

<b>Municipal Credit Union v Jennings</b>
2021 NY Slip Op 32034(U)
May 24, 2021
Civil Court of the City of New York, New York County
Docket Number: CV-17311-18
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 32C

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MUNICIPAL CREDIT UNION

Plaintiff

**HON. SABRINA B. KRAUS**

**DECISION & ORDER**

-against-

**Index No.: CV-17311-18**

LOERONE JENNINGS aka  
LERONE JENNINGS,

Defendant

\_\_\_\_\_  
X

**BACKGROUND**

Plaintiff commenced this action pursuant to a summons and complaint filed on July 20, 2018, seeking a judgment in the amount of \$11,025.51, based on alleged failure of defendant to pay amounts due pursuant to a loan and promissory note.

Defendant appeared by counsel on September 14, 2018, and filed an answer asserting three affirmative defenses: lack of personal jurisdiction, statute of limitations and that some or all of the monies due have been paid.

On November 6, 2019, plaintiff filed a Notice of Trial. The action appeared on the trial calendar on April 10, 2020, and May 29, 2020, when it appears to have been marked off calendar due to the Pandemic.

**THE PENDING MOTION**

On April 30, 2021, plaintiff moved for summary judgment and dismissal of defendant's affirmative defenses. On May 24, 2021, the motion was fully submitted, and the court reserved decision. For the reasons set forth herein, the motion is granted to the extent of dismissing

defendant's first and third affirmative defenses, granting plaintiff summary judgment on liability based on the breach of contract cause of action, and setting the matter down for an immediate trial to determine the amount due.

### **ALLEGED FACTS**

Plaintiff is a not-for-profit financial institution cooperatively owned by its members. Plaintiff offers financial products and services to its members, such as checking and savings accounts, personal loans, and credit cards.

On or about December 14, 2011, defendant executed a Loan and Security Agreements and Disclosure Statement under an account ending in 86-29. Defendant financed the principal amount of \$11,263.00, plus finance charges for a total of \$14,962.59. The loan was to be paid in 59 monthly installments in the amount of \$249.38, commencing January 25, 2012. Defendant made a few payments on the loan and then lost his job and defaulted on the payments.

### **DISCUSSION**

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853)”.

Plaintiff has met its obligation to make a *prima facie* showing of entitlement to judgment as a matter of law based on the existence of the note executed by the defendant, the unconditional terms of repayment, and the defendant's default thereunder. The burden then shifts to the defendant, who must present sufficient evidence to raise a triable issue of fact (*Sce v. Ach*, 56 A.D.3d 457, 458).

***Defendant's First Affirmative Defense Alleging  
Lack of Personal Jurisdiction Is Dismissed***

Plaintiff moves for dismissal of the first affirmative defense which asserts lack of personal jurisdiction. CPLR §3211(e) provides in pertinent part:

.... an objection that the summons and complaint ..... was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

N.Y. C.P.L.R. 3211 (McKinney).

As noted above, defendant's answer was filed on September 14, 2018. Defendant made no motion to dismiss based on lack of personal jurisdiction since that date. Additionally, pursuant to CPLR § 3020 (c) in order to preserve a defense of lack of personal jurisdiction, the answer must be verified by defendant, and the answer in this action is not verified. Finally, defendant does not submit any opposition addressing that portion of the motion which seeks dismissal of the first affirmative defense.

Based on the foregoing the first affirmative defense is dismissed.

***Defendant is entitled to assert the Statute of Limitations  
Defenses as to any payments due before July 20, 2011***

Defendant's second affirmative defense asserts that plaintiff is barred from bringing this action based on the statute of limitations.

CPLR §213(2) provides that an action on a contractual liability must be commenced within six years. the commentary to that section further notes:

... a promissory note is a contract, of course, and its nonpayment is governed by CPLR 213(2) ... if the note is payable in installments, the statute of limitations on each payment begins to run when that payment falls due. This is because each required payment creates a separate obligation. The creditor who delays suit on an installment note will be entitled to recovery only with respect to installments that fell due within six years of commencement of the action.

N.Y. C.P.L.R. 213 (McKinney)

Both parties discuss acceleration of the loan in their papers, with plaintiff pointing out that the note allowed for acceleration on default, and defendant arguing that plaintiff never exercised the option to accelerate. The issue of acceleration, however is not relevant to the statute of limitations discussion. As held by the Appellate Division, First Department:

Acceleration of the debt does not change this analysis. Acceleration causes those future installment payments that are not yet due and payable to become immediately due and payable. It enables a lender to advance the due date for the future installment payments and thus, the statute of limitations runs on the balance of the debt. It does not change the due date of those past due installment payments to that of the date of acceleration. Said differently, acceleration does not reset the limitations period for the earlier missed payments.

*Cannell v. Grail Partners, LLC*, 180 A.D.3d 457, 459 (2020)(citations omitted).

Moreover, by the time this action was commenced all payments were past due, so the issue of acceleration is not relevant for the purposes of this action.

As this action was commenced on July 20, 2018, plaintiff is limited to suing for defaults on payments due on or after July 20<sup>th</sup> 2012, and defendant's statute of limitations defense is not subject to dismissal. The statement annexed by plaintiff to its moving papers seems to suggest that defaults from dates before that period are included in the amount sued for herein.

***Defendant's Third Affirmative defense is dismissed***

Defendant's third affirmative defenses alleges "(u)pon information and belief, defendant has paid all or a portion of the amount due to the original creditor." It is uncontested that plaintiff is the original creditor herein. Plaintiff has provided its records showing credit for all payments it acknowledges having received from defendant.

Defendant in his opposition papers provides no proof of any payments, and makes no specific allegation regarding a payment he alleges was made but not credited. Instead, he asserts upon information and belief that the amount claimed is incorrect and that it is unclear whether plaintiff's calculations were properly done.

"It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial (*Di Sabato v. Soffes*, 9 A.D.2d 297, 301(1959)." Defendant has failed to come forward with proof of any uncredited payments and based on the foregoing the third affirmative defense is dismissed.

***Defendant Has Waived its Right to Any Outstanding Discovery***

Defendant argues that the motion for summary judgment should be denied because plaintiff never responded to the "Demand for Interrogatories" annexed to the answer. However that answer was filed years ago, and defendant has never made a motion to enforce any remedy for outstanding discovery. Plaintiff filed its notice of trial on November 6, 2019, in which it asserted there was no outstanding discovery, defendant never moved to strike the notice of trial. Even in response to plaintiff's motion for summary judgment, defendant has not cross-moved for any relief as pertains to discovery.

§ 208.17(d) of The New York City Civil Court Act provides:

After any action has been placed on the trial calendar pursuant to this rule, no pretrial examination or other preliminary proceedings may be had, except that if some unusual or unanticipated conditions subsequently develop which make it necessary that further pretrial examination or further preliminary proceedings be had, and if without them the moving party would be unduly prejudiced, the court may make an order granting permission to conduct such examination or proceedings and prescribing the time therefor. Such an order may be made only upon motion on notice showing in detail, by affidavit, the facts claimed to entitle the moving party to relief under this subdivision

N.Y. Comp. Codes R. & Regs. tit. 22, § 208.17.

Defendant's failure to have moved for any relief within 20 days of the filing of the notice of trial means that defendant has waived the right to further discovery in this action (*Manzo v. City of New York*, 62 A.D.3d 964, 965) and any alleged outstanding discovery is thus not a basis to deny plaintiff's motion for summary judgment.

***Plaintiff has failed to make a prima facie case  
for a cause of action based on account stated***

Either retention of bills without objection or partial payment on bills can be the basis for a cause of action for account stated (*Morrison Singer Cohen and Weinstein, LLP v Waters* 13 AD3d 51). Defendant does not deny receiving the statements nor does he allege he ever objected to same.

However, the statements annexed by plaintiff are not really bills. These statements are akin to bank account statements and relate to all kinds of transactions beyond the note at issue in this case. None of the statements annexed seek payment for the entire amount sued for herein. For example, the last statement issued states a payment of \$249.38 is due on March 25, 2012. These are not the kind of statements that can form the basis for a cause of action on account

stated. As such, plaintiff's motion for summary judgment based on the second cause of action is denied.

***The Sole Remaining Issue Is the Amount Due  
On the Loan for Defaults after July 20, 2012***

As noted above, plaintiff has established a *prima facie* case on liability based on breach of contract. It is uncontested that defendant took the loan and defaulted on making the payments due. Defendant's affirmative defenses have been dismissed, except as to payments due before July 20, 2012.

However, it is unclear exactly how much is due. The amount sought appears to include sums from defaults prior to July 20, 2012, and the manner in which interest and other charges were calculated is also unclear.

Based on the foregoing the court is directing an immediate virtual trial on this issue pursuant to CPLR § 3212( c). The trial shall take place on July 7, 2021 at 10:00 am before this court in Part 118. A link will be sent to counsel for said appearance. Any exhibits are to be emailed to the court with copies to adversaries on or before June 15, 2021.

This constitutes the decision and order of the Court.

Dated: New York, New York  
May 24, 2021

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Sabrina B. Kraus, JCC

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