

University of Pennsylvania v McNeil

2022 NY Slip Op 31358(U)

April 25, 2022

Supreme Court, New York County

Docket Number: Index No. 654198/2015

Judge: Sabrina Kraus

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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**

<p>PRESENT: <u>HON. SABRINA KRAUS</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>UNIVERSITY OF PENNSYLVANIA</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>NICOLIE MCNEIL,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 57TR</p> <p>INDEX NO. <u>654198/2015</u></p> <p>MOTION DATE <u>03/30/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48
 were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this action seeking a judgment based on defendant’s default on two alleged student loan agreements, for which plaintiff was the guarantor and subsequent purchaser.

PROCEDURAL HISTORY

Plaintiff filed a summons and complaint on December 15, 2015, asserting a cause of action for \$9,969.04 due on the loans as well as attorneys’ fees.

Defendant appeared *pro se* on March 19, 2016, and filed a verified answer asserting numerous affirmative defenses including statute of limitations, improper service, lack of standing and related claims.

On December 1, 2017, plaintiff moved for summary judgment. That motion was denied by the court (Reed, J), pursuant to a decision and order which held that the loan documents submitted by the parties were different and conflicting, and that combined with authentication issues required that the matter be determined at trial.

On November 11, 2020, plaintiff filed a Note of Issue seeking a bench trial.

PENDING MOTIONS

On March 30, 2022, plaintiff moved a second time for summary judgment, and defendant cross-moved for summary judgment. On that day, the motions were marked submitted and referred to this court for determination. For the reasons stated below, plaintiff's motion is denied, defendant's cross-motion is granted, and the action is dismissed.

DISCUSSION

Defendant may not make a second motion for Summary Judgment and the Motion is Otherwise Deficient

Judge Reed's prior decision already determined there are questions of fact requiring a trial herein in response to plaintiff's first motion for summary judgment. Plaintiff in its moving papers makes no reference to the first decision nor is any justification offered for the second motion after Judge Reed's denial.

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" (*Sutter v. Wakefern Food Corp.*, 69 A.D.3d 844, 845, 892 N.Y.S.2d 764; *see Coccia v. Liotti*, 101 A.D.3d 664, 666, 956 N.Y.S.2d 63; *Powell v. Trans-Auto Sys.*, 32 A.D.2d 650, 300 N.Y.S.2d 747; *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801, 232 N.Y.S.2d 769).

Vinar v. Litman, 110 A.D.3d 867, 868 (2013).

Additionally, plaintiff's motion violates the Uniform Rules governing summary judgment applications. Effective February 1, 2021, every motion for summary judgment in this State, except in lieu of a complaint pursuant to CPLR 3213, must annex a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" (22 NYCRR [Uniform Rules of Supreme and County Court] § 202.8-g[a]; *see also* Siegel, NY Prac § 281 [2021 supp]). Such numbered paragraphs must specifically cite to evidence separately submitted in support of the motion

(see Uniform Rule 202.8-g[d]). Here, plaintiff offers no Statement of Material Facts at all — in direct violation of the Rule. The affirmation of counsel purports to include a “statement of facts” but this is not only in violation of the rule, but inappropriate for an affirmation of counsel.

Finally, the court notes that plaintiff has not even established that it has personal jurisdiction over the defendant, who alleged improper service in her verified answer. As far as the court can tell, plaintiff never filed any proof of service of the summons and complaint in this action.

For all of the forgoing reasons plaintiff’s motion for summary judgment is denied.

Defendant’s Cross-Motion for Summary Judgment is Granted

Defendant moves to dismiss the action alleging that it is brought in contravention of what she alleges to be a four-year statute of limitations pursuant to §5525(a)(7) of the Pennsylvania Judicial Code. Plaintiff counters that as this is a writing under seal there is a twenty-year statute of limitations pursuant to 42 Pa. C.S.A. §5529(b)(1). Plaintiff alleges that the Promissory Notes are both signed by defendant and therefore are documents executed under seal.

Plaintiff cites no case law to support its claim that an executed document is a sealed document. Not all executed documents are sealed documents under Pennsylvania Law (*See eg In re Polkowski*, 303 B.R. 585 (Bankr. M.D. Pa. 2003)(*holding statement in guaranty, indicating that guarantor intended for agreement to be sealed instrument, was not sufficient under Pennsylvania law to make guaranty a “sealed instrument” subject to extended 20–year statute of limitations for actions on sealed instruments, where signature of guarantor was not accompanied by any marking in nature of seal*).

In fact, the contract needs to contain a separate and distinct indication that it is executed under seal.

The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely—and, even of wafers, very largely—ceased. **In short, sealing has become constructive, rather than actual, and is in a great degree a matter of intention.**

Driscoll, supra at 259 (quoting *Lorah² v. Nissley*, 27 A. 242 (Pa. 1893) (emphasis added in *Driscoll*)).

Nat'l Loan Invs., L.P. v. Gold, 242 A.3d 411 (Pa. Super. Ct. 2020). In short there must be some indication on the contract or language in the body of the contract that indicates it is executed under seal.

Under Pennsylvania Law, when a party signs an instrument which contains a pre-printed word 'SEAL,' that party has presumptively signed an instrument under seal [*In re Est. of Snyder*, 2011 PA Super 13, 13 A.3d 509, 513 (2011)]. In neither of the purported contracts in the case at bar does there appear to be any such word or marking or any other indication that the documents are signed under seal, nor does plaintiff allege any such language or indication exists.

The court finds that the documents relied upon by plaintiff were not executed under seal and are therefore subject to a four-year statute of limitations.

Plaintiff's counsel further argues that the provisions of paragraph two of the loan waive the right to assert a statute of limitations defense. Initially the court notes that such waivers are not enforceable under New York Law (*Deutsche Bank Nat. Trust Co. v Flagstar Capital Markets Corp* 143 AD3d 15) and plaintiff provides no authority suggesting the rule is otherwise in Pennsylvania. Moreover, the language plaintiff relies upon is geared to a laches defense, not a waiver of the statute of limitations, and in fact makes no specific reference at all to the statute of limitations. Both parties agree that defendant's default under the notes occurred in February 2011. As noted above this action was commenced in December 2015. Based on the foregoing the action was untimely when commenced and defendant's cross-motion for dismissal is granted.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

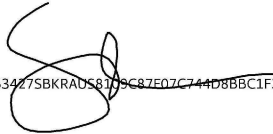
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.


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4/25/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE