STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2, Plaintiff-Appellee, v MATTHEW PETERSON, Defendant-Appellant.	UNPUBLISHED November 21, 2013 No. 311566 Lenawee Circuit Court LC No. 12-004396-CK

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion for summary disposition in this breach of contract action. We affirm.

On July 27, 2004, defendant signed a credit agreement with Bank One N.A., located in Ohio, for a $20,000 educational loan to support his attendance at Ave Maria School of Law in Michigan, with repayment to begin on December 15, 2007. Thereafter, Bank One assigned defendant's loan to plaintiff. After defendant failed to make any payments on the loan, plaintiff brought this lawsuit and then moved for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). At the hearing, defendant admitted to the trial court that (1) he entered into the contract, (2) it was his signature on the contract, (3) he signed the contract in Michigan, (4) the loaned funds were transferred to Michigan, and (5) the funds were going to be used for education commencing in Michigan. Defendant also admitted to the trial court that "[n]o payments were ever made." After concluding that none of defendant's numerous affirmative defenses were logical or applicable to the case, the court granted plaintiff's motion for summary disposition, holding that no genuine issue of material fact existed. This appeal followed.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App 553, 564-565; 618 NW2d 23 (2000) (citation omitted). Pursuant to MCR 2.116(C)(10), a moving party is entitled to summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Once the moving party has supported its motion, the non-moving party has the burden of producing evidence that genuine issues of material fact exist. *Arthur*

Land Co, LLC v Otsego Co, 249 Mich App 650, 666; 645 NW2d 50 (2002). The trial court must consider the pleadings, affidavits, and other admissible evidence in the light most favorable to the non-moving party. *Ruff v Isaac*, 226 Mich App 1, 4; 573 NW2d 55 (1997).

First, defendant claims that plaintiff's motion for summary disposition should have been dismissed "due to their failure to comply with the relevant Michigan Rules of Evidence regarding the admission of documents." In particular, defendant first claims that plaintiff failed to produce the "best evidence" as required by MRE 1003 because plaintiff "only produced a duplicate of the alleged document." Second, defendant claims that the credit agreement was not authenticated as required by MRE 902(11) and, thus, it was inadmissible. Third, defendant claims that plaintiff failed to establish with admissible evidence that it was "the party in interest entitled to sue." Fourth, defendant claims that, because plaintiff failed to comply with the notice requirement of MRE 902(11), the affidavit of assignment plaintiff relied on was inadmissible evidence. And fifth, defendant claims that he should be permitted to submit an affidavit challenging the document plaintiff produced in support of this breach of contract claim. These evidentiary challenges are clearly without merit. Moreover, this is a breach of contract case and defendant admitted that he entered into the loan agreement, agreed to repay the loan, received the loan funds, and then did not repay the loan. Accordingly, defendant failed to establish that any genuine issue of material fact existed precluding the summary dismissal of this action in plaintiff's favor.

Second, defendant argues that the trial court erred by failing to conclude that plaintiff's case was barred as set forth in his affirmative defenses. In particular, defendant argues that plaintiff's case was barred by Delaware's three-year statute of limitations because plaintiff is a Delaware resident and his failure to pay back the loan "caused injury to [plaintiff] in Delaware." However, defendant's contract with plaintiff's assignor, Bank One NA (Ohio), provides as follows: "I understand that you are located in OHIO and that this Credit Agreement will be entered into in the same state. Consequently, the provisions of this credit agreement will be governed by federal law and the laws of the state of Ohio, without regard to conflict of law rules." Thus, by its plain language, the parties to this contract agreed that it was governed by Ohio law.

However, "[w]hen determining the applicable law, the expectations of the parties must be balanced with the interests of the states." See *Hudson v Mathers*, 283 Mich App 91, 96; 770 NW2d 883 (2009). That is, "[t]he parties' choice of law will not be followed if (1) the chosen state has no substantial relationship to the parties or the transaction or (2) there is no reasonable basis for choosing the state's law." *Id*. at 96-97. Here, because Bank One NA (Ohio) assigned this loan to plaintiff, Ohio no longer has any substantial relationship to the parties or the transaction. And there is no reasonable basis for choosing to apply Ohio law in this case because Ohio's statute of limitations for actions based on written contracts is eight years, which is even longer than Michigan's statute of limitations. See RC 2305.06. Further, again, defendant admitted to the trial court that he signed the contract in Michigan, received the loaned funds in Michigan, and planned on using the funds for education commencing in Michigan. And defendant has never denied that he lives in Michigan. Accordingly, the trial court properly rejected defendant's claim that Delaware's statute of limitations applied to this action.

