STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2010

Northstar Education Finance, Inc.,
Respondent,

vs.

Bradley A. Kirscher,
Appellant.

Filed May 13, 2013
Affirmed in part, reversed in part and remanded
Klaphake, Judge[*]

Ramsey County District Court
File No. 62-CV-11-7897

Ryan D. Peterson, Stephen M. Harris, Meyer & Njus, P.A., Minneapolis, Minnesota (for respondent)

Bradley A. Kirscher, Kirscher Law Firm, P.A., Roseville, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Klaphake, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Respondent Northstar Education Finance, Inc. (Northstar) sued appellant Bradley Kirscher to recover a defaulted student loan debt, and the district court granted summary judgment for Northstar. Kirscher challenges the decision, arguing that affidavits

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

submitted by Northstar were untimely and insufficient to show that Northstar owned the debt, that the debt was discharged in Kirscher's 2006 bankruptcy, and that Northstar's suit was barred by the statute of limitations.

The district court did not abuse its discretion in considering Northstar's affidavits and properly concluded that Kirscher's student-loan debt was not discharged through bankruptcy. But because genuine issues of material fact exist concerning when the statute of limitations began to run on Northstar's cause of action, we reverse the grant of summary judgment for Northstar and remand for further proceedings.

D E C I S I O N

We review the district court's grant of summary judgment de novo. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 627 (Minn. 2012). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Viewing the evidence in the light most favorable to the party against whom judgment was granted, we must determine whether genuine material factual issues exist that would preclude summary judgment and whether the district court erred in its application of the law. *Mattson Ridge*, 824 N.W.2d at 627.

1. Timeliness of Discovery

Kirscher first contends that the district court erred in denying his motion to strike two of Northstar's affidavits, dated June 21 and August 2, 2012, as untimely. The district court enjoys "considerable discretion in granting or denying discovery requests in civil

actions" and we will not reverse a discovery decision absent a clear abuse of that discretion. *Wiggin v. Apple Valley Med. Clinic, Ltd.*, 459 N.W.2d 918, 919 (Minn. 1990). Because Kirscher did not object to the August 2 affidavit before the district court, his argument against its admission is waived for purposes of appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Concerning the June 21 affidavit, the district court correctly found that Kirscher "did receive the documents in question nearly three weeks before the filing of his summary judgment memorandum." Further, the June 21 affidavit detailed the structure of the loan program for Kirscher's loans and its nonprofit status. While this information was requested 18 months before it was disclosed, Kirscher made no motion to compel disclosure. Under these circumstances, the trial court did not abuse its discretion in considering the affidavit.

2. Sufficiency of Affidavits

Kirscher also argues that Northstar's affidavits were insufficient to support its claims that it owns Kirscher's debt and that the loans were made under a program funded by a nonprofit entity. He contends that the affidavits do not include the foundational detail necessary to authenticate the attached documents. Again, we will address only Kirscher's challenge to the June 21 affidavit, because he never objected to the sufficiency of the August 2 affidavit before this appeal. *Thiele*, 425 N.W.2d at 582.

In general, "[e]vidence offered to support or defeat a motion for summary judgment must be such evidence as would be admissible at trial." *Hopkins ex rel. LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991);

see Minn. R. Civ. P. 56.05. Kirscher contends that the affidavit did not comport with Minn. Stat. § 600.02 (2012), which sets forth the requirements for admissibility of a business record which would otherwise be hearsay. To be admissible as a business record under section 600.02, the document must be made in the regular course of business and must contain information pertinent to that business. *See Flemming v. Thorson*, 231 Minn. 343, 347-48, 43 N.W.2d 225, 227-28 (1950).

The June 21 affidavit was made by Robert Forbrook, an agent of Northstar, and incorporates: (1) an unsigned copy of the Total Higher Education (T.H.E.) Loan Program Participation Agreement, which describes the participants and their roles in the program that issued Kirscher's loans; and (2) a document entitled "Northstar Education Finance—Background." Because these are not the types of documents made in the regular course of business, we conclude that they are not business records subject to the requirements of Minn. Stat. § 600.02. Moreover, section 600.02 appears to merely codify the business-records exception to the hearsay rule, Minn. R. Evid. 803(6), and Kirscher did not argue at the district court, nor does he on appeal, that these documents constitute hearsay evidence, such that it would be necessary to determine if the business-records exceptions apply.

Instead, the documents are simply pieces of evidence that, to be admissible, must be authenticated or identified under Minn. R. Evid. 901. "The [district] court has considerable discretion under Minn. R. Evid. 901(a) in deciding whether evidence has been adequately authenticated or identified . . . ." *State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984). Under rule 901, "[t]he requirement of authentication or identification as a

condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). One way in which authentication can be achieved is through the testimony of a witness with knowledge "that a matter is what it is claimed to be." *Id.* 901(b)(1).

In the affidavit, Forbrook stated that he is "an agent of Northstar Education Finance, Inc.," and in an earlier affidavit, he listed his title as "Vice President, Northstar Capital Market Services Inc.—authorized agent for Northstar Education Finance, Inc." The record shows that Northstar Capital Markets Services, Inc. was formed by respondent Northstar Education Finance to administer the loan program under which Kirscher's loans were made.

We conclude that, in his capacity as vice president of a company formed by Northstar and as an agent for Northstar, Forbrook has adequate personal knowledge to state that the documents attached to his June 21 affidavit accurately reflect Northstar's background and the structure of the T.H.E. loan program. Given the wide discretion we afford the district court in evidentiary matters, the district court did not abuse that discretion in admitting and considering Forbrook's June 21 affidavit to establish that Kirscher's loans were made under a program funded by a nonprofit institution, and that Northstar now owns the debt.

3. Discharge in Bankruptcy

Kirscher also contends that Northstar cannot maintain this action because his student loan debts were discharged in his 2006 bankruptcy. Whether a debt was discharged in bankruptcy is a question of law, which we review de novo. *See Fast v. Fast*, 766 N.W.2d 47, 48 (Minn. App. 2009).

Kirscher filed for Chapter 7 bankruptcy on September 28, 2005, when the bankruptcy code excepted from discharge any debt "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." 11 U.S.C. § 523(a)(8) (2000). The parties agree that this version of the code governs in Kirscher's case,[1] and neither party alleges that any governmental unit was involved with Kirscher's loans.

Northstar submitted documents showing that the T.H.E. loan program was a collaboration between loan originator Northstar Guarantee, Inc. (a nonprofit), loan servicer Great Lakes Higher Education Corporation (a nonprofit), and various for-profit banks which actually funded the loans. Thus, we must determine whether Kirscher's loans were "made under any program funded in whole or in part" by nonprofits Northstar Guarantee and Great Lakes Higher Education. 11 U.S.C. § 523(a)(8).

[1] Congress amended the student loan exception in April 2005 to except an even wider class of student loans from discharge, including those made by certain private lenders. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (amending 11 U.S.C. § 523(a)(8)). The amendment is only effective, however, in bankruptcy cases commenced after October 17, 2005. *See id.* § 1501, 199 Stat. 23, 216.

No cases from this state's appellate courts or the U.S. Supreme Court interpret this provision. It has been interpreted, however, by several lower federal courts, whose interpretation is persuasive, though not binding, on this court. *See Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986) (stating that while we are only bound by the statutory interpretations of the Minnesota Supreme Court and the United States Supreme Court, statutory construction of federal law by federal courts is entitled to due respect), *review denied* (Minn. Nov. 19, 1986).

Federal courts have interpreted the plain language of section 523(a)(8) to mean that an individual's *loan* need not be funded by a nonprofit institution, but rather that the *program* must be funded by a nonprofit institution. *See, e.g.*, *In re Pilcher*, 149 B.R. 595, 598 (B.A.P. 9th Cir. 1993). Federal courts have differed somewhat as to what involvement by a nonprofit constitutes "funding" of a program. *See id.* (interpreting § 523(a)(8) to except from discharge "all loans made under a program in which a nonprofit institution plays any meaningful part in providing funds") (quotation omitted); *In re O'Brien*, 419 F.3d 104, 107 (2nd Cir. 2005) (holding that "§ 523(a)(8) includes within its meaning loans made pursuant to loan programs that are guaranteed by non-profit institutions"); *Decker v. EduCap, Inc.*, 476 B.R. 463, 468 (W.D. Pa. 2012) (finding that the non-profit defendant, "by acting as a disbursement agent, servicer and guarantor for educations loans, funded the program under which plaintiff's loan was issued," even though a for-profit bank provided all funding of the loan itself); *In re Sears*, 393 B.R. 678, 680-81 (Bankr. W.D. Mo. 2008) (placing emphasis "on the nonprofit institution's degree of involvement in the administrative functions of the program under which a loan

is funded"); *In re Drumm*, 329 B.R. 23, 35 (Bankr. W.D. Pa. 2005) (stating that a nonprofit guarantee was enough and that "[a] meaningful financial contribution or a meaningful financial risk are not required").

Federal courts have arrived at this interpretation based on the historical purpose of the student loan discharge exception. *See In re Segal*, 57 F.3d 342, 348 (3d Cir. 1995) ("[T]he legislative history of section 523(a)(8) teaches that the exclusion of educational loans from discharge provisions was designed to remedy abuses of the educational loan system by restricting the ability of a student to discharge an educational loan by filing for bankruptcy shortly after graduation, and to safeguard the financial integrity of educational loan programs."). Given this purpose and our respect for federal court interpretations of federal law, we elect to interpret 11 U.S.C. § 523(a)(8) consistent with the federal courts interpretation.

Under any of the varying standards described in the federal cases cited above, we conclude that Kirscher's loans were made under a program funded by a nonprofit institution for purposes of exception from discharge under section 523(a)(8). Nonprofit institutions Northstar Guaranty and Great Lakes started the T.H.E. loan program and originated, serviced, and guaranteed the loans made under the program. The for-profit banks involved in the program did little more than provide the money for the loans. Further, Northstar has provided evidence that Kirscher's loans have been transferred to Northstar and that Northstar now owns the debt. Kirscher's student loans were thus not discharged in his 2006 bankruptcy, and Northstar was entitled to sue Kirscher to collect the unpaid debt.

4. Statute of Limitations

Finally, Kirscher argues that the district court erred when it found that Northstar's action was not barred by the applicable six-year statute of limitations. We review de novo the construction and application of a statute of limitations. *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). In general, "[t]he question of whether an action is barred [under a statute of limitations] is a question of fact for the jury." *Berres v. Anderson*, 561 N.W.2d 919, 922–23 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). If, however, no genuine issues of material fact exist regarding the date of the event that triggers the statute of limitations, disposition of the limitations claim on summary judgment is appropriate. *See City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73, 77 (Minn. 1991).

Under Minnesota law, an action "upon a contract or other obligation" must be commenced within six years. Minn. Stat. § 541.05, subd. 1(1) (2012). "Because an assertion that the statute of limitations bars a cause of action is an affirmative defense, the party asserting the defense has the burden of establishing each of the elements." *MacRae*, 753 N.W.2d at 716. A limitations period begins to run when the cause of action accrues. Minn. Stat. § 541.01 (2012). "A cause of action accrues when all of the elements of the action have occurred . . . ." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). In general, a cause of action for breach of contract accrues at the time of the breach. *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803 (Minn. 1989).

The district court found that the statute of limitations on Kirscher's loans began to run on March 30, 2005, when Northstar purportedly accelerated the debt. Thus, the court

found that Northstar had until March 30, 2011, to bring suit, and that because it served the complaint on December 13, 2010, the action was timely.

On May 15, 2003, Kirscher received a letter from Great Lakes, the loan servicer, stating, "We now demand full and unconditional payment of your account. Payment . . . must be received in our office no later than 30 days from the date of this notice. This total includes principal and interest. Failure to pay within that time will cause your loan to default." Kirscher made only one payment after receiving this letter, sending Great Lakes $180.89 on July 26, 2004. Kirscher contends that the statute of limitations began to run when he received the letter on May 15, 2003, and that his payment on July 26, 2004, restarted the statute of limitations.[2] Further, the parties do not dispute that the applicable statute of limitations in this case is further extended by the 135-day period during which Kirscher's bankruptcy petition was pending. *See* 11 U.S.C. § 362(a)(6), (c)(2)(A) (2000) (providing an automatic stay for the period between filing and closing of a bankruptcy case of "any act to collect . . . a claim against the debtor that arose before the commencement of a case"). Thus, Kirscher contends that the statute of limitations expired six years plus 135 days after July 26, 2004, or December 8, 2010, and Northstar's service of the complaint on December 13, 2010, was untimely.

Northstar, on the other hand, contends that it did not "accelerate" Kirscher's loan until March 30, 2005, pointing to a document entitled "Account Level Payment" which

[2] Northstar does not appear to dispute that the partial-payment doctrine would apply to restart the statute of limitations if Kirscher's arguments have merit. *See Windschitl v. Windschitl*, 579 N.W.2d 499, 501-02 (Minn. App. 1998) (stating that partial payment of a debt is an acknowledgment of the debt that "tolls the statute of limitations on the debt and starts it running anew on the date of the acknowledgment").

appears to be a spreadsheet reflecting activity on Kirscher's account from January 8, 2004, until March 30, 2005. Northstar does not provide any affidavit or other explanation of this document, merely arguing that it shows that Kirscher's account was accelerated on March 30, 2005. The document seems to show that Kirscher's account was still active after his 2004 payment, suggesting that Northstar did not declare the account in default in 2003.[3]

Northstar contends, and Kirscher does not dispute, that the student loans at issue were installment contracts. "Where a money obligation is payable in installments, the general rule is that a separate cause of action arises on each installment and the statute of limitations begins to run against each installment when it becomes due." *Honn v. Nat'l Computer Sys., Inc.*, 311 N.W.2d 1, 2 (Minn. 1981). If the creditor has the option under the contract, however, of declaring all amounts payable in the event of default on a single payment, the statute of limitations begins to run when the "creditor unequivocally exercises the option." *See id.*

Because Kirscher has the burden of establishing that the statute of limitations bars Northstar's claim, *see McRae*, 753 N.W.2d at 716, for purposes of summary judgment Kirscher is the moving party and Northstar the party opposing summary judgment on statute-of-limitations grounds. A party opposing summary judgment must "do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also* Minn. R. Civ. P. 56.05.

[3] Northstar also asserts that Kirscher was given a new payment plan after May 15, 2003, and that "the amount due on this subsequent payment plan was not accelerated until March 30, 2005." Northstar provided no documentary support for this assertion or any evidence of a "new" payment plan.

Even viewing the evidence in the light most favorable to Northstar, we conclude that the district court's reliance on Northstar's "Account Level Payment" document as undisputed evidence of the accrual of the cause of action is misplaced. The evidence submitted by Kirscher, including the May 15, 2003 letter and his July 26, 2004 payment suggest that Northstar demanded due his account in 2003 and that Kirscher acknowledged the debt in 2004. The document submitted by Northstar is unclear and is explained by nothing more than Northstar's conclusory assertion that the document shows the accrual of its cause of action. At best, the document shows that Kirscher's account was still active until March 30, 2005.

While we do not believe that the document undisputedly shows that Northstar accelerated the account on March 30, 2005, neither do Kirscher's documents prove when exactly the account went into default. In light of this conflict, Northstar's document creates more than a "metaphysical doubt" as to when the cause of action accrued—it creates an unresolved issue of fact. *Id.* at 71. Reasonable persons could look at the documents and draw different conclusions as to when Kirscher actually breached the loan contract, and therefore a genuine issue of material fact exists that precludes summary judgment on Kirscher's affirmative statute-of-limitations defense. *See Lake City Apartments v. Lund-Martin Co.*, 428 N.W.2d 110, 112 (Minn. App. 1988) (stating that "[w]hen reasonable minds may differ about" the trigger of a statute of limitations, "the issue is one for the trier of fact"), *review denied* (Minn. Oct. 19, 1988).

We therefore reverse the grant of summary judgment for Northstar on statute-of-limitations grounds and remand for proceedings consistent with this opinion to determine whether Northstar's suit was timely.

Affirmed in part, reversed in part, and remanded.