

IN THE COUNTY COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2006-SC-003640-XXXX-MA
DIVISION: A

CAPITAL ONE BANK,

Plaintiff,

v.

OLIVE D. MULLIS

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE STIPULATION
FOR FINAL JUDGMENT EXECUTION WITHHELD AND FOR
RELIEF FROM FINAL JUDGMENT EXECUTION WITHHELD

This matter came before the Court on Defendant, Olive D. Mullis' Motion to Set Aside the "Stipulation for Final Judgment Execution Withheld" filed herein and Motion for Relief from "Final Judgment Execution Withheld" which was entered based upon the subject stipulation pursuant to Rule 7.190(b)(1) and (3), Florida Small Claims Rules and the Court having heard argument of counsel for the Plaintiff and Defendant, having reviewed the file including Olive D. Mullis' affidavit filed herein and being otherwise sufficiently advised in the premises, finds as follows:

1. On or about May 25, 2006, Plaintiff's counsel caused to be served upon Olive D. Mullis (hereinafter "Ms. Mullis") a form Summons/Notice to Appear for the Pretrial Conference with its Complaint for Damages. The only supporting documentation attached to the Complaint was a generic partial form contract which did not contain a date, any reference to Ms. Mullis or

her signature. Also, attached to the Complaint and served upon Ms. Mullis with service of process was an undated letter signed by Plaintiff's counsel, Robert J. Orovitz, Esquire of Hayt, Hayt and Landau and a Stipulation for Entry of Final Judgment Execution Withheld.

2. Each of these documents were served together as one package.
3. The letter states

You have now been served with a Complaint by Capital One Bank to collect the outstanding balance due and owing on your account. I am enclosing for your review and signature a Stipulation for Entry of Final Judgment Execution Withheld. As you will note, the amount of the monthly payments has intentionally been left blank. Kindly contact my office upon receipt of this letter so that we may mutually agree to the terms and conditions of said stipulation. If we agree on an amount, you will not have to go to court. (This is your last opportunity to resolve this matter without going to court.) *emphasis provided by author*

Please understand that any information we obtain will be used for the purpose of collecting this debt.

If you have any questions or wish to discuss this matter in further detail please feel free to contact me.

4. The Stipulation for Entry of Final Judgment Execution Withheld attached to the Complaint allows for post-judgment interest at the rate of 20.650% and provides in Paragraph Number 6:

In the event of Defendant(s) default under the terms of the Stipulation and Plaintiff's obtains an execution order, the Defendant(s) hereby agree(s) to waive any garnishment defenses that are waivable (sic) under Florida Statute 222.11.

5. Fla.Sm.C.L.R. 7.050(a) provides that a case shall be commenced by filing a Statement of Claim. --Actions are commenced by the filing of a statement of claim in concise form, which shall inform the Defendant of the basis and the amount of the claim. If the claim is based on a written document, a copy or the material part thereof shall be attached to the statement of claim.

6. Fla.Sm.Cl.R. 7.060(a) provides that a summons entitled Notice to Appear shall be served on the Defendant with the time and place of hearing and the prescribed information regarding venue. Also, a statement of claim shall be served with the summons. Fla.Sm.Cl.R. 7.060(b)

7. The Stipulation served on the Defendant in this action is not a proper pleading and should never have been served with the initial process. See Capital One Bank, Inc. v. Mary B. Livingston, 13 Fla.L.Weekly Supp. 1203 (County Court, Florida Fourth Judicial Circuit, Duval County, Florida, 2006); North Star Capital Acquisitions, LLC v. Lynn S. Krig, 14 Fla. L.Weekly Supp. 166a (County Court, Florida Fourth Judicial Circuit, Duval County, Florida, 2006); Capital One Bank v. Jean C. Miller; 14 Fla.L.Weekly Supp. 585 (County Court, Florida Fourth Judicial Circuit, Duval County, Florida, 2006); Capital One Bank, Inc. v. Donna M. Carncross, County Court, Florida Fourth Judicial District, Clay County, Florida, signed March 9, 2007, the Honorable Richard R. Townsend; and Capital One Bank, Inc. v. Evelyn B. Hayward, County Court, Florida Fourth Judicial District, Clay County, Florida, signed March 9, 2007, the Honorable Richard R. Townsend.

8. Serving the Stipulation and cover letter with the initial process simulates legal process and gives the document an air of authority and importance even though it is not a true legal pleading. See Livingston, Miller, Krig, supra.

9. The Commentary to Rule 4-4.3. Dealing with Unrepresented Persons provides

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice

to obtain counsel.

10. The interest rate provided by the Stipulation is more than the statutory post-judgment interest rate allowed. The inclusion of this rate and the language waiving Defendant's statutory exemptions to garnishment in the Stipulation is unconscionable. See *Livingston, Miller, Krig, supra*.

11. The Plaintiff's form "Stipulation for Entry of Final Judgment Execution Withheld" and "Final Judgment Execution Withheld" are not in conformity with the stipulation process contemplated by the Florida Small Claims Rules. Form 7.345, *Fla.Sm.Cl.R.* - "Stipulation for Installment Settlement, Order Approving Stipulation and Dismissal." There is no provision in the Florida Rules of Civil Procedure or Florida Small Claims Rules for Plaintiff's "Stipulation for Entry of Final Judgment Execution Withheld" and "Final Judgment Execution Withheld."

12. At the time the stipulation was signed by Ms. Mullis, she was misled as to its nature and her options and she was not informed of important legal rights she was forfeiting by signing the stipulation such as but not limited to her right to demand proof of the debt and the amounts claimed, free mediation conducted by a Supreme Court certified mediator and, if a judgment was entered, interest at the statutory rate.

It is therefore,

ORDERED:

- A. Defendant's Motion to Set Aside the Stipulation for Final Judgment Execution Withheld and Motion for Relief from Final Judgment Execution Withheld are granted.
- B. The Stipulation for Entry of Final Judgment Execution Withheld signed by Ms.

Mullis on June 22, 2006 is set aside and the Final Judgment Execution Withheld entered on July 5, 2006 and recorded on July 7, 2006 in the current public records of Duval County Florida Official Records Book 13376, Page 2260 and re-recorded on September 13, 2006 in the current public records of Duval County, Florida Official Records Book 13515, Page 947 is hereby vacated and set aside.

C. Defendant shall have twenty days from the date of the entry of this order to file a response to Plaintiff's Complaint for Damages.

D. The Court reserves jurisdiction as to the awarding of attorneys fees and costs in this matter.

DONE AND ORDERED in Duval County, Florida, this 28 day of November, 2007.

Is/ Emmet F. Ferguson, III

COUNTY COURT JUDGE

Copies furnished to:

Jason Dragutsky, Attorney for Plaintiff
Lynn Drysdale, Attorney for Defendant