

Educap, Inc. v Tsekas
2013 NY Slip Op 31851(U)
August 9, 2013
Sup Ct, New York County
Docket Number: 111355/10
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 111355/2010
EDUCAP, INC.
vs
TSEKAS, JERALD
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 8/7/13
which disposes of motion sequence(s) no. 004

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

FILED
AUG 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
AUG 08 2013
CLERK OF SUPREME COURT
NEW YORK COUNTY OFFICE
100 CANTON ST. 10014-1502
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CLERK OF SUPREME COURT
NEW YORK COUNTY OFFICE
100 CANTON ST. 10014-1502

Dated: 8/7/13

SS, J.S.C.

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
EDUCAP, INC.

Plaintiff,

Index Number: 111355/10
Submission Date: 5/15/13

- against -

DECISION and ORDER

JERALD TSEKAS and ELENI BOUSIOU,

Defendants.

----- X

For Plaintiff:
Law Offices of Jeffrey H. Ward
330 Seventh Avenue, 15th Floor
New York, NY 10001

For Defendant:
Jerald Tsekas
590 Fort Washington Avenue, Apt. 1E
New York, NY 10033

Papers considered in review of plaintiff's motion for summary judgment (motion seq. no. 004):

Notice of Motion/Affidavit/Exhibits.....	1
Affidavit in Opp./Exhibits.....	2

HON SALIANN SCARPULLA, J.:

In this action to recover a student loan debt, plaintiff Educap, Inc. ("Educap") moves for summary judgment on its complaint against defendant Jerald Tsekas ("Tsekas") pursuant to CPLR § 3212.

Educap commenced this action on August 25, 2010 seeking to recover an outstanding balance on Tsekas' student loan ("student loan"). In its complaint, Educap asserts causes of action sounding in breach of contract, unjust enrichment, and account stated. On November 27, 2012, Tsekas answered the complaint and asserted an affirmative defense that the student loan was discharged in bankruptcy.

In its motion, Educap argues that it is entitled to summary judgment on its complaint because: (1) Tsekas defaulted on the loan; (2) the student loan was not discharged in bankruptcy pursuant to 11 U.S.C. § 523(a)(8); and (3) Tsekas fails to show that he obtained a discharge of his student loan based on undue hardship.

Educap submits a copy of the promissory note that Tsekas signed on March 13, 2006, in exchange for the student loan from HSBC Bank USA, N.A. (“HSBC”) in the amount of \$30,135.00. Educap also submits evidence that HSBC assigned the student loan to Educap on June 5, 2006.

Educap submits an affidavit from its director of default management Marc Maiorca (“Maiorca”). In his affidavit, Maiorca states that the student loan is presently in default, and that the last payment was made on December 3, 2008.

Educap seeks a judgment against Tsekas in the amount of \$54,640.68. Maiorca states in his affidavit that Tsekas owes the following amounts: \$30,724.80 for the principal amount due, \$12,307.41 in accrued interest, \$680.33 in late charges, plus \$10,928.14 in attorney’s fees.

Educap argues that it is entitled to attorney’s fees under the promissory note. Paragraph 12(g) of the promissory note states that “If I [Tsekas] am in default, I will pay your reasonable costs of collection, including attorneys fees, to the extent permitted by law.” Maiorca states that Educap has a 25% contingency fee arrangement with its attorneys.¹

¹ Maiorca states that Educap seeks \$10,028.14 in attorney’s fees. However, it appears that Educap seeks \$10,928.14 in attorney’s fees (i.e., a 25% contingency fee).

In opposition to the motion, Tsekas argues that the student loan has been discharged in bankruptcy. Tsekas submits a copy of his Chapter 7 bankruptcy petition dated August 3, 2011, which lists the student loan as an unsecured nonpriority claim. Tsekas further submits a copy of an order from the U.S. Bankruptcy Court, Southern District of New York, dated December 2, 2011, in which the court ordered that Tsekas is “released from all dischargeable debts” under Chapter 7.

Discussion

Pursuant to 11 U.S.C. § 523(a)(8), the discharge of a debtor pursuant to particular sections of the bankruptcy code does not discharge the debtor from certain student loan debts unless the debt “would impose an undue hardship on the debtor and the debtor’s dependents.”² 11 U.S.C. § 523(a)(8); *In re O’Brien*, 318 B.R. 258, 260 (S.D.N.Y. 2004).

If a student loan falls within 11 U.S.C. § 523(a)(8), the debtor must file an adversary proceeding to prove undue hardship. *State Higher Educ. Servs. Corp. v. Quell*, 104 A.D.2d 11, 15 (3d Dep’t 1984); *Wells Fargo Bank v. Israelyan*, 9 Misc.3d 1106(A) at *3 (Sup. Ct., Queens County 2005). Where the debtor fails to commence an undue

² 11 U.S.C. § 523, “Exceptions to discharge” states:

“(a) A discharge under . . . this title does not discharge an individual debtor from any debt . . .

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for--

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend”

hardship proceeding and the loan falls within 11 U.S.C. § 523(a)(8), the student loan debt is not discharged. *Wells Fargo Bank*, 9 Misc.3d 1106(A) at *3.

Here, I find that Educap made a *prima facie* showing that it is entitled to summary judgment on its complaint in the amount of \$43,712.54, which includes \$30,724.80 for the principal amount due, \$12,307.41 in accrued interest, and \$680.33 in late charges. Educap submitted a copy of the promissory note that Tsekas signed on March 13, 2006, as well as evidence that Tsekas defaulted on the loan. Educap's director of default management, Marc Maiorca, stated in his affidavit that the student loan is presently in default, and that the last payment was made on December 3, 2008.

Tsekas fails to raise a triable issue of fact with respect to his defense that the student loan was discharged in bankruptcy. Tsekas submitted evidence that he obtained an order releasing him from "all dischargeable debts" under Chapter 7, but the order did not release him from the student loan because it falls within an exception to discharge pursuant to 11 U.S.C. § 523(a)(8). *In re Baiocchi*, 389 B.R. 828, 832 (Bankr.E.D. Wis. 2008); *In re Roy*, No. 08-33318, 2010 WL 1523996, at * 1 (Bankr.D.N.J. April 15, 2010). Tsekas fails to demonstrate that he filed an adversarial proceeding and obtained a specific determination from the Bankruptcy Court that the student loan was discharged on the ground of undue hardship.

As to attorney's fees, I grant that portion of Educap's motion on the issue of liability only, and I order a hearing on the issue of whether the attorney's fees requested are reasonable. Although Educap demonstrates that it is entitled to attorney's fees under

the promissory note, Educap failed to present any evidence that its request for \$10,928.14 in attorney's fees is reasonable. Educap failed to submit an affidavit from its attorney attesting to the contingency fee arrangement, and failed to address whether the attorney's fees are reasonable in its moving papers. The burden of proving that the contingency fee arrangement is reasonable rests with the attorney. *Community Nat. Bank & Trust Co. v. I.M.F. Trading, Inc.*, 167 A.D.2d 193, 194 (1st Dep't 1990); *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 522 (1976).

In accordance with the foregoing, it is

ORDERED that plaintiff Educap, Inc.'s motion for summary judgment on its complaint pursuant to CPLR § 3212 is granted in the amount of \$43,712.54, and granted as to attorney's fees on the issue of liability only; and it is further

ORDERED that the parties are directed to appear for a hearing on attorney's fees on October 4, 2013 at 10:00 a.m., 60 Centre Street, Room 335; and it is further

ORDERED that a final judgment shall be entered after a hearing to determine the amount of reasonable attorney's fees to be awarded to Educap.

This constitutes the decision and order of this Court.

Dated: New York, New York
August 7, 2013

FILED
AUG 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Saliann Scarpulla, J.S.C.