

Educational Loan Co. Trust, I v Lord Sec. Corp.

2016 NY Slip Op 32924(U)

April 19, 2016

Supreme Court, New York County

Docket Number: 653101/15

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART 53

Index Number : 653010/2015
EDUCATIONAL LOAN COMPANY
vs.
LORD SECURITIES CORP.
SEQUENCE NUMBER : 001
DISMISS

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

*Motion is decided in accordance with
accompanying Memorandum Decision.*

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

Dated: 4/14/16


_____, J.S.C.
CHARLES E. RAMOS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. 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: COMMERCIAL DIVISION

-----X
EDUCATIONAL LOAN COMPANY TRUST, I, a Delaware
statutory trust,

Plaintiff,

Index No. 653101/15

-against-

LORDS SECURITIES CORPORATION, a Delaware
corporation,

Defendant.

-----X
Hon. C.E. Ramos, J.S.C.:

Defendant Lord Securities Corporation (Lord) moves for an order partially dismissing the first cause of action for breach of contract as barred by the applicable six-year statute of limitations, and dismissing the second cause of action for failure to state a claim and/or on the basis of documentary evidence (CPLR 3211 [a] [1], [5], [7]).

This Court previously granted the motion, in part, to the extent of dismissing the second cause of action for indemnification on the ground that it was duplicative (1/26/16 Tr 14).

Plaintiff Educational Loan Company Trust I, a student-loan backed Delaware statutory trust (Trust) brings this action for breach of contract action against its professional administrator, Lord. According to the complaint, the Trust issued \$300 million worth of notes in 2006 and 2007, which were used to acquire the Trust's student loan portfolio. The student loans are the

primary source of payment for the note payment and principal; student loan borrowers pay interest which flows to the Trust.

Lord was retained as administrator of the Trust pursuant to an administrator agreement, and obliged to perform various specialized accounting and administrative duties. Lord allegedly breached its contractual obligations and acted with gross negligence by, inter alia, failing to properly calculate the interest due to Trust note holders. Lord's breaches allegedly span approximately sixty-nine reporting periods over roughly six years, resulting in the overpayment of more than \$5.7 million of Trust capital to the note holders.

In support of its motion to dismiss a portion of the first cause of action for breach of contract, Lord argues that it is time-barred, to the extent that the alleged miscalculations were first made in 2008. In opposition, the Trust asserts that Lord's continuous engagement and continuing breaches toll the limitations period.

"The general rule applicable to contract actions is that a six year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation" (*Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310 [2d Dept 2004]). Nonetheless, the continuous treatment rule extends to certain professionals and tolls the running of the statute of limitations during the representation period,

regardless if the underlying theory is based in contract or tort (*Chase Scientific Research v NIA Group*, 96 NY2d 20 [2001]).

Here, the Trust alleges that Lord, as issuer/administrator, was a fiduciary and an attorney-in-fact, and performed specialized accounting and administrative services. As fiduciary and attorney-in-fact, Lord was obligated to regularly and periodically perform certain enumerated duties for the Trust, which Lord allegedly breached by failing to properly calculate the net loan rate resulting in the Trust overpaying millions of dollars in trust capital. Lord also failed to discover and rectify its errors, and certified each month that interest amounts to be paid by the Trust were correct.

The Trust's allegations satisfy the "the two prerequisites for continuous representation tolling," namely, a claim of misconduct concerning the manner in which the professional services were performed, and the ongoing provision of professional services with respect to the contested matter or transaction (*In re Lawrence*, 24 NY3d 320, 341-42 [2014], *rearg denied* 24 NY3d 1215 [2015]).

For these reasons, the Trust's breach of contract claim, premised on Lord's alleged deficient performance where it continued to render services with respect to the administration agreement, is timely brought under the continuous engagement doctrine. The limitations period is tolled during the period of

Lord's continuous engagement (*accord John P. D'Ambrosio, P.C. v Soloman & Co.*, 223 AD2d 683 [2d Dept 1996]).

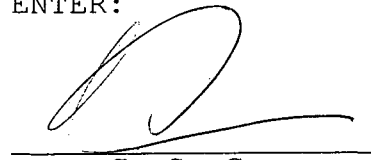
Accordingly, it is

ORDERED that the motion by defendant to dismiss the balance of the complaint is denied in its entirety.

The parties are directed to appear for a preliminary conference on May 4 at 10AM.

Dated: April 19, 2016

ENTER:



J. S. C.

CHARLES E. RAMOS