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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Geoffrey A Thomas, Plaintiff, v. Jeffery Shields, et al., Defendants.	No. CV-22-00257-TUC-JCH **ORDER**

Before the Court is Defendant Jeffery[1] Shields's motion to dismiss filed under Fed. R. Civ. P. 12(b)(6) ("Motion") (Doc. 14). Plaintiff opposes the Motion.[2] (Doc. 16.) For the reasons stated below, the Court denies the Motion and orders both Defendants to answer the Complaint.[3]

I. Background

The facts are based on the allegations in the Complaint, which the Court construes

[1] The Complaint spells Defendant's first name as "Jeffery," (*See* Doc. 1 at 1), whereas Defendant's Motion uses both "Jeffery" and "Jeffrey." *Compare* Doc. 14 at 8 (signatory line), *with* Doc. 14 at 8 (electronic signature); *compare* Doc. 14 at 1 (heading), *with* Doc. 14 at 1 (first paragraph). The Court will use "Jeffery" as indicated in the Complaint.

[2] Defendant did not file a Reply.

[3] Defendant Jeffery Shields appears pro se and is seemingly trying to dismiss the case on behalf of himself and his co-defendant. While a party may represent himself and manage his own case in federal court, *see* 28 U.S.C.A. § 1654, "[i]t is well established that the privilege to represent oneself … is personal to the litigant and does not extend to other parties or entities." *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008). Defendant Jefferey Shields does not purport to be licensed to practice law in Arizona and cannot represent or file on behalf of his co-defendant. As such, the Motion is summarily denied as to Defendant Terel Shields and she is ordered to Answer the Complaint within twenty (20) days from the date of this order.

in Plaintiff's favor. In May 2006, Defendants Jeffery Shields and Terel Shields borrowed $200,000 subject to a Promissory Note (the "Note") from Plaintiff Geoffrey A. Thomas. (*See* Doc. 1 ¶ 8; Exh. B.) The Note indicates a $200,000 principal amount, a 5% interest rate compounded yearly, and a payment schedule starting in June 2009, with the final outstanding balance due in May 2012. (Doc. 1 at ¶ 9; Doc. 1, Exh. B § 1.1.) Defendants made no payments on the Note. (Doc. 1 at ¶¶ 11, 13.)

In June 2015, the parties entered into a Modification Agreement (the "Modification"). (*Id.* at ¶ 12; Doc. 1, Exh. A.) The Modification set a new principal balance: $295,925.37 (the "New Balance"). (*Id.* at ¶ 14.) Defendants were to pay $1,000 monthly for eleven (11) months commencing in July 2015, with the outstanding balance due on June 1, 2016. (*See* Doc. 1 at ¶ 15; Doc. 1-2 at 8.) In exchange for the extended repayment schedule, Defendants agreed to an 8% interest on the New Balance, rather than the 5% interest contemplated in the Note. (Doc. 1 at ¶ 14; Doc. 1, Exh. A § 3.b.) Defendants made no payments on the Modification. (*See* Doc. 1 at ¶ 15.)

On May 31, 2022, Plaintiff filed suit. (*See* Doc. 1.) The Complaint alleges a single count, breach of contract, against Defendants for defaulting under the Modification. (*See generally* Doc. 1.) Defendant Jeffery Shields ("Defendant") moves to dismiss arguing that no enforceable contract exists and that the action is barred by the applicable statute of limitations. (Doc. 14 at 2.) The briefings reference the Note and the Modification attached in Plaintiff's Complaint.[4]

II. Jurisdiction

Federal courts have original jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of $75,000" and there is complete diversity of

[4] While a court ordinarily may not consider evidence outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss the court may "consider materials ... incorporated by reference in the complaint ... without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 907-908 (9th Cir. 2003). Defendant does not necessarily challenge the documents' authenticity but disputes whether such documents constitute valid enforceable contracts. Specifically, Defendant contends that the Modification contains "duplicate and contradicting signature pages, a duplicate and contradictory page 3, (one of which only has defendants initials [sic] and the other containing only the Plaintiff's), and the documents has [sic] no page 4." (Doc. 14 at 4.)

citizenship between the parties opposed in interest. 28 U.S.C. § 1332(a); *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009).

Plaintiff asserts that subject matter jurisdiction exists under 28 U.S.C. § 1332 because the parties' citizenship is completely diverse and the amount in controversy exceeds $75,000.00, exclusive of costs and interest. (Doc. 1 at ¶ 4.) The Complaint alleges Plaintiff is a citizen of Australia, and Defendants are citizens of the United States residing in Utah. (*Id.* at ¶¶ 1–3.) Plaintiff further asserts that personal jurisdiction exists over Defendants because they have "purposefully availed themselves of the laws of the State of Arizona, Defendants' contacts within the State of Arizona give rise to Plaintiff's claim against Defendants, and the exercise of personal jurisdiction in Arizona is reasonable." (*Id.* at ¶ 5.) Plaintiff also asserts that the Modification was negotiated, in substantial part, in Arizona with performance to be made in Tucson, Arizona. (*Id.* at ¶ 6.)

Lastly, because Federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural law, *see Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003), Arizona substantive law applies to this action.

III. Legal Standard – Dismissal Under Rule 12(b)(6)

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a defendant with "fair notice" of the claims against them and the grounds for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citation omitted).

A court may dismiss a complaint under Rule 12(b)(6) when it does not contain enough facts to state a claim that is plausible on its face. *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 557). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's

obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted). In considering a motion to dismiss, a court must accept the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 550.

IV. Analysis

A. Existence of a Contract

To state a cause of action for breach of contract in Arizona, Plaintiff must plead that: (1) a contract exists; (2) the defendants breached the contract; and (3) the breach damaged the plaintiff. *Dylan Consulting Servs. LLC v. SingleCare Servs. LLC*, No. CV-16-02984-PHX-GMS, 2018 WL 1510440, at *2 (D. Ariz. Mar. 27, 2018); *Graham v. Asbury*, 112 Ariz. 184, 185 (1975). Contract terms may be expressly stated or inferred from the parties' conduct. *See Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 381 (1985).

Defendant argues that Plaintiff has failed to show valid contracts, (Doc. 14 at 3–5), specifically, (1) the Complaint, Modification, and Note reference inconsistent commencement dates for the Note;[5] (2) the Note and Modification, attached to the Complaint, contain inconsistencies including duplicate pages, contradicting signature pages, and pagination errors; and (3) the Modification's "waiver provision" renders the contract illusory. Defendant's arguments are unavailing.

In his first argument, Defendant contends that, "Plaintiff [has] offered exhibits that contradict [the] [C]omplaint, are missing pages, and have conflicting dates from those asserted in [the] Complaint." (Doc. 14 at 4.) Defendant also asserts that the Modification references "a note that the Plaintiff fails to provide or that does not exist." *Compare* Doc. 14 at 4, *with* Doc. 14 at 3 ("Attached to their Complaint, the Plaintiff's [sic] provide two exhibits. The original agreement [the Note], and the modified agreement.") At this stage of

[5] Specifically, Defendant contends: (1) the Complaint alleges the Note commenced on or around May 15, 2006 (Doc. 14 at 4 (referencing Doc. 1 at ¶ 8)); the Modification references the Note becoming effective May 15, 2006 (Doc. 14 at 4 (referencing Doc. 1, Exh. A); and the Note indicates a commencement date of June 15, 2009 (Doc. 14 at 4 (referencing Doc. 1, Exh. B).

the proceedings, however, the Court must accept as true Plaintiff's assertions. Plaintiff has provided at least some evidence of the Modification, (Doc. 1, Exh. A), and the Note (Doc. 1, Exh. B), and it is facially plausible, based on the facts alleged, that Plaintiff and Defendants entered written promises under both the Note and Modification. *See Iqbal*, 556 U.S. at 678.

In his second argument, Defendant asserts that the Modification's "waiver provision" renders the contract illusory. (*Id.* at 3–5.) Specifically, "[the waiver provision] allows the Plaintiff to terminate the contract at any time as it very bluntly and explicitly abrogates every right and legal enforcement the Defendants have regarding this contract." (*Id.* at 4.) Defendant's interpretation is mistaken.

"An agreement which permits one party to withdraw at his pleasure is void." *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588 (1977). Such interpretations that render contracts void, however, are highly disfavored. *Id.* at 589 ("[i]t is a long-standing policy of the law to interpret a contract whenever reasonable and possible in such a way as to uphold the contract."); *Hall v. Rankin*, 22 Ariz. 13, 15 (1920) ("Where a ... contract as a whole is susceptible of two meanings, one of which will uphold the contract ... and the other of which ... render[s] it invalid, the former will be adopted.") (internal quotes and citations omitted). "A contract must be construed so that every part is given effect, and each section of an agreement must be read in relation to each other to bring harmony, if possible, between all parts of the writing.... [T]he court will not construe one provision in a contract so as to render another provision meaningless." *Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277 (App. 1993). Thus, in interpreting a contract, if there is a plausible interpretation that allows the contract to be upheld, the Court should prefer that interpretation. *Shattuck*, 115 Ariz. at 589.

Here, Defendant's interpretation relies on a single provision, which reads in full:

> Waiver. Maker, for itself and its successors and assigns, hereby absolutely and irrevocably waives, releases and forever discharge Payee and its affiliates, agents, attorneys,

> representatives, and successors (collectively, "Payee Released Parties") from any and all claims, rights, demands, actions, suits, cause of actions, damages, counterclaims, defenses, losses, costs, obligations, liabilities and expenses of every kind of nature, known or unknown, suspected or unsuspected, fixed or contingent, foreseen or unforeseen (collectively "Claims"), *arising out of or relating directly or indirectly to any circumstances or state of facts pertaining to the Note*, including Claims related to the actions of Payee in administering the Note or negotiating the Note, or this Agreement, and all claims of lender liability, fraud, duress, illegality, usury, waiver, bad faith, interference in such Party's business, or any nonperformance or non-payment of any agreement or obligation related thereto, or any disclosures, statements, representations, acts or omissions, intentional, willful, negligent or innocent, by any of the Payee Released Parties in any way connected with, relating to or affecting, direct or indirectly, the Note, this Agreement, or Payee; *provided, however, that the foregoing shall not constitute a release of any Payee's obligations under this Agreement.* THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. MAKER ACKNOWLEDGES THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO PAYEE TO ENTER INTO THIS AGREEMENT.

(Doc. 1, Exh. A at 3) (italicization added). The provision does not provide Plaintiff authority to terminate the Modification at any time. The more plausible interpretation, read so that every part is given effect, is that this provision waives all claims arising under the original Note without releasing Defendants from any obligations arising under the Modification. Such an interpretation is further evidenced by language found elsewhere in the Modification that suggests the parties intended the Modification to replace the Note. (*See* Doc. 1, Exh. A at 2) ("Payee and Maker desire to modify and amend the Note, on the

terms and conditions set forth below.")

Additionally, Defendant argues that the Modification lacks mutual consideration such that the satisfactory performance of the monthly payments contemplated in the Modification "still ends with the [original] contract being breached." (Doc. 14 at 4–5.) "A promise lacks consideration if the promisee is under a preexisting duty to counter-perform." *Travelers Ins. Co. v. Breeze*, 138 Ariz. 508 (App.1983); *see also* Restatement (Second) of Contracts § 73 (2022) ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.") If the promisee undertakes any obligation not required by the pre-existing duty, even if the new obligation involves almost the same performance as the pre-existing duty, then such promise is supported by adequate consideration. *See Leone v. Precision Plumbing & Heating of S. Arizona, Inc.*, 121 Ariz. 514, 515 (App. 1979). By contrast, restructuring a preexisting financial agreement in a manner that is purely beneficial to one party and detrimental to the other is not a valid contract. *See Wassef v. JPMorgan Chase Bank, N.A.*, CV-12-02480-PHX-DGC, 2013 WL 2896853, at *2 (D. Ariz. June 13, 2013); *see also K–Line Builders, Inc. v. First Federal Sav. & Loan Ass'n*, 139 Ariz. 209, 213 (App. 1983). Valid consideration requires that there be a mutuality of obligations, and mutuality fails where only one party is obligated to perform. *See Carroll v. Lee*, 148 Ariz. 10, 13 (1986) (en banc).

Under the Modification: Plaintiff agreed to a modified repayment schedule, waived late charges accrued through May 31, 2015 (totaling $17,468.56), and in exchange, Defendants agreed to an increased 8% interest rate on the New Balance. (Doc. 1, Exh. A §§ A–D, 1–4.) The agreement does not give all the benefit or detriment to one party. As such, Plaintiff asserts a plausible allegation that the Modification is supported by adequate consideration. *See U.S. Life Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 356 (App. 1986) (noting that the adequacy of consideration is frequently a matter of fact).

