

Morrison v Scaffaro

2008 NY Slip Op 32901(U)

September 30, 2008

Supreme Court, Suffolk County

Docket Number: 14434/2008

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 14434/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 CHAROLETTE MORRISON,
 R.A.M. SR. MANAGEMENT, INC.,

Plaintiffs,

-against-

TERENCE G. SCAFFARO,
 DONNA M. SCAFFARO,

Defendants.

ORIG. RETURN DATE: JUNE 11, 2008
 FINAL SUBMISSION DATE: JULY 10, 2008
 MTN. SEQ. #: 001
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
 LAW OFFICES OF PETER SMITH
 & ASSOCIATES
 389 FORT SALONGA ROAD
 NORTHPORT, NEW YORK 11768
 631-897-9374

DEFT'S/RESP ATTORNEY:
 JOHN F. CLENNAN, ESQ.
 2206 OCEAN AVENUE - POB 1143
 RONKONKOMA, NEW YORK 11779
 631-588-6244

Upon the following papers numbered 1 to 5 read on this motion _____
 TO DISMISS _____

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; it is,

ORDERED that this motion by defendants for an Order, pursuant to CPLR 3211(a), dismissing the first through fourth causes of action in the complaint on the grounds that the causes of action were not commenced within the applicable statute of limitations period set forth in CPLR 213, is hereby **GRANTED** solely to the extent provided herein. The Court has received an affirmation in opposition from plaintiffs.

Plaintiffs commenced this action by summons and complaint dated April 30, 2008, asserting four causes of action to recover damages as a result of defendants' alleged breach of four promissory notes, as described hereinafter.

The first cause of action alleges that defendant TERENCE G. SCAFFARO, on or about September 16, 1998, executed and delivered to plaintiffs a promissory note, whereby TERENCE G. SCAFFARO promised to repay to plaintiff R.A.M. SR. MANAGEMENT, INC. the sum of \$6,500.00. The note recites that the monthly payments were to be in the amount of \$175.00, beginning on October 1, 1998, and continuing for a total of forty-eight (48) months. The complaint alleges “[n]one of which has been paid, defendant TERENCE G. SCAFFARO owes to plaintiff the amount of said note.”

The second cause of action alleges that defendant DONNA M. SCAFFARO, on or about December 8, 1999, executed and delivered to plaintiffs a promissory note, whereby DONNA SCAFFARO promised to repay to plaintiff R.A.M. SR. MANAGEMENT, INC. the sum of \$14,000.00. The note recites that the monthly payments were to be in the amount of \$250.00, beginning on January 1, 2000, and continuing for a total of eighty-four (84) months. The complaint alleges “[n]one of which has been paid, defendant DONNA M. SCAFFARO owes to plaintiff the amount of said note.”

The third cause of action alleges that defendant TERENCE G. SCAFFARO, on or about January 25, 2002, executed and delivered to plaintiffs a promissory note, whereby TERRY SCAFFARO promised to repay to plaintiff CHAROLETTE MORRISON the sum of \$12,960.00. The note recites that the monthly payments were to be in the amount of \$360.00, beginning on March 1, 2002, and continuing for a total of thirty-six (36) months. This note recites that “[t]he total amount shall be due and payable in full on February 1st 2005 if not paid already.” The complaint alleges “[n]one of which has been paid, defendant TERENCE G. SCAFFARO owes to plaintiff the amount of said note.”

The fourth cause of action alleges that defendants TERENCE G. SCAFFARO and DONNA M. SCAFFARO, on or about February 14, 2002, executed and delivered to plaintiffs a promissory note, whereby TERENCE G. SCAFFARO and DONNA M. SCAFFARO promised to repay to plaintiff CHAROLETTE MORRISON the sum of \$28,500.00, in monthly payments each in the amount of \$475.00, beginning on April 1, 2002, and continuing for a total of sixty (60) months. This note recites that “[t]he total amount shall be due and payable in full on March 1st 2007 if not paid already.” The complaint alleges “[n]one of which has been paid, defendants TERENCE G. and DONNA M. SCAFFARO owe to plaintiff the amount of said note.”

Plaintiffs demand judgment against defendants in the sum of sixty-seven thousand four hundred sixty (\$67,460.00) dollars, plus interest, costs and disbursements. This amount includes an additional loan document attached to the complaint, dated May 19, 2000, in which "Terry Scaffaro" apparently borrowed \$5,500.00 from "R. & C. Morrison" to be repaid in thirty-six monthly installments of \$225.00 each. However, the Court notes that plaintiffs have not alleged a separately stated cause of action in the complaint (see CPLR 3014), with statements sufficiently particular to give the Court and parties notice of this purported loan (see CPLR 3013). Therefore, the Court finds that this purported loan is not properly before the Court.

Defendants have now filed the instant motion to dismiss, arguing that the four causes of action were not commenced within the applicable six-year statute of limitations set forth in CPLR 213. Defendants further argue that any issue with respect to the additional loan document attached to the complaint, dated May 19, 2000, is not properly before the Court, as no cause of action of action was pleaded in the complaint. As discussed, the Court concurs with respect to this additional loan document.

Regarding the first cause of action, defendants argue that the agreement was breached on October 1, 1998, the date the first payment was due and not tendered, and therefore the statute of limitations expired six years thereafter on September 30, 2004. As discussed, this action was commenced by summons and complaint dated April 30, 2008.

Regarding the second cause of action, defendants argue that the agreement was breached on January 1, 2000, the date the first payment was due and not tendered, and therefore the statute of limitations expired six years thereafter on December 31, 2005.

Regarding the third cause of action, defendants argue that the agreement was breached on March 1, 2002, the date the first payment was due and not tendered, and therefore the statute of limitations expired six years thereafter on February 28, 2008, approximately two months prior to April 30, 2008.

Regarding the fourth cause of action, defendants argue that the agreement was breached on April 1, 2002, the date the first payment was due and not tendered, and therefore the statute of limitations expired six years

thereafter on March 31, 2008, approximately one month prior to April 30, 2008.

Based upon the foregoing, defendants seek dismissal of plaintiffs' complaint in its entirety.

In opposition, plaintiffs argue that each cause of action was timely interposed, as the statute of limitations began to run on the date of maturity of each loan. Specifically, plaintiffs argue the following:

With respect to the first cause of action, plaintiffs allege that the term of the loan ended on September 16, 2004, thus the six-year statute of limitations would not bar a claim until September 16, 2010. However, the Court notes that the term of this loan was four years from September 16, 1998, or until September 16, 2002. Therefore, based upon plaintiffs' argument, the six-year statute of limitations would not bar a claim until September 16, 2008.

With respect to the second cause of action, plaintiffs allege that the eighty-four (84) month term of the loan ended on December 8, 2006, thus the six-year statute of limitations would not bar a claim until December 8, 2012.

With respect to the third cause of action, plaintiffs allege that any unpaid balance was due and payable in full by February 1, 2005, thus the six-year statute of limitations would not bar a claim until February 1, 2011.

With respect to the fourth cause of action, plaintiffs allege that any unpaid balance was due and payable in full by March 1, 2007, thus the six-year statute of limitations would not bar a claim until March 1, 2013.

Plaintiffs further argue that if the Court disagrees with the foregoing, then payments alleged by defendants in their answer may serve to revive the debt for statute of limitations purposes. As such, plaintiffs argue that further discovery is necessary herein to "determine if payments were made, if so, when, and were payments made under circumstances evincing defendants' acknowledgment of more being due."

Initially, the Court finds that the six-year statute of limitations set forth in CPLR 213 applies to the four promissory notes at issue herein (see CPLR 213; *UMLIC VP, LLC v Mellace*, 19 AD3d 684 [2d Dept 2005]; *Shelley v Dixon Equities*, 300 AD2d 566 [2d Dept 2002]). As such, it must be determined when

such statute of limitations began to run for each note. In each case, defendants argue that the statute began to run from the date the first installment payment was due and not tendered, while plaintiffs argue that the statute began to run from the maturity date of the loans. Plaintiffs further argue that any payments made pursuant to the notes could revive the debt for statute of limitations purposes, and therefore the motion should be denied on this ground as well, and the matter should proceed to discovery.

Demand and installment obligations are critically distinct in the context of when the statute of limitations attaches and warrant different considerations and results under the statute of limitations' microscope (*Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138 [1993]). Each note herein provided for repayment in monthly installments, without interest, and thus were not payable on demand (*cf.* UCC 3-108; *Cognetta v Valencia Developers*, 8 AD3d 318 [2d Dept 2004]). If the notes were demand instruments, then the six-year statute of limitations would begin to run on the date the obligation was created (*see* CPLR 213 [2]; *Lynford v Williams*, 34 AD3d 761 [2d Dept 2006]; *Shelley v Dixon Equities*, 300 AD2d 566 [2d Dept 2002]).

In contrast, the statute of limitations for installment obligations begins to run on the date each installment becomes due; however, if the debt is accelerated, the entire amount becomes due and the statute of limitations begins to run on the entire debt (*see Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, *supra*; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). As plaintiffs have not alleged that they accelerated any of the debts prior to maturity, the Court finds that the statute of limitations for the installment obligations herein began to run on the date each installment became due and was not tendered by defendants.

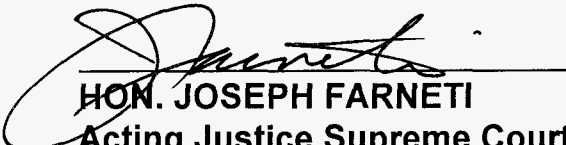
Although plaintiffs argue that any payments made pursuant to the notes could revive the debt for statute of limitations purposes, in order for a part payment to have the effect of tolling a time-limitation period, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder (*Lew Morris Demolition Co. v Board of Education*, 40 NY2d 516 [1976]; *Stern v Stern Metals, Inc.*, 22 AD3d 567 [2d Dept 2005]). In each cause of action in the complaint herein, plaintiffs allege that defendants failed to make any payments towards the outstanding balances. The Court notes

that plaintiffs would possess such knowledge concerning any installment payments made by defendants. Accordingly, the Court finds this argument unavailing.

As discussed, plaintiffs commenced this action by summons and complaint dated April 30, 2008. However, the Court's records of this matter indicate that the summons and complaint were filed with the Clerk of the Court on May 2, 2008. In view of the foregoing, this application to dismiss is **GRANTED** to the extent that any claims by plaintiffs based upon installment payments that were due under the subject notes prior to May 2, 2002, are hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: September 30, 2008


HON. JOSEPH FARNETI
Acting Justice Supreme Court