

Baxter v Columbia Univ.
2008 NY Slip Op 33693(U)
October 10, 2008
Supreme Court, New York County
Docket Number: 303121/2007
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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BRIAN BAXTER, on behalf of the FIRST-
GENERATION, LOW INCOME COLLEGE
STUDENT,

Plaintiff,

INDEX № 303121/2007

-against-

DECISION/ORDER

COLUMBIA UNIVERSITY, MARY HARSH and
CITIBANK (N.A.).

Defendants.

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IIION. BETTY OWEN STINSON:

This motion by defendants Citibank (N.A.) ("Citibank") and Nancy Harsh, s/h/a Mary Harsh, for an order dismissing the plaintiff's complaint against them is granted.

Plaintiff Brian Baxter ("plaintiff" herein) attended Columbia University ("Columbia") as an undergraduate student beginning in 1987, and as a graduate student beginning in 1992.

Plaintiff apparently received some scholarship help from Columbia and financed the remaining tuition and other school expenses with student loans from Citibank at an annual interest rate of 8.25%. According to plaintiff, the original principal amount of his loans altogether was \$65,000. Although plaintiff made some payments on the loans, he eventually defaulted on his promissory notes, leaving the amount of \$95,931.82 to be paid by the government guarantor.

In 2007 plaintiff commenced this action against Columbia, Citibank and Nancy Harsh, alleging Columbia and Citibank had a confidential agreement by which Columbia would steer students to Citibank as Columbia's preferred lender for student loans, even though other lending

institutions were offering interest rates 0.25% lower than Citibank's. In the complaint as it related to Citibank, plaintiff alleged breach of contract, fraud and deceptive business practices. Plaintiff alleged that, at some point, he had an offer from Midland Marine Bank for a loan with a lower interest rate than that offered by Citibank and wanted to borrow from Midland Marine, but was misled by Columbia's and Citibank's silence regarding their agreement. Because of that silence, plaintiff believed he was "obligated" to use Citibank as his lender or be ineligible for financial aid. Had he known of the agreement, he would have made more informed decisions in his choice of lenders. The participation of Nancy Harsh, a Citibank employee, was limited to signing one of the documents relating to the loans once they were in default.

Citibank made the instant motion to dismiss in lieu of an answer, arguing that the limitations periods for plaintiff's causes of action have expired, plaintiff has failed to state a cause of action for either breach of contract, fraud or deceptive business practices, and has alleged no facts at all to support a cause of action as against Nancy Harsh.

An action may be dismissed on the motion of any party upon a showing that the statute of limitations has expired (Civil Practice Law and Rules ["CPLR"] § 3211[a][5]) or that the pleading fails to state a cause of action (CPLR § 3211[a][7]). On a motion to dismiss a complaint, the court must take all allegations in the complaint as true and resolve all inferences which reasonably flow therefrom in favor of the pleader (*Cron v. Hargro Fabrics, Inc.*, 91 NY2d 362 [1968]).

The limitations period for a claim of breach of contract is six years (CPLR § 213[2]). The limitations period for a claim of fraud is the greater of six years after the cause of action accrued, or two years from the time the plaintiff discovered the fraud or with reasonable diligence could have discovered it (CPLR § 213[8]). The burden of establishing that fraud could not have been

discovered during the two-year period before commencement of an action, for limitations purposes, rests on the plaintiff who seeks the benefit of a discovery exception to the six-year statute of limitations (*Percoco v. Lesnak*, 24 AD3d 427 [2nd Dept 2005]). Any cause of action for which no limitations period is prescribed by law has a limitations period of six years (CPLR § 213[1]).

In an action to recover damages for fraud, the plaintiff must prove a (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant, (2) made for the purpose of inducing the plaintiff to rely on it, (3) justifiable reliance by the plaintiff on the misrepresentation or material omission and (4) injury to the plaintiff as a result (*Lama Holding v Smith Barney*, 88 NY2d 413 [1996]).

Regarding plaintiff's cause of action for breach of contract, it is undisputed that the latest contract between plaintiff and Citibank was signed in 1992, more than six years before this action was commenced. In order to take advantage of the two-year statute of limitations for fraud, plaintiff, at a minimum, had to specify when he learned of the behavior alleged to be fraudulent. Plaintiff has remained consistently silent on that point and cannot, therefore, have the benefit of the shorter limitations period. The allegedly deceptive business practice, *i.e.* the failure of Citibank to disclose to the plaintiff an agreement with Columbia, took place in 1992 at the latest, more than six years ago. Plaintiff brought this action more than fifteen years after the subject events and all his cause of action are, therefore, barred by the statute of limitations.

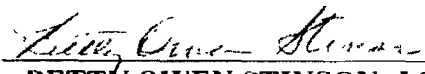
Furthermore, plaintiff has not stated a cause of action for breach of contract by Citibank. Plaintiff admitted he was aware of a loan offer for less interest than that charged by Citibank at the time he borrowed loan amounts from Citibank, but he signed the contract with Citibank

nevertheless. By his own account, it was he who breached the contract by failing to make payments on the loan. Plaintiff did not allege any facts tending to show that Citibank misled him as to the terms of the contract, rather he alleged it was the financial aid office of Columbia that provided him with loan applications and led him to contract with Citibank. There is, therefore, no basis stated in the complaint for a cause of action alleging fraud or deceptive business practices against Citibank. Finally, there are no facts alleged to support any claim of fraud, misrepresentation or deception on the part of Nancy Harsh.

The complaint as against defendants Citibank (N.A.) and Mary Harsh is, for the foregoing reasons, dismissed.

This constitutes the decision and order of the court.

Dated: October 16, 2008
Bronx, New York


BETTY OWEN STINSON, J.S.C.