SLM Private Credit Student Loan Trust 2006-A v Milton
2016 NY Slip Op 31895(U)
October 5, 2016
Supreme Court, New York County
Docket Number: 162044/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SLM PRIVATE CREDIT STUDENT LOAN TRUST 2006-A,

Plaintiff,

-against-

MICKEI M. MILTON,

Defendant.

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Index No.: 162044/2014

DECISION AND ORDER

Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action to recover money owed to Plaintiff/Creditor SLM Private Student Loan Trust, 2006-A ("Plaintiff") by Defendant Mickei M. Milton ("Milton") pursuant to a student loan/promissory note, Milton, appearing *pro se*,[1] moves to dismiss the Complaint pursuant to CPLR 3211(a)(5). For the reasons below, Milton's motion is denied.

BACKGROUND FACTS[2]

On or about September 25, 2005, Milton, residing in Florida at the time, applied for a private loan from JP Morgan Chase Bank, N.A. ("Chase") to assist with law school-related expenses (*Pl Exh A*). Chase approved Milton's application and she received a disbursement of $10,798.00 shortly thereafter (*id.*). In early 2006, Sallie Mae sent Milton a letter informing Milton that Sallie Mae, which had been servicing Milton's loan for some time, had purchased the original Chase loan (*Milton Exh A* at 4).[3]

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[1] Milton is, however, an attorney admitted to practice in New York.

[2] Except where otherwise noted, the essential facts are undisputed.

[3] "Sallie Mae" appears to be Plaintiff's trade name. Neither party disputes that the two are, as relevant here for the purposes of ownership of Milton's debt, a related entity.

On or about March 14, 2007, Milton received another letter from Sallie Mae informing her that the grace period on the loan would soon expire, and setting a first repayment date of June 12, 2007 (*id.*). With the exception of an alleged payment of $111.00 on September 15, 2008 – a payment which Milton claims she never made – Milton made no payments on the private loan (*Pl Exh F*; *Milton Affirm* ¶ 7; *Milton Reply* ¶ 4). On or about July 28, 2009, Sallie Mae sent another letter to Milton informing her that as of August 27, 2009, her loan would be considered in default and demanding immediate payment of the full balance, including interest, of $17,627.21.

Having received no further payments, Plaintiff commenced this action several years later, on December 1, 2014. Milton answered shortly thereafter, asserting several defenses including, as relevant here, a statute of limitations defense. After discovery, and shortly before the note of issue was filed, Milton filed this motion to dismiss.

In support of her motion, Milton argues: first, that this action should be dismissed because it was filed after expiration of New York's six-year statute of limitations for breach of contract actions, as measured from June 12, 2007, the loan's first repayment date; and second, Plaintiff, a creditor cannot take advantage of New York's six year statute of limitations if its home state, *i.e.*, Delaware, has a shorter statute of limitations, which is three years.

In opposition, Plaintiff argues: first, that this is an action for breach of a promissory note, not breach of contract, thereby implicating six-year statutes of limitations in New York, Delaware, and the lender's actual home state of Ohio; second, that the complaint was timely filed because the underlying cause of action did not begin to accrue until August 27, 2009, the date of the promissory note was accelerated after, as Defendant proudly admits, no payments were

made;[4] and third, that the action should not be dismissed because it is meritorious, as established by an affidavit of Mary Kay Mauer ("Mauer"), the Custodian of Records at Navient Solutions (Sallie Mae's account "administrator and agent").

In reply, Milton: first, disputes the reliability of the payment log and Mauer's affidavit and reiterates that she "never made a payment on" the student loan account; and second, argues that there is no distinction between a promissory note and contract for statute of limitations purposes. Accordingly, she reiterates her initial argument that, calculating accrual from June 12, 2007, this action is barred by Delaware's three-year statute of limitations for breach of contract actions or, in the alternative, by New York's six-year statute of limitations.

DISCUSSION

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). Of particular importance here given the vague Complaint, a plaintiff's submissions in response to the motion "must be given their most favorable intendment" (*see, id.*). "Only if the defendant makes such a prima facie showing does the burden then shift to the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the statute of limitations" (*Philip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765, 766 [2d Dept 2010]).

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[4] Plaintiff adds that in fact, the ledger shows that one payment was made for $111.00 on September 15, 2008.

As an initial matter, and contrary to Milton's arguments, this court finds that the loan agreement is a promissory note rather than a general contract. A promissory note is, like the loan agreement here, an "unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person" (Black's Law Dictionary [10th ed. 2014]; *see also State of N.Y. Higher Educ. Services Corp. v Zamore*, 90 AD2d 664 [3d Dept 1982], *affd sub nom.*, 59 NY2d 933 [1983] [treating student loan agreement as a note]). This conclusion also finds support in the plain language of the agreement signed by Milton (*see e.g. Exh C* ["Application and Promissory Note"]; *Exh D* ["Refer to your Promissory Note..."]; *Exh E* ¶ M[2] ["If this Note is assigned...."]).

Thus, although Milton correctly notes that Delaware's statute of limitations for breach of contract actions is three years (even assuming Delaware law applies)[5], that abbreviated time frame is irrelevant because Delaware courts apply a six-year statute of limitations to private student loan actions (*see* Del Code Ann 8106, 8109 [three years for contract, six years for note]; *Kpakiwa v Brazos Student Fin. Corp.*, CIV.A.S10A-03-002RFS, 2010 WL 2653413, at *1 [Del Super July 1, 2010]; *see also Fineberg v Credit Intern. Bancshares, Ltd.*, 857 F Supp 338, 350–51 [D Del 1994] [Delaware courts have defined a "promissory note" as a written promise by one person to pay another person, absolutely and unconditionally, a sum certain at a specified period of time]).

As the statute of limitations for breach of a promissory note is also six years in New York

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[5] There is insufficient evidence in the record to establish that Plaintiff actually hails from Delaware. The only evidence, submitted by Milton, is a July 1, 2010 press release from Sallie Mae indicating its intent to relocate to Delaware nearly a year later (*Milton Exh D*). Even accepting the authenticity of the web page's contents, the evidence does not demonstrate – as, for example, a certified corporate registration might – that Sallie Mae's principal place of business or residency lies in Delaware at this time (or at the time this action was commenced).

(CPLR 213 [six years for contract and note]), Milton's contention that Delaware's shorter three-year (breach of contract) statute of limitations precludes Plaintiff's reliance upon New York's longer statute of limitations, lacks merit. It is noted that the statute of limitations for breach of a promissory note is also six years in Ohio, where Plaintiff claims it is located (ORC 1303.16, 2305.6 [six years for note and eight for contract]).

Having found that a six-year statute of limitations applies to this action, the Court turns to the issue of whether the statute began to accrue in June of 2007, when the first payment was due and defaulted upon, or in August of 2009, when Plaintiff accelerated the loan.

A six-year statute of limitations begins to run on the date on which each of a note's installments becomes due and payable unless, as relevant here, the entire debt is accelerated (*Cadlerock, L.L.C. v Renner*, 72 AD3d 454, 454 [1st Dept 2010]; *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141, 143 [1993] [noting that the action against the guarantor was not barred by the statute of limitations because the creditor did not trigger the statute by exercising the note's acceleration option]; *see also Mundaca Inv. Corp. v Rivizzigno*, 247 AD2d 904, 906 [4th Dept 1998] ["a cause of action accrues for the purpose of setting the [Statute of Limitations] in motion as soon as the creditor, by his own act and in spite of the debtor, can make the [note] payable"]). The note herein did contain such an acceleration clause:

> J. WHOLE LOAN DUE
>
> Subject to applicable law, you have the right to give me notice that the whole outstanding principal balance, accrued interest, and all other amounts payable to you under the terms of this Note are due and payable at once and to cease to make any further disbursements to me, if:
> 1. I fail to make any payment to you when due; ***
> (*Pl Exh E*).

Thus, the statute of limitations began to run on August 27, 2009, the date set by Plaintiff's July 28, 2009 demand letter which exercised Plaintiff's right to accelerate the loan (*Pl Exh G* ["WE HEREBY DEMAND PAYMENT OF YOUR LOANS IN FULL"]). Milton's reliance on *Schleifer v Schlass* (303 AD2d 204, 205 [1st Dept 2003]) for the proposition that the statute of limitations "begins to run once payment is overdue" is misplaced.

In *Schleifer,* the Court found as untimely, plaintiff's action to recover on demand loans which were entered into between 11 and seven years prior to the date the action was commenced. The Court rejected plaintiff's contention that partial loan payments by defendants revived the statutory period, on the ground that there was no evidence that such payments "were made under circumstances permitting the inference that such payments amounted to an absolute and unqualified acknowledgment that additional loan payments were due."

Schleifer is factually distinguishable in that it did not involve an acceleration of the loan (*cf. Sce v. Ach*, 56 A.D.3d 457, 867 N.Y.S.2d 140 [2d Dept 2008] ("with respect to a note payable in installments . . . there are separate causes of action for each installment accrued, and the statute of limitations begins to run on the date each installment becomes due and is defaulted upon, *unless the debt is accelerated") citing Phoenix Acquisition Corp. v. Campcore, Inc.*, 81 N.Y.2d 138, 141, 596 N.Y.S.2d 752, 612 N.E.2d 1219); *Cadlerock, L.L.C. v. Renner*, 72 A.D.3d 454, 898 N.Y.S.2d 127 [1st Dept 2010] ["since the debt was not accelerated while defendant was making the monthly payments, the applicable six-year statute of limitations (CPLR 213[2]) began to run on the date on which each installment became due and payable)).

Accordingly, as plaintiff accelerated the debt on August 27, 2009, this action was timely filed on December 5, 2014.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant Mickei M. Milton's motion to dismiss pursuant to CPLR 3211(a)(5) is hereby denied; and it is further

ORDERED that Plaintiff SLM Private Student Loan Trust, 2006-A shall, within 20 days of entry, serve a copy of this decision and order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

Dated: October 5, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.