

Karches v Sterling
2005 NY Slip Op 30276(U)
April 12, 2005
Supreme Court, New York County
Docket Number: 0604995/2001
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **KAREN SMITH**

PART _____

0604995/2001

KARCHES, PETER
VS
STERLING, OLIVER JAMES

INDEX NO. _____

MOTION DATE _____

SEQ 1

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits - *Cross motions*

Replying Affidavits

memorandum of law

PAPERS NUMBERED

1

2

3

4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that ~~this motion~~ *plaintiff's motion*
and defendant's cross motion are
decided in accordance with the
attached memorandum decision and
order.

FILED
APR 13 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/05

KSS
KAREN SMITH J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

-----X
PETER KARCHES,

Plaintiff,

-against-

Index no.: 604995/2001
Motion seq.: 001
Motion date: February 14, 2005

OLIVER JAMES STERLING

DECISION AND ORDER

Defendant.

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff Peter Karches's motion, pursuant to CPLR § 3212, for an order granting summary judgment is granted in part and denied in part, and defendant Oliver James Sterling's cross motion for an order granting summary judgment dismissing the complaint is granted in part and denied in part.

This action arises out of an Agreement for Sale and Purchase of Stock ("Contract") and a promissory note ("Note") issued pursuant thereto. Plaintiff moves for summary judgment on the ground that defendant has breached his obligations under the Contract and Note and can offer no defense for his breach. Defendant moves for summary judgment on the grounds that plaintiff's claims are time barred and that plaintiff has failed to properly serve defendant and thus the court has not acquired personal jurisdiction over defendant.

The relevant facts are contained in the parties' moving papers and are not in dispute. Plaintiff and defendant entered into the Contract on February 7, 1994. Under the terms of the Contract, plaintiff agreed to convey to defendant all of plaintiff's shares of common stock in Excelco Energy, Inc., ("Excelco"), a Delaware Corporation. In turn, defendant agreed to pay plaintiff a total of \$120,000, paid in three installments. Under the terms of the contract, defendant was to pay \$30,000 upon receipt of the shares and to execute the Note, providing for payments to plaintiff in the amount of \$30,000 on or before February 1, 1995 and \$60,000 on or before February 1, 1996. On February 7, 1994, plaintiff conveyed all of his Excelco stock to defendant and defendant tendered \$30,000 and executed the Note. Defendant has failed to tender the payments due under the note and is now in

default thereunder.

Plaintiff initiated this action by purchasing an index number and filing his Summons and Complaint with the County Clerk's office on October 18, 2001. By way of an affidavit, plaintiff's process server Brad Weeks alleged that, starting on December 19, 2001, he attempted to serve defendant in person approximately 18 times at what he understood to be defendant's home and business addresses. Finally, on January 28, 2002, Mr. Weeks affixed a copy of the summons and complaint to defendant's business address and sent a copy to the same address. Defendant served an answer on February 26, 2002.

In his complaint, plaintiff claims that defendant breached the Contract by failing to tender payment pursuant to the Note. Defendant's answer acknowledges execution of the Contract and the Note and enters a general denial of the remainder of plaintiff's allegations. Defendant also raises two defenses. First defendant argues that the court lacks jurisdiction over defendant as plaintiff has failed to properly serve defendant. Second, defendant argues that plaintiff's claims are time barred.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Id*).

The portion of defendant's motion that seeks summary judgment on the grounds that plaintiff has failed to properly serve him is denied. CPLR § 3211 (e) clearly states that a party who objects to jurisdiction on the basis of improper service in his pleading must move for judgment on that basis within sixty days of the pleading, or that objection will be waived. Here, defendant served his answer on February 26, 2002, but seeks summary judgment on this ground almost three years later. Regardless of the propriety of service, defendant has waived any defense on that ground. As such, this portion of defendant's motion is denied.

The portion of defendant's motion raising the defense of statute of limitations is granted as to the first installment payment due under the contract. Actions based upon contractual obligations must be brought within six years of the accrual of the cause of action. (CPLR § 213) When a

contract calls for payments in installments, the statute of limitations begins to run on each installment from the time it becomes due. (*Vigilant Insurance Company of America v. Housing Authority of El Paso, Texas*, 87 NY2d 36, 45 [1995]). Here, plaintiff's claim is clearly based upon a contractual obligation. The first payment was due on February 1, 1995. Plaintiff did not commence this action until October 18, 2001, more than six years after the first payment became due. As such, that portion of plaintiff's claim is time barred and defendant has demonstrated that he is entitled to judgment as a matter of law.

Plaintiff's argument that defendant waived his statute of limitations defense is without merit. Agreements to waive statute of limitations defenses that are entered into at the inception of a contract are void as against public policy. (*John J. Kassner & Co. v. City of New York*, 46 NY2d 544, 551 [1979]). Here, the language plaintiff purports to be defendant's waiver is contained in the note defendant signed on the same day on which the contract was formed. As such, any waiver of a statute of limitations defense contained therein is invalid.

Plaintiffs claim for summary judgment on the second installment, in the amount of \$60,000 due on February 1, 1996 is granted, and defendant's motion to dismiss this claim is denied. Plaintiff has put forth proof sufficient to establish plaintiff and defendant entered into a contract, that plaintiff performed his duties under that contract and that defendant breached his duties under that contract. As such, plaintiff has made his *prima facie* showing that he is entitled to judgment as a matter of law. Defendant has failed to put forth proof sufficient to raise a material question of fact as to this claim.

Defendant's contention that this portion of plaintiff's claim is time barred is without merit. Defendant argues that, upon his failure to pay the first installment on February 1, 1995, he was in default on the note and the payment originally due February 1, 1996 became due on that date as well. As such, defendant argues, both installments are time barred. This argument ignores the specific language of the Note, which states that, "if Maker fails to perform or observe fully any obligation or condition to be performed or observed by Maker under this note . . . then a default shall exist under this note and the entire unpaid principal balance on this note shall become immediately due and payable, *at the option of the holder of this note*[" (Emphasis added). Hence, the remainder became payable on February 1, 1995 only at plaintiff's option. Defendant has not alleged or put

forth any proof that plaintiff exercised his option to accelerate the remaining balance at any time before February 1, 1996. As plaintiff brought this action within six years of that date, plaintiff's claim is timely.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted as to the installment due February 1, 1996, and the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the defendant in the amount \$60,000, together with interest at the rate of 9% per annum from February 1, 1996 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and it is further

ORDERED that the remainder of plaintiff's motion is denied, and it is further

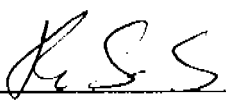
ORDERED that defendant's motion for summary judgment is granted as to the installment due February 1, 1995 and is denied as to the remainder of the claims therein.

This constitutes the decision and order of the court.

Dated: April 12, 2005

ENTER:

New York, New York



J.S.C.