SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

----------X

INDEX NO. 159066/2017

AUTOVEST, L.L.C.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHAWN P. TORRES,

Defendant.

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DEFAULT JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is granted in part as follows.

In this action to recover for breach of contract, plaintiff Autovest, L.L.C. moves, pursuant to CPLR 3215, for a default judgment against defendant Shawn P. Torres in the amount of $7,526.35, plus interest, attorneys' fees, and costs and disbursements. Defendant does not oppose the motion. After a review of plaintiff's papers, and after a review of the relevant statutes and case law, the motion is granted in part as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On February 27, 2014, defendant entered into a Retail Installment Contract and Security Agreement ("the contract") with C & J Auto Sales, LLC ("C & J") for the purchase of a 2006 Jeep

Grand Cherokee ("the vehicle"). Doc. 15.[1] Pursuant to the contract, defendant promised to pay C & J $17,737.36 in 36 equal installments of $423.26 commencing on March 29, 2014. Doc. 15. The contract provided, in pertinent part, that, if defendant defaulted, he would be responsible for C & J's

> reasonable expenses incurred in realizing on the security interest in the [vehicle], including the retaking, holding, preparing for disposition processing and disposing of the [vehicle]. You also agree to pay for our legal expenses and reasonable attorneys' fees not in excess of 15% of the unpaid debt after default and referral to an attorney not a salaried employee of [C & J].

Doc. 15, at p. 4.

The contract was assigned by C & J to American Credit Acceptance, LLC ("ACA"). Doc. 15, at p. 6; Doc. 26, at par. 7. ACA in turn assigned the contract to Security Credit Services, LLC ("SCS"). Doc. 16. SCS then assigned the contract to Absolute Resolution Corporation ("ARC"). Doc. 17. ARC assigned the contract to Razor Capital, LLC ("Razor"). Doc. 18. Razor then assigned the contract to plaintiff. Doc. 19. C & J had originally been granted a security interest in the vehicle pursuant to the contract, which interest plaintiff perfected after it was assigned the contract. Doc. 1, at par. 6.

On or about July 25, 2014, defendant defaulted on his payment obligations under the contract, the vehicle was repossessed by ACA, and defendant was advised that the vehicle would be sold at a private sale sometime after August 4, 2014. Doc. 14, at par. 11; Doc. 20. By correspondence dated June 16, 2015, ACA advised defendant that the vehicle was sold on August

[1] All references are to the documents filed with NYSCEF in this matter.

18, 2014. Doc. 21. After the sale of the vehicle, defendant owed $7,526.35 on the contract. Doc. 22.

On October 11, 2017, plaintiff commenced this action by filing a summons and complaint. Doc. 23. As a first cause of action, plaintiff alleged that defendant breached the contract. As a second cause of action, plaintiff claimed attorneys' fees. Defendant was served with process by substitute service on October 19, 2017 and the summons and complaint were mailed to him the following day. Doc. 24. Plaintiff then mailed the summons and complaint to defendant pursuant to CPLR 3215 on October 24, 2017. Doc. 24. Defendant has failed to answer or otherwise appear in this action and his time to do so has expired. Doc. 14, at par. 15.

On or about January 8, 2018, plaintiff attempted to have the Clerk enter judgment against defendant but the proposed judgment was rejected and plaintiff was directed to "file a motion to the court to obtain and [sic] order from the Judge directing the [C]lerk to enter [j]udgment." Doc. 14, at pars. 16-17. In the proposed default judgment, which was not assigned a NYSCEF document number, plaintiff stated that it "hereby waives its claim for attorney [sic] fees in this action."

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendant in the amount of $7,526.35, plus interest, attorneys' fees, and costs and disbursements. Docs. 13-38. In support of the motion, plaintiff submits the affidavit of its attorney, Pilar A. Cano, Esq. of Deily & Glastetter, LLP (Doc. 14); the affidavit of Julie Allen-Rains, the Legal Operations Manager for plaintiff (Doc. 26); the summons and complaint (Doc. 23); the contract; the bills of sale and assignments of the contract (Docs. 16-19); correspondence advising defendant that the vehicle would be sold (Doc. 20); documents reflecting the amount owed by defendant (Docs. 21-22); a

bill of costs reflecting that plaintiff incurred $663.50 in costs and disbursements (Doc. 25); and an affidavit of non-military history (Docs. 35-36).

LEGAL CONCLUSIONS:

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 [it]." Pursuant to CPLR 3215, the party moving for a default judgment 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). Proof of the facts constituting the claim may be provided by plaintiff's affidavit or a verified complaint. *See* CPLR 3215(f). A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 N.Y.2d 62 (2003).

