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Midland Funding LLC v Joya Valentin
2013 NY Slip Op 23162
Decided on May 9, 2013
District Court Of Nassau County, First District
Hirsh, J.
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Decided on May 9, 2013

District Court of Nassau County, First District

Midland Funding LLC, Plaintiff,

against

Joya Valentin, Defendant.

CV-002092-12

Attorneys - Maria Gonzalez - for plaintiff

Crystal Scott - for defendant

Fred J. Hirsh, J.

The following named papers numbered 1 - 2

submitted on this motion on March 14, 2013 *Papers NumberedNotice of Motion and Affidavits Annexed1-2*

Order to Show Cause and Affidavits Annexed

Affirmation in Opposition

Replying Affidavits

Plaintiff Midland Funding LLC ("Midland") moves for an order of preclusion precluding defendant from offering evidence if defendant Joya Valentin ("Valentin") does not respond to a Notice to Admit.

BACKGROUND

Midland sues as assignee of Citibank to recover the amount alleged to be due on a Citibank credit card. Midland alleges Citibank issued a credit card to Valentin, Valentin used the credit card and defaulted in payment. Midland alleges Citibank assigned Valenti's credit card debt to Midland. Midland alleges the assignment of the debt gives it standing to maintain the action.

Valentin's answer admits she is a resident of Nassau County but denies having information sufficient to answer the remaining allegations in the complaint. More specifically, she denies having information sufficient to form a belief regarding the issuance of a credit card, her use of the credit card, her default in payment and the assignment of the debt to Midland.

On or about June 15, 2012, Midland's attorney served a Notice to Admit upon Valentin's attorney containing 18 specific items requesting Valentin admit she applied for and used the credit card in issue, received the monthly billing statements, the billing statements attached to the Notice to Admit are true and accurate copies of billing statements, she defaulted in payment on the credit card, she never objected to any of the [*2]charges contained on the billing statements, she received notice of the assignment of

the account from Citibank to Midland, Midland is now the owner of the debt, the credit card statements are business records and she owes to the owner of the debt the amount indicated on the final statement. Although Midland seeks Valentin to admit Citibank assigned the debt to Midland and Midland advised Valentin of the assignment, Midland did not attach a copy of the assignment or the notice purporting to advise Valentin of the assignment of the debt to either the complaint or the Notice of Admit.

Valentin did not respond to the Notice to Admit within 20 days of its service by either admitting, denying or setting forth a reason why she cannot admit or deny any of the specific items.

Discussion

Plaintiff need not make a motion to preclude relating to a Notice to Admit. A proper Notice to Admit is self-executing. A party who does not respond to a Notice to Admit is deemed to have admitted the items in the Notice to Admit for the purposes of the action in which the Notice to Admit was served. Siegel, *New York Practice 5th* §364; 6-3123 New York Civil Practice (Weinstein-Korn & Miller) CPLR ¶ 3123.10; and CPLR 3123(a).

CPLR 3103(a) grants the court authority on its own initiative to make a protective order denying, limiting, conditioning or regulating an disclosure device. A Notice to Admit is a disclosure device.

A notice to admit is to be used to save a party the trouble and expense of proving a readily admittable fact. Siegel, *New York Practice 5th* §364. A Notice to Admit is used to get a party to admit facts that will not be in dispute at trial. 6-3123 New York Civil Practice (Weinstein-Korn & Miller) CPLR ¶3123.1.

"The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper (citations omitted)." *DeSilva v. Rosenberg*, 236 AD2d 508 (2nd Dept. 1997). A Notice to Admit is to be used "...to elicit a stipulation regarding specific matters concerning which there is general agreement. (Citation omitted)." *Lewis v. Hertz Corp.*, 193 AD2d 470 (1st Dept. 1993).

A notice to admit is not to be used to obtain information more properly obtained by another discovery device such as a deposition. *DeSilva v. Rosenberg, supra.;* and *Tolchin v. Glaser*, 47 AD3d 922 (2nd Dept. 2008); and *Falkowitz v. Kings Highway Hosp.*, 43 AD2d 696 (2nd Dept. 1973).

