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim.” *Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d at 202; *Mejia-Ortiz v Inoa*, 71 AD3d 517 (1st Dept 2010). Here, since the complaint is not verified, this Court may not rely on it as proof of any of the facts alleged. *See Martinez v Reiner*, 104 AD3d 477, 478 (1st Dept 2013). Although plaintiffs submit the affidavit of Janice Seitz in support of the motion, the affidavit does not provide a sufficient evidentiary basis on which to permit this Court to issue a default judgment. *See Mejia-Ortiz v Inoa*, 71AD3d at 517; *Beltre v Babu*, 32 AD3d at 723.

Seitz, a Program Officer for plaintiff, states that she is familiar with the records kept by plaintiff and thus has “full knowledge of the cause of action upon which [p]laintiff is suing.” Doc. 7, at par. 3. However, there are several deficiencies in Seitz’s affidavit which prevent the granting of the relief sought. Initially, this Court notes that Seitz does not explain what plaintiff entity is and does not discuss plaintiff’s relationship to defendant.

In her affidavit, Seitz states, inter alia, that:

4. The facts in connection with the causes of action are that a loan(s) was/were taken by Defendant(s) under the Promissory Note(s) for Loan(s) under the NJ Class Program. The note(s) and financial documentation, showing interest and other related information are annexed hereto as Exhibit A.

5. Defendant(s) has/have failed to comply with the terms of the agreement regarding payment and the loan(s) is/are now in default.

6. The interest rate is set by [plaintiff] under its regulatory powers. When there are multiple loans, the interest rate is a weighted average interest rate. The current interest, per the terms and conditions of the note(s) is 7.09 %.

7. Pursuant to the terms of the agreement and as a consequence of the default of the [d]efendant(s), [p]laintiff has elected to declare the entire balance of \$42,809.44 due with accrued interest of \$1183.60 for a total of \$43,993.04 as of 10/29/15.

8. Pre- and post-suit payments and/or tax offsets were made on the account(s) in the amount of \$1000.

9. As of 11/14/16, the balance due is \$42,808.85 in principal and \$3,360.56 interest due.

10. Collection/attorney fees pursuant to the agreement(s) and NJ Regulation 9A:10-6.16(b) are due. The fees payable to counsel are based on a contingency fee of 22% as outlined in the accompanying attorney certification.

Doc. 7.

Paragraph 4 of the affidavit is unclear as to whether defendant failed to pay a single loan or more than one loan. It is also unclear as to whether there was more than one promissory note which imposed on defendant an obligation to repay a debt to plaintiff. Although Seitz notes at paragraph 4 that she has annexed to her affidavit as Exhibit A “financial documentation, showing interest and other related information” (Doc. 7, at par. 4), she fails to explain the significance of the attached information, i.e., the amount of the debt on each promissory note, when the debt accrued, whether any part of the debt was paid off, and how interest and attorneys’ fees were calculated.² Seitz annexes four promissory notes as part of Exhibit A to her affidavit but does not make specific references to any of the notes and how they gave rise to the alleged debt. Doc. 7, at Ex. A. Nor does Seitz explain what the “NJ Class Program” is and why it is relevant in this matter. Further, although Seitz annexes what appear to be ledgers showing amounts owed by defendant, she neither discusses the amounts shown on these documents nor annexes proof that statements were mailed to defendant demanding payment for any balance(s) owed.

In paragraph 5, Seitz again alludes to the fact that defendant may be obligated to repay more than one loan.

In paragraph 6, Seitz, alluding to the possibility that there may be multiple loans, not only fails to address the loans individually, but does not explain how the “weighted average interest rate” of 7.09% to which she refers was calculated.

² The total amount of the debt on the four promissory notes annexed to Seitz’s affidavit is \$68,940.

In paragraphs 7 and 9 of her affidavit, Seitz does not explain how she calculated the amount of principal and interest allegedly owed by defendant. She does not explain whether defendant's debt arose from one promissory note or from more than one such note. Nor does she address whether one or more of the promissory notes signed by defendant allowed plaintiff to accelerate payment of the alleged debt(s).

In paragraph 8 of her affidavit, Seitz fails to explain the "tax offsets" on defendant's "account(s)" were made. She does not state whether the offsets were applied to a single account or to more than one account and does not state whether they were made before or after suit was commenced against defendant.

In paragraph 10, Seitz does not address what "agreement(s)" she is referring to which allegedly render defendant liable to plaintiff for attorneys' fees. If there is more than one agreement at issue, Seitz must address each of them.

Even assuming, arguendo, that Seitz's affidavit provided all of the information above, this Court notes that the notice of motion does not seek a sum certain upon defendant's default. Rather, it only seeks the "fixing of the attorney fee." Doc. 3. It is thus unclear whether plaintiff is seeking a default for a sum certain or an inquest upon a determination that defendant is in default.³

³ This deficiency is not remedied by the "wherefore" clause of the attorney affirmation in support of the motion, which states that "[p]laintiff demands judgment under CPLR 3215 awarding [it] a default judgment, plus its attorney[s'] fees, together with such other and further relief as is just and proper." Doc. 4.

Finally, Seitz's affidavit in support of the motion is not accompanied by a certificate of conformity, as required by CPLR 2309 (c).

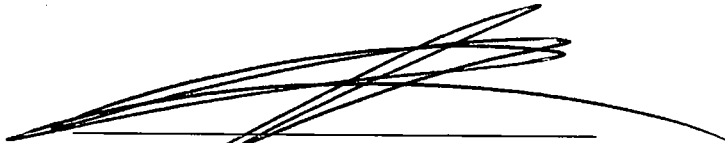
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiffs is denied with leave to renew upon the submission of proper papers; and it is further,

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

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT

7/17/2017
DATE


HON. 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

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE