

Murphy v PHG Funding LLC

2023 NY Slip Op 32222(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 656158/2021

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 KEVIN MURPHY,

Plaintiff,

- v -

PHG FUNDING LLC, PFIFEBRIDGE INC., JOHN
 THOMAS, TODD JORN, and STEVEN NIGRO

Defendants.

INDEX NO. 656158/2021

MOTION DATE 08/15/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
 MOTION**

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 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for

DISMISSAL

Plaintiff Kevin Murphy commenced this action by motion, pursuant to CPRL 3213, seeking summary judgment in lieu of complaint against defendants PHG Funding LLC (PHG), Pfffebridge, Inc. (Pfffebridge), John Thomas (Thomas), Todd Jorn (Jorn, and collectively with PHG, Pfffebridge, and Thomas, Defendants), and Steven Nigro (Nigro)¹ (NYSCEF # 2). After the court denied Plaintiff's motion and converted this matter into a conventional action (NYSCEF # 44), Plaintiff filed a formal complaint, as directed by the court, asserting claims for breach of contract and attorneys' fees against Defendants (NYSCEF # 46 – Compl). Defendants now move to dismiss the Complaint as time-barred pursuant to CPLR 3211(a)(5). For the following reasons, the motion is denied.

BACKGROUND

In 2009, Murphy purchased certain term notes in an aggregate principal amount of \$7,500,000 from PHG pursuant to a subscription agreement between Murphy and Pfffebridge (the Original Notes) (Compl ¶¶ 2, 18). In connection with the Original Notes, PHG also entered into two security agreements for the benefit of Murphy (*id.* ¶ 19). The security agreements identified a portfolio of insurance policies as collateral for the Original Notes (*id.* ¶ 20).

¹ Plaintiff filed a notice of voluntary discontinuance as to Nigro after a settlement between the two parties (NYSCEF # 37). The Defendants opposed discontinuance of the action against Nigro without their consent (NYSCEF # 41, 43). Plaintiff subsequently filed a formal complaint listing Nigro in the caption but asserting claims only against Defendants (NYSCEF # 46 at 1, 2 n.1).

After consummation of this transaction, PHG purportedly failed to make payments to Murphy in accordance with the terms of the Original Notes, while Thomas and Jorn caused PHG and Pfifebridge to dispose of the Original Notes' collateral without authorization (*id.* ¶¶ 21-22). To avoid potential litigation arising out of these purported breaches of the Original Notes' terms, Murphy and Defendants (as well as Nigro) entered into: (1) the Amended and Restated Consolidated Term Note, dated as of April 1, 2012 (the Amended Note); (2) a limited liability company (LLC) agreement; and (3) a guaranty agreement (Compl ¶¶ 23, 26-27; NYSCEF # 58 – Note).² The effect of these agreements was to consolidate, amend, and restate Defendants' original indebtedness to Murphy and provide him with new collateral to be held pursuant to the LLC agreement (*id.*).

Under the Amended Note, Defendants agreed to be jointly and severally liable to Murphy for a principal amount of \$1,228,307.42 (Note at 1). By its plain terms, the Amended Note provided for a maturity date of December 31, 2017, at which time the principal was due in full (the Maturity Date) (Compl ¶ 25; Note at 1). In the lead up to the Maturity Date, Defendants were required to pay “semi-annual installments of interest” at a fixed rate of 12% per annum (Note § II[A]). That interest rate, in turn, increased to 15% per annum in the event of a default (*id.* § V.C). Although Defendants could prepay the principal amount, in full or in part, at any time prior to the Maturity Date, they were required to pay off all accrued interest at the time of any such prepayment (*id.* § V[B]).

As Murphy alleges, Defendants failed to pay their first semi-annual installment at the time it was due (Compl ¶ 31). Murphy accordingly sent a payment demand on July 8, 2013 (*id.* ¶ 33). Eventually, on April 5, 2016, Defendants made their first payment on the Amended Note in the amount of \$1,118,208.00 (the April 2016 Payment) (*id.* ¶ 32). By this time, the Amended Note had accumulated interest in the amount of \$964,333.55 (*id.* ¶ 40).³ The April 2016 Payment would, however, constitute Defendants' final payment, notwithstanding the Maturity Date and Murphy's additional payment demands sent on April 8, 2017, and January 6, 2018 (*id.* ¶¶ 32-33). Murphy alleges that, as of July 26, 2022, the current amount owed, including interest, under the Amended Note is \$2,801,262.76 (*id.* ¶¶ 34, 36, 40).

On October 26, 2021, Murphy moved for summary judgment in lieu of complaint under CPLR 3213 seeking an amount of \$2,500,816.39 plus interest, costs, disbursements, and attorneys' fees from Defendants (NYSCEF # 2). In connection with his motion, Murphy served upon Defendants a summons and copy

² Jorn and Thomas also agreed to grant Murphy a security interest in all their right, title, and interest in an income stream from a certain “Tiger Capital Asset” received pursuant to a consulting agreement between Pfifebridge and Madison Strategic Partners (Compl. ¶ 28).

