

<b>Midland Funding LLC v Sidibe</b>
2018 NY Slip Op 31547(U)
July 11, 2018
Civil Court of the City of New York, Bronx County
Docket Number: CV-006802/12/BX
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: PART 34-C

\_\_\_\_\_  
MIDLAND FUNDING LLC X  
A/S/I/I TO A CHASE ACCOUNT,  
Plaintiff

-against-

SAIBOU SIDIBE  
Defendant(s)  
\_\_\_\_\_ X

**DECISION & ORDER**

Index No.: CV - 006802/12/BX

**HON. SABRINA B. KRAUS**

**BACKGROUND**

This action was commenced by Plaintiff seeking a judgment against Defendant in the amount of \$6405.39, based on the allegation that Defendant entered into a credit card agreement with Plaintiff's predecessor in interest and failed to pay amounts due under said account.

The summons and complaint were filed on April 10, 2012. Defendant appeared *pro se*, and filed an answer on April 23, 2012. An initial court date was set for May 16, 2012, when the parties appeared and entered into a stipulation of settlement, so-ordered by the Court. The stipulation provided for settlement in the amount of \$4500, which Defendant agreed to pay at the rate of \$50 a month, by the 20<sup>th</sup> of each month, commencing August 20, 2012.

Defendant never made any payment, and defaulted on the stipulation. On September 7, 2012, at Plaintiff's request, the clerk entered judgment against Defendant in the amount of \$6998.39, representing the original amount sued for plus interests, costs and disbursements.

### **THE PENDING MOTION**

On May 24, 2017, Defendant moved to vacate the stipulation of settlement and the judgement. Defendant asserts he failed to make the payments, because he lacked income, and because Plaintiff never billed him for the payments due under the stipulation.

### **THERE IS NO BASIS TO VACATE THE STIPULATION OF SETTLEMENT**

Stipulations of settlement are favored by the courts and not lightly cast aside (see *Matter of Galasso*, 35 N.Y.2d 319, 321, 361 N.Y.S.2d 871, 320 N.E.2d 618). This is all the more so in the case of “open court” stipulations (*Matter of Dolgin Eldert Corp.*, 31 N.Y.2d 1, 10, 334 N.Y.S.2d 833, 286 N.E.2d 228) within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation (*Matter of Frutiger*, 29 N.Y.2d 143, 149–150, 324 N.Y.S.2d 36, 272 N.E.2d 543).

[*Hallock v. State*, 64 N.Y.2d 224, 230 (1984)].

In this case, Defendant presents no basis to vacate the underlying stipulation of settlement, as such to the extent Defendant seeks to vacate the stipulation, the motion is denied. Neither Defendant’s inability to pay, nor the fact that Plaintiff did not send him bills (which was not required under the stipulation), constitute a basis to vacate the stipulation.

### **THE TERMS OF THE STIPULATION REQUIRED SERVICE OF A NOTICE OF DEFAULT AND DID NOT CONTEMPLATE ENTRY OF A SUM CERTAIN THUS ENTRY OF A JUDGMENT WITHOUT A MOTION WAS NOT PERMITTED**

CPLR § 3215(i) provides in pertinent part:

Where after the commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount ... the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

As this Court has previously noted [*Arrow Fin. Servs., LLC v. Benjamin*, 56 Misc. 3d 483, 487–89, (N.Y. Civ. Ct. 2017)], the Appellate Division, Second Department, held that stipulations of settlement, such as those in the case at bar, do not allow for entry of a judgment by the clerk pursuant to CPLR 3215(i), but in fact require that a motion be made to the court for said relief. The court held in pertinent part:

(T)he ... County Clerk did not have authority to enter a clerk's judgment against (defendant) pursuant to CPLR 3215(i)(1). This statute states, in relevant part, that “[w]here ... a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount ... the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based” (CPLR 3215 [i][1] [emphasis added] ). Although the stipulation provided that (Plaintiff) could enter a money judgment against (Defendant) in the event of a default, it permitted entry of such a judgment only “upon ten (10) days notice” to (Defendant). Thus, the stipulation was not one which provided for entry of a judgment upon default “without further notice.” Moreover, the stipulation did not provide for entry of a judgment “in a specified amount.” Rather, it provided that the judgment to be entered upon Defendant's default would be calculated so as to “credit [Defendant] for all payments made on account.” The stipulation thus did not specify the exact principal sum of the judgment that (Plaintiff) would have the right to enter based on a default by (Defendant) under the stipulation; rather, it provided for a formula that required reference to extrinsic proof as to exactly how much (Defendant) might have already paid to (Plaintiff) prior to the default, or prior to the judgment. Accordingly, the entry of a clerk's judgment was not authorized by CPLR 3215(i)(1).

Furthermore, as a general rule, a clerk's judgment should not be entered where, as here, the amount of the judgment can be determined only by reference to extrinsic proof (see *Stephan B. Gleich & Assoc. v. Gritsipis*, 87 A.D.3d 216, 221–222, 927 N.Y.S.2d 349 [2011]; see also *Vinny Petulla Contr. Corp. v. Ranieri*, 94 A.D.3d 751, 941 N.Y.S.2d 659 [2012]; *Dante Piano Serv. Corp. v. Haedrich*, 42 Misc.3d 136[A], 2014 N.Y. Slip Op. 50125[U], 2014 WL 470152 [App.Term, 9th & 10th Jud.Dists.2014] ). Generally, a judgment should be entered on application to the clerk only where “there can be no dispute as to the amount due” (*Reynolds Sec. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 572, 406 N.Y.S.2d 743, 378 N.E.2d 106 [1978] ). Under these circumstances, HSBC was required to apply to the court, rather than to the clerk, for an order enforcing the stipulation and granting leave to enter an appropriate judgment (see *Stephan B. Gleich & Assoc. v. Gritsipis*, 87 A.D.3d at 222, 927 N.Y.S.2d 349). [*HSBC Bank USA, Nat. Ass'n v. Wielgus*, 131 A.D.3d 510, 511–12, 15 N.Y.S.3d 170 (App.Div.2015) (emphasis added); see also *Mashatt v. Alsahlani* 139 A.D.3d 820, 34 N.Y.S.3d 60; but Cf. *Chase Manhattan Bank v. Mohamed* 1 Misc.3d 133(A), 2003 WL 23191045; *Star Office Supply Co. Inc. v. Galton* 56 Misc.2d 288, 288 N.Y.S.2d 651].

[*HSBC Bank USA National Association v Wielgus* 131 AD3d 510, 511-512].

Given this binding legal precedent, the court finds the clerk lacked authority to enter the underlying judgment, rendering such judgment void *ab initio* (*Geer, Du Bois & Co. v. O.M. Scott & Sons Co., Inc.* 25 A.D.2d 423, 266 N.Y.S.2d 580; *Gaynor & Bass v. Arcadipane* 268 A.D.2d 296, 700 N.Y.S.2d 818). As such, the motion is granted to the extent of vacating the underlying judgment. All liens, garnishments and income executions are also vacated.

**DEFENDANT’S MOTION IS FURTHER GRANTED TO THE EXTENT OF AFFORDING DEFENDANT AN OPPORTUNITY TO CURE THE DEFAULT PRIOR TO THE ENTRY OF ANY NEW JUDGMENT**

Based on the terms of the parties’ stipulation, Defendant should have paid \$3650 out of the \$4500 as of July 20, 2018. It is undisputed that to date, Defendant has made no payments.

Plaintiff’s right to proceed on the default is stayed through August 20, 2018, to afford Defendant an opportunity to pay \$3650.00 due under the stipulation through said date. If said amount is paid, the stipulation is reinstated and will remain in full force and effect, as long as Defendant continues to make the payments due. If Defendant fails to cure his default by making said payment, or upon a further default in the future, Plaintiff may move for entry of a judgment by motion on notice to Defendant.

This constitutes the decision and order of this court.

Dated: July 11, 2018  
Bronx, New York

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Hon. Sabrina B. Kraus

TO: FOSTER & GARBUS, LLP  
By: VALERIE WATTS, ESQ  
Attorneys for Plaintiff  
60 Vanderbilt Motor Parkway  
PO Box 9030  
Commack, New York 11725

SAIBOU SIDIBE  
Defendant, *pro se*  
537 Tinton Avenue, Apt. 22  
Bronx, New York 10455