Long Is. Univ. v Smith
2019 NY Slip Op 33244(U)
November 4, 2019
Civil Court of the City of New York, New York County
Docket Number: CV-64171-05/NY
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 34

X

LONG ISLAND UNIVERSITY

HON. SABRINA B. KRAUS

Plaintiff,

DECISION & ORDER
Index No.: CV-64171-05/NY

-against-

TAMARA T SMITH a/k/a
TAMARA DOUGLAS-SMITH

Defendant

X

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff commenced this action pursuant to a summons and complaint filed on December 22, 2005, seeking a judgment in the amount of $14,019.53, plus costs and interest, for tuition and fees. Defendant failed to answer or appear, and on March 15, 2006, a judgment was entered against defendant on default in the amount of $20,142.87, which was based on the amount originally sued for plus $5,993.34 in interest and $130.00 in costs.

On April 19, 2006, defendant appeared *pro se* and moved to vacate the default judgment. The motion was granted by the court (Padilla, J), pursuant to a decision and order dated April 19, 2006, which vacated the judgment and accepted defendant's answer. Defendant's answer stated that she did not owe any money and that her tuition had been paid in full.

The action was restored to the calendar and a trial date was set for May 22, 2006. The action was adjourned to December 6, 2006. On that date, plaintiff moved for summary judgment, but the parties entered into a stipulation of settlement and the motion was withdrawn.

The stipulation of settlement, was so-ordered by the court (Oing, J) and provided that

defendant consented to the jurisdiction of the court, acknowledged owing $20,012.00 and agreed to pay that amount at the rate of $150 per month. The stipulation further provided that on default defendant would receive a ten day notice of default, and if not cured, that plaintiff could without further notice enter judgment for $20,012.00, less any payments made, plus interest from 12/6/06.

Plaintiff acknowledges that defendant made $2700.00 in payments, but alleges that Defendant subsequently defaulted on the stipulation. On November 3, 2008, a default judgment was entered against defendant, by the clerk of the court in the amount of $20,068.80, which was based on $17,312.00 unpaid on the stipulation, and another $2,596.80 in interest and additional costs of $155.00.

THE PENDING MOTION

On August 2, 2019, defendant moved for an order vacating the judgment and restraining notice and related relief. Defendant alleged that the amount of the judgment was incorrect and that it did not reflect payments made and that she never received a notice of default. For the reasons set forth below, defendant's motion is granted and the judgment is vacated.

DISCUSSION

PLAINTIFF FAILED TO ESTABLISH THAT IT PROPERLY ISSUED A NOTICE OF DEFAULT

It is the plaintiff's burden to show proof of mailing of a proper notice of default [*Solid Gold Const. v Robertson* 1 Misc.3d 136(A); *Capital One Bank v Hembrick* 17 Misc.3d 1128(A); *JTM Group, Inc. D/b/a American Barter Exchange v Fleischman* 2001 NY Slip Op 40456(U); *CACV of Colorado, LLC v Atekha* 24 Misc.3d 1250(A)].

Plaintiff annexes its purported notice to the opposition papers, however, the court finds that the "notice" served was 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).

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 default. It is

essential that the party seeking a default judgment comply with the notice 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 is specifically refers to this action, and it fails to meet the CPLR requirements for a paper served on a party.

BECAUSE THE TERMS OF THE STIPULATION REQUIRED SERVICE OF A NOTICE OF DEFAULT AND DID NOT CONTEMPLATE ENTRY OF A SUM CERTAIN 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.

In a case on point, 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:

> However, the ... **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 AD3d 216, 221-222 [2011]; *see also Vinny Petulla Contr. Corp. v Ranieri*, 94 AD3d 751 [2012]; *Dante Piano Serv. Corp. v Haedrich*, 42 Misc 3d 136[A], 2014 NY Slip Op 50125[U], [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 NY2d 568, 572 [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 AD3d at 222).

[*HSBC Bank USA, Nat. Ass'n v. Wielgus*, 131 A.D.3d 510, 511–12, (App. Div. 2015) (emphasis

added); *see also Mashatt v Alsahlani* 139 AD3d 820; *but Cf Chase Manhattan Bank v Mohamed* 1 Misc.3d 133(A); *Star Office Supply Co. Inc v Galton* 56 Misc.2d 288].

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 AD2d 423; *Gaynor & Bass v Arcadipane* 268 AD2d 296). As such, the motion is granted, the underlying judgment is vacated. All liens, restraints, garnishments and income executions are also vacated.

Finally, the court notes that plaintiff impermissibly assessed costs twice in this action against defendant and defendant is thus entitled to an additional credit of $155.00 beyond any payments made.

This constitutes the decision and order of the court.

Dated: New York, New York
November 4, 2019

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Hon. Sabrina B. Kraus, JCC

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