B. Statute of Limitations

In Arizona, the limitations period for breach of a written contract is six years. A.R.S. § 12-548(A)(1). "[A] cause of action accrues, and the statute of limitations commences, when one party is able to sue another." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 589 (1995). When a fixed debt is payable in installments, missing a payment gives the creditor the right to sue for the missed payment and the statute begins to run as to that payment. *See Johnson v. Johnson*, 195 Ariz. 389, 391 ¶ 11 (App. 1999). If the parties have not agreed otherwise, "the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due." *Navy Fed. Credit Union v. Jones*, 187 Ariz. 493, 495 (App. 1996). In closed accounts, the principal amount of the debt is fixed, and there is a defined schedule of repayment specifying the size of each payment and when the payment falls due. *See Mertola, LLC v. Santos*, 244 Ariz. 488, 491 (2018). As such the cause of action as to future installments does not accrue until the time they become due. *See Navy Fed. Credit Union*, 187 Ariz. at 495.

Here, Defendant argues that Plaintiff fails to state a claim for relief because the action is barred by the applicable statute of limitations. (Doc. 14 at 5.) Specifically, Defendant contends that the cause of action accrued on July 1, 2015, when Defendants allegedly missed their first payment on the Modification, and Plaintiff failed to commence or prosecute his action within six years of July 1, 2015. (*Id.* at 6.) As Plaintiff correctly notes, however, Arizona's continuing breach doctrine applies, such that the six-year statute of limitations period under Section 12-548 begins anew from the due date of each matured but unpaid installment. *Durham v. Trinity Fin. Servs. LLC*, No. CV-19-00238-PHX-DLR, 2020 WL 569332, at *4 (D. Ariz. Jan. 17, 2020). Accordingly, under the Modification, Defendants' final payment on the outstanding balance did not become due until June 1, 2016.[6] (*See* Exh. A § 3.c (providing "all outstanding principal, accrued and unpaid interest and any other fees or costs associated herewith shall be due and payable in full" on

[6] Plaintiff notes that "Defendants' final $309,037.10 payment under the [Modification] did not become due until June 1, 2016." This amount is seemingly calculated based on Defendants' assumed compliance with the amortization schedule. (*See* Doc. 1-2 at 8.)

June 1, 2016).) Because Plaintiff could not have sued Defendant for the lump sum due under the Modification until June 2, 2016, the cause of action did not accrue until then. Plaintiff filed suit on May 31, 2022, within the six-year statute of limitations period.

In the alternative, Defendant argues that the Modification lacks Defendants' "willingness" such that it may constitute a valid acknowledgment of debt. As Defendant concedes, (Doc. 14 at 5), a written acknowledgement extends the statute of limitations—even on a time-barred debt—when a document signed by the debtor acknowledges the debt and expresses a willingness to pay it. A.R.S. § 12-508; *see Freeman v. Wilson*, 107 Ariz. 271, 275–76 (1971) (finding that defendant's acknowledgment seven years after promissory notes were executed revived the statute of limitations on the notes.) "Where a debtor acknowledges the 'justness' of the debt and expresses a willingness to repay the obligation the law will imply from the acknowledgment a promise to pay the entire obligation ... and no precise form of words need be used to constitute a legally sufficient acknowledgment." *Freeman*, 107 Ariz. at 276.

Here, the Modification, signed by both Defendants, explicitly "acknowledge[d] and agree[d] that the [Note] is a valid, legal and binding obligation," and promised to pay the incorporated New Balance defined as the sum of the outstanding principal amount and the accrued interest through May 31, 2015. *See* Doc. 1, Exh. A §§ 1, 3.c.; *see also In re Tolleson's Estate*, 64 Ariz. 80, 83 (1946) (finding that an expression by a debtor that he desired to pay the debt in full satisfied the justness element). As such, the Modification plausibly satisfies the requirements of A.R.S. § 12-508 and bars the defense of the statute of limitations.

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V. Order

Accordingly,

IT IS ORDERED DENYING Defendant Jeffery Shields's Motion to Dismiss (Doc. 14).

IT IS FURTHER ORDERED that Defendants Jeffery Shields and Terel Shields must answer the Complaint within 20 days from the date of this Order. Further, Defendant Terel Shields must either file a notice of appearance to appear pro se or secure legal counsel within 14 days from the date of this Order.

Dated this 7th day of November, 2022.