Here, plaintiff has proven that defendant was properly served by substitute service pursuant to CPLR 308(2), followed up by a mailing of the summons and complaint the following day. Additionally, defendant was mailed an additional copy of the summons and complaint pursuant to CPLR 3215. Plaintiff's counsel represents that, despite proper service, defendant has failed to answer or otherwise appear in this matter. Further, plaintiff, through the affidavit of Ms. Allen-Rains and the exhibits attached to the motion, has set forth the facts constituting the claim. Plaintiff's proof establishes that the contract was assigned to plaintiff, that defendant breached the

contract, and that, as a result of the breach, defendant owes plaintiff $7,526.35, as well as costs and disbursements in the amount of $663.50.

Although plaintiff claims attorneys' fees and interest as well, it is not entitled to this relief. With respect to attorneys' fees, plaintiff specifically waived the same when it submitted its proposed judgment to the Clerk in or about January 8, 2018. The representation by plaintiff's counsel that plaintiff "did not request attorneys [sic] fees" when it submitted the proposed judgment (Doc. 14, at pars. 16-17) is extremely disingenuous, and approaches frivolity, given that the proposed judgment states that plaintiff "hereby waives its claim for attorney [sic] fees in this action."

Even assuming that attorneys' fees were not waived, plaintiff is still not entitled to recover the same given that plaintiff has not provided a basis for such recovery. Although plaintiff's counsel asserts that she is entitled to a contingency fee of "one-third of the debt, provided there is recovery in full" (Doc. 14, at par. 24), which sum, she claims, is greater than $2,508.78 (one-third of the $7,526.35 owed by defendant), no such contingency agreement is attached to the motion. Additionally, as noted above, the contract itself provides that, upon default, plaintiff will be entitled to "attorneys' fees not in excess of 15% of the unpaid debt after default and referral to an attorney not a salaried employee of [C & J]." The same 15% was also demanded for attorneys' fees in the complaint.[2] Fifteen percent of $7,526.35 equals $1,128.95, which is clearly less than the amount of at least $2,508.78 to which plaintiff suggests it is entitled. Given this discrepancy, as well as the fact that plaintiff has neither demanded a specific amount for attorneys' fees nor has

[2] This Court further notes that, insofar as plaintiff demands a default judgment on the complaint, it cannot recover on its second cause of action seeking attorneys' fees, since a claim for attorneys' fees cannot be maintained as a separate cause of action. *See La Porta v Alacra, Inc.*, 142 AD3d 851 (1st Dept 2016); *Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217 (1st Dept 2006), citing *Burke v Crosson*, 85 NY2d 10, 17-18 (1995).

asked for an inquest regarding the same, such fees will not be awarded. Moreover, plaintiff has failed to establish that the attorneys' fees claimed arose from its representation by "an attorney not a salaried employee of [C & J]."

Nor is plaintiff entitled to interest on the judgment. The notice of motion does not request that interest be awarded. Doc. 13. The affidavit of plaintiff's attorney in support of the motion requests that interest be awarded "at the rate of 0.00% per annum from August 18, 2014." Doc. 14, at par. 14. The wherefore clause of counsel's affidavit seeks interest "at the rate of Zero percent (0.0000%) per annum from August 18, 2014." Doc. 14, at wherefore clause. Similarly, the affidavit of Allen-Rains in support of the motion seeks interest "at the annual rate of 0.0000% from August 18, 2014." Doc. 26, at par. 21. The "wherefore" clause of Allen-Rains' affidavit seeks interest "at the contract rate of 0.0000% from August 18, 2014." Doc. 26, at wherefore clause.[3] Although this Court may ordinarily overlook a mistake such as a typographical error (see CPLR 2001), it declines to do so here, where an interest rate of 0% was demanded four times in plaintiff's motion papers.

Finally, this Court notes that, although the affidavit submitted by Julie Allen-Rains was notarized by a Michigan notary, it did not attach a certificate of conformity as required by CPLR 2309. However, this defect, which may be cured by the submission of a proper certificate *nunc*

[3] The contract reflects that the rate of interest is 25.25%. Doc. 15, at p. 1. In New York, interest in excess of 16% per year constitutes civil usury and interest in excess of 25% constitutes criminal usury. Here, the contract is governed by the law of South Carolina (Doc. 15, at p. 4), where the legal maximum rate of interest is 8.75% and the interest rate on judgments is 12%. However, given that plaintiff has consistently demanded 0% interest in its motion papers, this Court need not address whether the interest rate set forth in the contract complied with the applicable law.

pro tunc, does not warrant the denial of the motion. *See Bank of New York v Singh*, 139 AD3d 486, 487 (1st Dept 2016).

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

ORDERED that the motion by the plaintiff Autovest, L.L.C. for a default judgment against defendant Shawn P. Torres is granted to the extent that it is awarded judgment in the amount of $7,526.35; plus costs and disbursements in the amount of $663.50; and it is further,

ORDERED that plaintiff Autovest, L.L.C. shall serve a copy of this order on defendant Shawn P. Torres and on the Trial Support Office at 60 Centre Street, Room 158; and it is further,

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

8/17/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE