CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

CITIBANK, N.A. ,
Plaintiff,

-against-

LUZ N RODRIGUEZ,
Defendant.

DECISION and ORDER
Index No. CV 345-18

Recitation of papers received on this motion for a default judgment:

Papers	Numbered
Amended motion	1

Plaintiff moves for an Order pursuant to CPLR 3215(i) directing entry of a default judgment based upon Defendant's breach of a stipulation of settlement.

This consumer credit case settled by an out of court stipulation of settlement dated February 26, 2018 in which Defendant agreed to make monthly installment payments. Defendant defaulted on the stipulation of settlement on September 9, 2019.

In support of the amended motion, Plaintiff submits, *inter alia*, an attorney affirmation in support, a copy of the summons, a copy of an unsigned, unverified complaint, a copy of the stipulation of settlement, a copy of the notice of default, the affidavit of service of the notice of default, an affidavit of service of the prior motion, and the affidavit of service of the instant motion.

Plaintiff first moved for a default judgment on January 7, 2020,

which was denied by Judge Fidel Gomez on January 13, 2020, for the Plaintiff's failure to provide proof of service of the motion on the Defendant. Plaintiff moved again for a default judgment on July 12, 2021, it was marked submitted on October 13, 2021, and was denied on November 10, 2021, by Judge Naita A. Semaj for the Plaintiff's failure to attach proof of service of the 10-day notice to cure. On February 15, 2022, Plaintiff attempted to file another motion which was rejected by the court clerk for the Plaintiff's failure to indicate the proper court part. The instant motion was filed on April 11, 2022, two and one-half years after the alleged default.

Analysis

The instant motion was improperly designated as an amended motion. Prior to the final submission of a motion, a party who concludes that a motion is defective or insufficient can apply for and obtain leave to withdraw or to amend it. *Woodward Medical and Rehabilitation, PC. v State Farm Fire and Casualty Co.,* 34 Misc.3d 138(A) (App. Term, 2nd, 11th and 13th Jud Dists 2011). However, there was no pending motion for which to seek to amend. Thus, it was error to designate the motion as an amended motion. Technically, although not stated as such, the second motion was a motion to renew. Once the second motion was denied, Plaintiff exhausted its opportunities to seek the same relief. Thus, the instant motion is really an improper second motion to renew and it is a policy of the courts that parties do not get multiple attempts at seeking the same relief.

However, the court shall review the motion on the merits as there is an issue with the interpretation of CPLR 3215(i) that should be addressed.

Plaintiff moved pursuant to CPLR 3215(i) which was also error. CPLR 3215(i) states in relevant part,

> [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) specifically authorizes the judgment clerk to enter a default judgment when there is a sum certain. Based upon the plain language of the statute, CPLR 3215(i) only applies in the instance where a Plaintiff directly submits a request for a default judgment to the judgment clerk. There is no requirement of a motion, nor was this section ever intended to require motion practice. A memorandum in support of the legislation issued on February 21, 1966 by the Judicial Conference states: "{a} court order would be dispensed with since the procedure is based on a stipulation by the party affected." The memorandums in support of the legislation in both the Senate and the Assembly state: "clearly no formal motion to the court is required, or should be required..." and in the Assembly memorandum "or likely is intended." A letter from Mayor John Lindsay on May 23, 1966, in support of the legislation states:

> This bill would permit the entry of judgment by the clerk without the necessity of a formal application to the court where there is a failure to comply with the stipulation of settlement and thereby effect a saving of time and expense…"

However, application to the judgment clerk is not appropriate where the monetary amount must be calculated or can be determined only by reference to extrinsic proof. *HSBC Bank v. Wielgus,* 131 AD3d 510 (2nd Dept. 2015). Here, the amount of the monetary judgment cannot be determined on the face of the stipulation. Since the amount of the judgment requires an offset of payments to the original debt and consideration of extrinsic evidence, CPLR 3215(i) is not applicable in this case and a judgment issued by a clerk would have been a nullity.

The appropriate CPLR sections applicable to the procedure for ***any and all*** motions for a default judgment, including a breach in a stipulation of settlement, is CPLR 3215(a) through CPLR 3215(g).

Pursuant to CPLR 3215(f),

> Proof. On **any** application for judgment by default, the applicant shall file … proof of the facts constituting the claim, the default and the amount due by **affidavit made by the party**… Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney." (Emphasis added).

Note that the statute does not state "on some applications for judgment by default." The clear and unambiguous language of the statute indicates that "any" refers to "any and all" motions for a default judgment that are before the court because an application to the judgment clerk does not require a motion. Where the statutory language is clear and unambiguous, the court must construe it so as to give effect to the plain meaning of the words used. *Raritan Development Corp. v Silva,* 91 N.Y.2d 98 (1997). Therefore, Plaintiff's motion to enter judgment based on a default in a stipulation of settlement must be evaluated under CPLR 3215(a) through CPLR 3215(g).

CPLR 3215(f) requires that proof of service of the summons and complaint be provided. Since Defendant signed a stipulation of settlement acknowledging service, service is not an issue, thereby satisfying this requirement. The section also requires proof of the facts constituting the claim, the default, and the amount due by an affidavit made by a party or by a verified complaint accompanied with an affidavit by the attorney.

Significantly, there was no affidavit from a party and the complaint was neither verified nor signed. There is also an issue with the Plaintiff's attorney affirmation because it does not establish personal knowledge. It is well settled that an attorney's bare affirmation which demonstrates no personal knowledge is without evidentiary value. *See generally, Zuckerman v City,* 49 N.Y.2d 557

(1980). Here, the affiant was not involved with the transactions between the parties nor with the stipulation of settlement and does not have personal knowledge of the facts. Plaintiff's counsel's generic statement "[u]pon review of the payment records maintained by the affiant's firm" is not sufficient to establish personal knowledge. The affiant simply referred to hearsay documents that are maintained by the law firm. This is impermissible double hearsay. As it is not likely that an attorney was responsible for the ministerial task of keeping track of payments, and it may have been the responsibility of a clerk, secretary, or bookkeeper, information must be provided to the court to attest to the accuracy of the records. The process is subject to human error and the record keeper may have inadvertently failed to credit payments. Thus, the affirmation must meet the hearsay exception requirements of CPLR 4518(a) and must establish the veracity of said documents by showing that the affiant was either directly involved in the transaction or is the custodian of the records, that the information was documented in the regular course of business, that the information is accurate, etc. as provided in CPLR 4518(a).

Furthermore, pursuant to CPLR 3215(c), the failure to move for default within one year must result in dismissal unless Plaintiff shows sufficient cause why the complaint should not be dismissed. *Baruch v Nassau County,* 134 A.D.3d 658 (2nd Dept. 2015). Not only did Plaintiff fail to state that this is the fourth attempt at a default

judgment, Plaintiff also failed to provide any excuse for the belated motion. *Six Star Supply v Praetorian Ins. Co.*, 39 Misc.3d 141(A)(App. Term, 2nd, 11th and 13th Jud Dists 2011). While the court recognizes that there was a delay due to covid, it is evident that the real reason for the delay was the three prior failed attempts at motion practice. These motions were denied due to incomplete submissions and a lack of due diligence. The lack of due diligence is not a reasonable excuse for the failure to meet the statutory deadlines. Thus, the motion must be denied for the failure to meet the deadline established in the statute. *See generally, Miceli v State Farm Mutual Automobile Ins. Co.*, 3 N.Y.3d 725 (2004)(statutory time frames are not options, they are requirements to be taken seriously by the parties. Too many hours of the courts are taken up with deadlines that are simply ignored).

To the extent that the First Department found in *Marine Midland Bank, NA v Worldwide Industrial Corp*, 307 AD2d 221 (1st Dept. 2003) (*Marine Midland*), that there is no time limit for entering a judgment pursuant to CPLR 3215(i), this court respectfully disagrees. In *Marine Midland*, the default occurred in 1992 and the judgment was allowed to be entered ten years later in 2002. This outcome is not only inherently unjust, but it also invites judicial inefficiency and forum shopping, as Plaintiffs will always seek to enter judgment through a judgment clerk when the statute of limitations has expired under CPLR 3215(c). Interestingly, under the First Department's

interpretation in *Marine Midland,* a judgment may be entered 20 years later or 100 years later. Everyone involved in the transaction could have died, but the creditor corporation could still enter judgment. It's an illogical conclusion and an inane result, which by the way, contravenes the intent of the statute in facilitating a quicker, more efficient process for entering a default judgment.

It is well settled that a statute must be construed as a whole and that its various sections must be considered together, with reference to each other, and harmonized. *Walsh v NYS Comptroller,* 34 N.Y.3d 520 (2019); McKinney's Cons. Laws of N.Y., Book 1, Statutes, ss 97, 98, 130. CPLR 3215 provides in relevant part:

> (a) When a defendant has failed to appear, plead or proceed to trial, a plaintiff may seek application to the court for a sum certain within one yar after the default.
>
> (c) If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall dismiss the complaint, unless good cause is shown.
>
> (d) When one or more defendants default, judgment may be entered against defaulting defendant within one year after the default.

A fair reading of the statue harmonized with these sections indicate that the legislature intended that <u>all</u> applications for default judgments be made within a year of default. Further, in CPLR 3215(a), the court specifically directs that the application to the

judgment clerk for a sum certain be made within a year. It does not make sense that some default judgments are entered within one year but the defaults in stipulations of settlements are not. A default is a default is a default. There is nothing special about defaults in stipulations of settlements that would warrant special treatment and an open-ended time frame to enter judgment. The two sections, 3215(a) and 3215(i) must be harmonized. Although the legislative materials for 3215(i) do not mention a statute of limitations period, there is language in the 1966 letter from the Office of the Mayor that states:

> The default under the present section 3215 which permits the court clerk to enter a judgment occurs when a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders dismissal for any other neglect to proceed. It does not include a default arising out of a failure to make payment. (internal quotations omitted)

Further in the Report prepared by the Committee on Civil Practice Law and Rules dated 1966 states this "bill fills an obvious gap in the kind of situations where the default judgment may be entered by the clerk." These legislative materials seem to indicate that defaults arising from the failure to pay pursuant to a stipulation of settlement is intended to be considered in the same category and treated as other defaults, ie: failing to appear, plead, or proceed to trial, or other neglect. A letter, dated May 25, 1966, in support of the legislation from the New York State Association

of Trial Lawyers states the "proposed amendment would eliminate needless expense and time in proceeding to enforce a stipulation of settlement previously entered into." Thus, the lack of a time restriction in CPLR 3215(i) is contradictory to the intended purpose of the statue in making it quicker and more efficient to enforce a stipulation.

Further, not placing a limitations period on CPLR 3215(i) applications gives a judgment clerk more authority than a judge as there is no time restriction for a judgment clerk to enter a default judgment pursuant to CPLR 3215(i), yet a judge is restricted to one year limitation period pursuant to CPLR 3215(c). From a policy standpoint, it does not make sense as clerks do not have more authority than judges.

Based on the foregoing, it is hereby

Ordered, that Plaintiff's motion is denied and the complaint is dismissed, and it is further

Ordered, that the judgment clerk is directed to reject applications for a judgment pursuant to CPLR 3215(i)based on the breach of a stipulation where the application was made over a year after the default occurred as the appropriate procedure is to file a motion and to establish a reasonable excuse for the delay.

Dated: October 5, 2022

ENTERED

OCT 06 2022

CIVIL COURT

BRONX COUNTY

Brenda Rivera

Hon. Brenda Rivera, JCC