The Notice to Admit served in this action is unquestionably improper since it requires plaintiff to admit or deny what amounts to all of elements of plaintiff's *prima facie* proof in its cause of action for breach of contract and account stated. Item 16 of the Notice to Admit requires defendant to admit "...you owe plaintiff, Midland Funding LLC $4,481.64 as demonstrated in the statements." Item 17 requests defendant admit "...billing statements are true and accurate business records that defendant would not object to as being admitted into evidence at trial."

The notice to admit in this case goes to the heart of the issues in this case, whether Citibank issued a credit card to Valentin, whether Valentin used the credit card, whether Valentin defaulted in payment, the terms of the credit card agreement, the Citibank's assignment of the debt to Midland and the balance due and owing on the account. These [*3]are ultimate conclusions that can only be made after a full anc complete trial.

One of the major problems assigned creditor such as Midland face in proving a *prima facie* case in assigned debt cases is proving the underlying debt. In order to get ths records establishing the underlying debt into evidence, Midland must establish the records upon which it relies are business records. In order to get these records into evidence, Midland must lay the appropriate foundation establishing the documents are business records of the original creditor, in this case Citibank. See, *Unifund CCR Partners v. Youngman*, 89 AD3d 1377 (4th Dept. 2011), *lv. dnd.* 92 AD3d 1267 (4th Dept. 2012), *lv. dnd.* 19 NY3d 803 (2012); *Velocity Investments, LLC v. Cocina*, 77 AD3d 1306 (4th Dept. 2010); *Palisades Collection, LLC v. Kedik*, 67 AD3d 1329 (4th Dept. 2009); *Velocity Investments, LLC v. McCaffrey*, 31 Misc 3d 308 (District Ct. Nassau Co. 2011); and CPLR 4518(a). A witness from an assignee such as Midland almost always lacks the requisite knowledge to lay the proper foundation to establish the documents, the credit card agreement and the credit card statement, are business records of the original creditor. *Id.*[FN1]Plaintiff is attempting to use a notice to admit overcome its inability to lay the

proper foundation for the admission of documents necessary to establish its *prima facie* case at trial.

A notice to admit may not be used for matters that constitute the very dispute involved in the litigation. Siegel, *New York Practice 5th* §364. The precise dispute in this action is whether plaintiff's assignor, Citibank, issued a credit card to defendant, the terms of the agreement pursuant to which the credit card was issued, whether defendant defaulted in payment and the amount due when defendant defaulted.

The Notice to Admit is also being used to have plaintiff admit or deny facts that would not be within Valentin's knowledge. Valentin would not know and would have no way of knowing whether a credit card debt has been assigned from the original creditor to another party.

A party may not use a Notice to Admit to prove all the of the necessary elements of its *prima facie* case. A party cannot circumvent its burden proof and the rules of evidence through a Notice to Admit.

If Midland seeks to conduct appropriate discovery, such as a deposition or written interrogatories, at which defendant could be questioned regarding the issuance of the credit card, its use and her payment and/or failure to make payment, it may do so.

Therefore, plaintiff's motion is denied. The court finds plaintiff's Notice to Admit abusive and improper. The court on its own motion issues a protective order vacating plaintiff's Notice of Admit dated June 15, 2012. Defendant's failure to respond to said Notice to Admit shall not be deemed an admission for the purposes of this litigation. [*4]

SO ORDERED:

Hon. Fred J. Hirsh

District Court Judge

Dated: May 9, 2013

cc:Crystal Scott, Esq.

Maria Gonzalez, Esq.

Footnotes

Footnote 1: The foundation for a business record is proof the document was made in the regular course of business, it was the regular course of business of the business to make such records, the entry was made at or about the time of the event being recorded and the person providing the information has a business duty to provide the information. *William Conover, Inc. v. Waldorf,* 251 AD2d 727 (3rd Dept. 1998); and Price-Richardson *On Evidence* §8-305 (11th Ed. Farrell 1995).

Return to Decision List