³ Specifically, the Complaint alleges that between April 1, 2012, and April 1, 2013, interest on the Amended Note had accrued to an amount of \$158,889.00 at the base interest rate of 12% per annum, while, between April 2, 2013, to April 5, 2016, the interest accrued to \$805,444.55 at the default rate of 15% per annum (Compl. ¶ 40).

of the motion (NYSCEF #s 12-13, 23). By Decision and Order, dated July 5, 2022, the court denied Murphy's motion, reasoning, *inter alia*, that summary judgment under CPLR 3213 was not appropriate because the Amended Note did not qualify as an instrument for payment of money only (NYSCEF # 44). Given this determination, the court converted the matter into a conventional action and directed Murphy to file a formal complaint (*id.*). The Complaint was then e-filed on July 26, 2022. Defendants now move to dismiss the Complaint as time barred under the recently enacted Consumer Credit Fairness Act (CCFA) (NYSCEF # 48 at 4-5).

DISCUSSION

The party seeking dismissal on statute of limitations grounds under CPLR 3211(a)(5) bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept. 2011]). This, in turn, requires a showing of "when plaintiff's cause of action accrued" (*Swift v N.Y. Med. College*, 25 AD3d 686, 687 [2d Dept. 2006]). If, and only if, that showing is made, then the burden shifts to the non-movant to raise a question of fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept. 2020]). In considering the motion, a court must accept the allegations in the complaint as true and resolve inferences in the non-movant's favor (*Island ADC, Inc. v Baldassano Architectural Grp., P.C.*, 49 AD3d 815, 816 [2d Dept. 2008]).

In general, an action "upon a contractual obligation or liability, express or implied"—such as a promissory note—must be "commenced within six years" (CPLR 213 [2]). Here, however, Defendants contend that this action involves a consumer credit transaction and is therefore covered by the CCFA and CPLR 214-i's corresponding three-year statute of limitations. The court disagrees.

At the outset, the amended statute of limitations promulgated by the CCFA did not go into effect until April 7, 2022 (NYSCEF #s 51, 52). Plaintiff, conversely, commenced this lawsuit on October 26, 2021, *i.e.*, prior to the Governor signing the CCFA into law on November 8, 2021, and well before the April 7, 2022, effective date. To be sure, the CCFA did shorten the statute of limitations from six years to three years for actions arising out of consumer credit transactions filed *on or after* April 7, 2022. Yet Defendants make no showing (*prima facie* or otherwise) supporting a conclusion that the New York Legislature intended this new three-year statute of limitations to also apply retroactively to lawsuits already commenced before April 7, 2022 (*cf. Bank of Am. v David*, 78 Misc3d 1214[A], at *2 [Ithaca City Ct, Mar. 6, 2023] [observing that the charge-off statement provision of the CCFA "is not retroactive"]; *see generally 30 E. 33rd St. Realty LLC v PPF Off Two Park Ave. Owner, LLC*, 105 AD3d 515, 515-16 [1st Dept. 2013] ["It 'has long been a primary rule of statutory construction that a new statute is to be applied

prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording”). To the extent Defendants claim that the formal complaint filed on July 26, 2022, shoehorned this action within the CCFA’s ambit, that argument should be rejected out of hand. Denial of a motion for summary judgment in lieu of complaint raises no statute of limitations issues if the matter is converted to a conventional action and summons was timely filed (*see Dyck-O’Neal Inc. v Thomson*, 56 AD3d 1262, 1263 [4th Dept. 2008]). And that is exactly what happened here.

Even assuming the CCFA applied retroactively to then-pending lawsuits, the Court would still conclude that its three-year statute of limitations is not applicable. Pursuant to CPLR 214-i, a three-year statute of limitations applies to actions “arising out of a consumer credit transaction where a purchaser, borrower or debtor is a defendant.” The term “consumer credit transaction” is in turn defined as “a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes” (CPLR 105 [f]).

Here, a careful review of the pleadings indicates that the indebtedness issued under the Amended Note facilitated a revenue stream from Tiger Capital Asset for Murphy after Defendants disposed of the portfolio of insurance policies into which Murphy had previously invested through the Original Notes (Compl. ¶¶ 18-20, 26-29; Note at 1; *see* NYSCEF # 48 at 1-2). There is no indication in the Amended Note that Defendants were intending to use the loan funds for personal, family, or household purposes, and Defendants do not seriously suggest otherwise in their moving papers. Accordingly, even if two individuals—Thomas and Jorn—jointly and severally promised to pay the Amended Note’s principal (along with PHG and Pfifebridge), the Amended Note plainly did not involve a consumer credit transaction (*see First Nat. Bank of N.Y. v Schiff*, 41 Misc3d 1240[A], at *3 [Sup Ct, Kings County, Dec. 9, 2013] [concluding that loan did not constitute consumer credit transaction where proceeds of note were to be used for business purposes]; *Meyerson Cap. X LLC v Kats*, 33 Misc3d 1017, 1021 [Sup Ct, Kings County, 2011] [concluding that loan did not constitute a consumer credit transaction where loan documents indicated that it was “for business or commercial purposes and not for personal, family, consumer or household purposes”]). None of Defendants’ cited cases suggest otherwise (*see e.g. Tilo Co. v Pantis*, 46 AD 2d 685, 685 [2d Dept. 1974] [promissory note entered in connection with plaintiff’s work to re-roof defendants’ residence constituted consumer credit transaction]; *Jack Mailman & Leonard Flug DDS, P.C. v Whaley*, 2002 NY Slip Op 50515[U] [Civ Ct, Richmond County, Nov. 25, 2002] [pleadings suggested that bill for dental services could constitute a consumer credit transaction]).

Having determined that the CCFA’s three-year statute of limitations does not apply, the court considers whether the six-year statute of limitations under CPLR 213(2) bars this action. Under NY UCC 3-109(1)(a), instrument is payable at a

definite time if “by its terms it is payable [] on or before a stated date.” The UCC further provides that “a cause of action” under an instrument accrues “in the case of a time instrument on the day after maturity” (NY UCC 3-122[1][A]).

Here, the Amended Note’s Maturity Date was December 31, 2017, at which time principal amount of \$1,228,307.42 was due in full (Note at 1). Murphy’s claims on the principal amount therefore did not accrue until January 1, 2018, i.e., the day after the Maturity Date, meaning that the six-year statute of limitations period would run until January 1, 2024 (*see Nordberg v South Street Seaport Corp.*, 43 AD3d 774, 775 [1st Dept. 2007] [concluding that statute of limitations began to run from the date the note matured]; *Scionti v Reid*, 238 AD2d 496, 496-97 [2d Dept 1997] [concluding that six-year statute of limitations began to run on the day after maturity]). Because Murphy filed this action well before that time, his claims regarding the principal amount due under the Amended Note are not time-barred.

The court reaches the same conclusion regarding any alleged installment payments of interest due under the Amended Note. To start, as Defendants concede, any claims regarding missed interest installment payments that began accruing on or after October 26, 2015, are not time-barred. This would necessarily include any claims over missed interest installment payments post-dating the April 2016 Payment (*see* Compl. ¶ 40). Meanwhile, none of the missed interest installment payments that accrued prior to the April 2016 payment (including those pre-dating October 26, 2015) appear to be at issue in this action. As alleged, Defendants defaulted on each of the semi-annual interest installments due between April 1, 2012, to April 1, 2016 (Compl. ¶¶ 32-34, 40). Although it is true that the statute of limitations began running on the date each of these installment payments came due (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 45 [1995], citing *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141 [1993]), Defendants then made their single payment of \$1,118,208.00 on April 5, 2016 (Compl. ¶ 40). At the time of this payment, there was purportedly \$964,333.55 of accumulated interest under the Amended Note (*id.*). Accordingly, based on the Amended Note’s requirement that any prepayments first satisfy all interest amounts (*see* Note § V[B]), the April 2016 Payment would have, as Murphy notes, first applied in full to the outstanding interest balance before reducing the outstanding principal (Compl. ¶ 40).

In response, Defendants do not seriously dispute that the April 2016 Payment occurred.⁴ However, they aver, rather confusingly and without any support, that this payment “applied to principal,” “did not consider the value of additional collateral,” and “satisf[ie]d the terms and intent of the 2012 settlement” (NYSCEF # 48 at 7; NYSCEF # 56 at 5). Defendants’ unsupported contention does not disturb this court’s conclusion. Defendants, at most, raise a factual dispute as to

⁴ Murphy alleges Defendants paid \$1,118,208.00, while Defendants claim they paid \$1,218,209.00 (*Compare* Compl. ¶ 40 *with* NYSCEF # 48 at 7). This discrepancy does impact the resolution of the motion to dismiss.

how the April 2016 Payment should have been apportioned between the principal amount and outstanding interest. But even if the April 2016 Payment somehow did not first apply to all outstanding interest at the time of payment (notwithstanding the unambiguous terms of the Amended Note), the Complaint nevertheless supports a reasonable inference that the April 2016 Payment was, at minimum, a partial payment that extended the statute of limitations on any claims targeting missed interest installment payments pre-dating October 25, 2015 (see *Mintz & Fraade, P.C. v Credit Control Cent., Inc.*, 2011 NY Slip Op 31681[U], at *2-3 [Sup Ct, NY County, June 20, 2011], citing *Education Resources Inst., Inc. v Piazza*, 17 AD3d 513, 516 [2d Dept. 2005] [holding that alleged, undisputed partial payment restarted running of the statute of limitations on a breach of contract claim]).

At bottom, accepting the facts of the Complaint as true and resolving all inferences in Murphy's favor, the court concludes that Defendants have not met their initial burden of establishing, prima facie, that Murphy's claims are time barred.

CONCLUSION

Based on the foregoing, it is

ORDERED that the motion to dismiss by defendants PHG Funding LLC, Pfffebridge, Inc., John Thomas, and Todd Jorn is denied; and it is further

ORDERED that that within 20 days of entry of this decision and order, defendant shall file an answer to plaintiff's complaint; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within ten days of this filing.

This constitutes the Decision and Order of the court.

06/30/2023

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE