

Education Resources Inst., Inc. v Bergman
2008 NY Slip Op 30145(U)
January 15, 2008
Supreme Court, New York County
Docket Number: 0104948/2003
Judge: Jacqueline W. Silbermann
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. HON. JACQUÉLINE W. SILBERMANN
Justice

PART 502

Education Resources
Institute Inc.
- v -

Dwight T. Bergman

INDEX NO. 104948/03

MOTION DATE _____

MOTION SEQ. NO. 008

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 _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided
in accordance with the
attached decision

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____

J.S.C.

Dated: 1/15/08

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 50L

-----X
THE EDUCATION RESOURCES INSTITUTE, INC.,

Plaintiff,

-against-

Index No.: 104948/03

MYLES BERGMAN,

Defendant.

-----X

SILBERMANN, J.:

This is an action brought by The Education Resources Institute, Inc., the guarantor of defendant's law school student loans, to recover the amount of four defaulted student loans plus interest. Defendant Myles Bergman, acting pro se,¹ now moves, by order to show cause, to vacate a July 25, 2007 ruling by the Hon. Ira Gammerman, J.H.O. Defendant argues that his statute of limitations defense, which was raised in a motion to dismiss that he filed in September 2006, was never adjudicated, is a meritorious defense to this action, and that J.H.O. Gammerman erred by sending this case out for trial on July 25, 2007 without a resolution of the statute of limitations issue.

This case was commenced by the filing of a summons and complaint on March 17, 2003. After plaintiff was granted leave to effect late service on defendant, the summons and complaint were served on March 15, 2005. Thereafter, defendant moved to dismiss the action on the grounds of lack of personal jurisdiction due to improper service and the expiration of the statute of limitations. By order dated January 2, 2007, the Hon. Doris Ling-Cohan granted the motion

¹While defendant did study law for some time, it is not clear whether he graduated. He is, however, not admitted to the bar of this state.

to the extent of ordering a traverse hearing before a Special Referee to determine the issue of service of process. Special Referee Louis Crespo conducted a traverse hearing on April 19, 2007, and, by decision and order dated April 19, 2007, sustained the March 15, 2005 service on the concierge of defendant's building pursuant to CPLR 308(2). Defendant did not appeal or move for reargument of either order.

After unsuccessful mediation, the case was then scheduled for trial on July 23, 2007 before the Hon. Ira Gammerman, J.H.O., in the Administrative Coordinating Part (Part 40). Due to the fact that defendant had failed to appear at an earlier trial-ready date, plaintiff was instructed to notify defendant of the July 23rd date and bring proof of notification to the court. On July 23rd, plaintiff's counsel appeared in Part 40 before J.H.O. Gammerman ready to be sent out for trial. When defendant failed to appear, J.H.O. Gammerman called the defendant on the telephone. Defendant claimed he had no idea the case was on for trial. J.H.O. Gammerman advised defendant to appear in court the next day on July 24th and be ready to go to trial. However, due to the fact that July 24th was a Jewish holiday, J.H.O. Gammerman agreed, in a conference call later that day, that the trial be adjourned to July 25th.

On July 25th, plaintiff's counsel again appeared in Part 40 ready for trial, together with a witness who had traveled from Boston to New York for the trial on July 23rd and was forced to remain in town for two additional days due to defendant's non-appearance and request for an adjournment. The defendant and his father appeared, but refused to go forward with the trial and requested another adjournment on the ground that defendant's defense based on the statute of limitations had never been resolved and was still pending before Judge Ling-Cohan. J.H.O. Gammerman denied the request, and advised defendant that he could either be sent out for trial

and make whatever arguments he had for an extension of time to the trial judge or they could be defaulted and an inquest would be had in their absence. Defendant Bergman and his father chose to leave the building. An inquest was then conducted with the consent of the plaintiff before the J.H.O., who awarded plaintiff \$74,845.72 plus interest. Judgment in the amount of \$75,980.72 was entered against the defendant on September 17, 2007.

After Judge Ling-Cohan refused to sign an order to show cause seeking similar relief in August 2007 and plaintiff commenced enforcement proceedings to collect on the judgment, defendant filed the instant order to show cause on October 26, 2007. For the following reasons, the motion is denied.

First, the motion is improper since a judgment has now been entered in the case and defendant's only recourse is to move, under CPLR 5015, to vacate that judgment or take an appeal. Second, defendant's motion to dismiss the complaint was resolved by the orders of Justice Ling-Cohan and Referee Crespo, and no motion based on the statute of limitations was pending in July 2007 when the case was called for trial. If defendant felt that either order was erroneous or incomplete, the proper course of action would have been for him to appeal, move for reargument pursuant to CPLR 2221 or file a motion for summary judgment on this defense. Defendant claims he was under the erroneous belief that he could not file a notice of appeal until he was served with notice of entry, when, in reality, service of notice of entry of an order only commences the 30-day time limit for appealing that order and is not a prerequisite for such filing. See CPLR 5513(a). Third, to the extent that defendant claims he was prejudiced by J.H.O. Gammerman's ruling sending the case to trial on July 25, 2007, defendant misunderstands that there was nothing precluding him from raising the statute of limitations as a defense at the

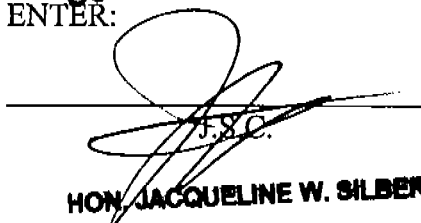
trial since Justice Ling-Cohan declined to make any ruling on that defense in connection with defendant's motion to dismiss.

Although this motion is denied on strictly procedural grounds, I note that defendant appears to be under the highly erroneous impression that the statute of limitations was not tolled until he was served with the summons and complaint. However, since the CPLR was amended effective July 1, 1992 to provide for a commencement by filing system, the statute of limitations is tolled when the summons and complaint is filed and the action is deemed commenced. See CPLR 203(c) and 304. In this case, that date is March 17, 2003, and since this case was filed less than six years after the plaintiff paid the original lender, i.e., on January 16 and April 6, 1998, the action is clearly timely. A cause of action for reimbursement on a defaulted student loan accrues on the date of payment by the guarantor. See State of New York Higher Educ. Servs. Corp. v Zamore, 90 AD2d 664 (3d Dept 1982), affd 59 NY2d 933 (1983); State of New York Higher Educ. Servs. Corp. v Langus, 140 AD2d 792 (3d Dept 1988); State of New York Higher Educ. Servs. Corp. v Cadley, 103 AD2d 908 (3d Dept 1984).²

For the foregoing reasons, it is hereby

ORDERED that defendant's motion is denied..

Dated: January 15, 2008

FILED
JAN 22 2008
NEW YORK
COUNTY CLERK'S OFFICE
ENTER:

HON. JACQUELINE W. SILBERMANN

²Defendant's reliance on Zamore, Langus and Cadley for his statute of limitations defense is misplaced, since these cases were all decided prior to the time that the CPLR was amended, effective July 1, 1992, to provide for commencement by filing in the Supreme Court. See L. 1992, ch. 216.