Defendant next claims that laches must bar plaintiff's claim. The doctrine of laches is an affirmative defense "concerned with unreasonable delay that results in 'circumstances that would render inequitable any grant of relief to the dilatory plaintiff.'" *Yankee Springs Twp v Fox*, 264 Mich App 604, 611-612; 692 NW2d 728 (2004) (quotation omitted). "The defendant has the burden of proving that the plaintiff's lack of due diligence resulted in some prejudice to the defendant." *Id*. at 612, citing *Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998). "Mere delay in asserting a claim for a period less than that in the statute of limitations does not constitute such laches as will defeat recovery in law or equity." *McRaild v Shepard Lincoln Mercury*, 141 Mich App 406, 411; 367 NW2d 404 (1985) (quotation omitted). Here, defendant has not shown that plaintiff did not act with due diligence in filing its claim. His argument on appeal amounts to merely noting the length of time before the claim was filed, and speculation as to plaintiff's motive. This is insufficient, as mere delay to bring suit, while ultimately doing so within the limitations period, is not enough to invoke laches. See *id*.

Defendant next argues that plaintiff failed to comply with the pleading requirements of MCR 2.112(N)(1), because, while plaintiff included an account number that it asserted corresponded to the loan at issue, this number did not appear on the contract excerpt included with the complaint. MCR 2.112(N) provides, in relevant part, "[a] party whose cause of action is to collect a consumer debt as defined in . . . [MCL 445.251[a] and [d]] must also include the following information in its complaint . . . (2) the corresponding account number or identification number, or if none is available, information sufficient to identify the alleged debt . . . ." Assuming, without deciding, that the student loan at issue qualifies as a "consumer debt," it is undisputed that plaintiff provided a purported account number on the face of the complaint, and the contractual documents it provided with this complaint referred to only a single loan. There is nothing in the rule suggesting that the account number must appear on attached documents when it is provided in the complaint, only a single loan or account is at issue, and only this single loan is referred to by the attached documents. Defendant's argument is without merit.

Next, defendant claims that plaintiff's claim is barred by the statute of frauds because the contract at issue could not be completed within one year and plaintiff "failed to produce admissible evidence of a written contract." However, defendant admitted signing the written contract at issue and the copy of the contract provided by plaintiff was admissible. Defendant's argument is simply meritless.

Defendant also asserts that plaintiff failed to mitigate damages by its delay in bringing suit. "The injured party in a contract action must make every reasonable effort to minimize his or her damages. However the burden is on the defendant to establish that the plaintiff has not used such efforts." *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 213-214; 457 NW2d 42 (1990) (citation omitted). Here, the contract at issue included an acceleration clause, making the only "damages" to be "mitigated" the accrual of interest on the principle. Defendant presents no supporting evidence to establish that plaintiff failed to mitigate damages beyond the mere allegation of delay in bringing suit. Thus, defendant has not carried his burden or established that genuine issue of material fact exists in this regard. Likewise, defendant's claim that plaintiff's claim must be offset by any benefit that plaintiff may have received from defendant's breach is unsupported by any assertion, even mere speculation, regarding what that benefit may have been.

Next, defendant claims that plaintiff's counsel violated 15 USC 1692(e)(2)(A) of the Federal Fair Debt Collection Practices Act (FDCPA), by filing a time-barred suit. However, plaintiff's case is not time-barred. Defendant further presents a confusing argument claiming that plaintiff violated section 623 a(1)(A) and (B), at 15 USC 1681s-2(a), of the Federal Credit Reporting Act (FCRA). However, under 15 USC 1681s-2(c), any violation of 15 USC 1681s-2(a) does not give rise to a private right of action. Therefore, even if plaintiff violated the subsection defendant highlights, this does not give him grounds to raise a claim against plaintiff.

Defendant also alludes to potential violations of the Michigan Collection Practices Act, MCL 445.251, *et seq*., without specifying what those violations may have been, and requested leave to amend its answer to add additional unknown counterclaims. However, a party seeking to collect its own debt is neither a "collection agency" under MCL 445.251(b) nor a "debt collector" under the FDCPA, 15 USC 1692a(6). See *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 731-733; 625 NW2d 804 (2001). Thus, such amendment would be futile, and the trial court's denial of his request for leave to amend to add counterclaims was not an abuse of discretion. See *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000), citing MCR 2.116(I)(5).

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro