No. 46

Portfolio Recovery Associates, LLC,

Respondent,

v.

Jared King,

Appellant.

Jared King, appellant pro se.

Robert A. Spolzino, for respondent.

CAMBA Legal Services, Inc. et al.; Association of the Bar of the City of New York et al.; Michael J. Hutter; AARP et al., amici curiae.

PIGOTT, J.:

In April 1989, defendant Jared King, then a resident of Connecticut, opened a credit card account with Greenwood Trust Company, a Delaware corporation with a principal place of business in Greenwood, Delaware. The agreement contained a standard choice of law clause stating that it would be governed

by the laws of Delaware. Greenwood subsequently changed its name to Discover Bank.

It is undisputed that, on January 27, 1999, King sent a letter to Discover cancelling his credit card, which he had cut in half and enclosed with the letter. King demanded that Discover advise him on how to proceed in paying the card's outstanding balance, but concededly made no payment on the account after December 1998. In August 2000, Discover transferred to plaintiff Portfolio Recovery Associates, LLC, "all right, title and interest in and to" King's outstanding account.

On April 1, 2005, nearly five years after the assignment and more than six years after the account was canceled, Portfolio commenced this action against King, now a resident of New York, asserting causes of action for breach of contract and account stated. King asserts in his answer, among other things, that upon application of CPLR 202--this State's "borrowing statute"--Portfolio's claims are time-barred. Specifically, King claims that Delaware's three-year statute of limitations for breach of a credit contract (see 10 Del.C. § 8106) applies and, alternatively, Portfolio's claims are untimely under this State's six-year breach of contract limitations period (see CPLR 213[2]).

Portfolio obtained summary judgment on its complaint. Supreme Court directed that judgment be entered in Portfolio's favor and the Appellate Division affirmed (55 AD3d 1074). We now

reverse.

The Appellate Division properly concluded that the Delaware choice of law clause did not require the application of the Delaware three-year statute of limitations to bar Portfolio's claims. Choice of law provisions typically apply to only substantive issues (see Tanges v Heidelberg N. Am., 93 NY2d 48, 53 [1999]), and statutes of limitations are considered "procedural" because they are deemed "'as pertaining to the remedy rather than the right'" (id. at 54-55 quoting Martin v Dierck Equip. Co., 43 NY2d 583, 588 [1978]). There being no express intention in the agreement that Delaware's statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that limitations period. We conclude, however, that the Appellate Division should have applied CPLR 202 to Portfolio's claims to determine whether they were timely brought (see e.g. Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 [1999] ["there is a significant difference between a choice-of-law question, which is a matter of common law, and (a) Statute of Limitations issue, which is governed by the particular terms of the CPLR"]).

CPLR 202 provides, in relevant part, that "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued." Therefore, "[w]hen a nonresident sues on a

cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued" (Triarc, 93 NY2d at 528). If the claimed injury is an economic one, the cause of action typically accrues "where the plaintiff resides and sustains the economic impact of the loss" (id. at 529).

Portfolio, as the assignee of Discover, is not entitled to stand in a better position than that of its assignor. We must therefore first ascertain where the cause of action accrued in favor of Discover. Here, it is evident that the contract causes of action accrued in Delaware, the place where Discover sustained the economic injury in 1999 when King allegedly breached the contract. Discover is incorporated in Delaware and is not a New York resident. Therefore, the borrowing statute applies and the Delaware three-year statute of limitations governs.

That does not end the inquiry, however, because in determining whether Portfolio's action would be barred in Delaware, this Court must "borrow" Delaware's tolling statute to determine whether under Delaware law Portfolio would have had the benefit of additional time to bring the action (see GML, Inc. v Cinque & Cinque, P.C., 9 NY3d 949, 951 [2007]). Delaware's tolling statute--Delaware Code § 8117--provides that:

> "If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefor

> in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action."

Section 8117 was meant to apply only in a circumstance where the defendant had a prior connection to Delaware, meaning that the tolling provision envisioned that there would be some point where the defendant would return to the state or where the plaintiff could effect service on the defendant to obtain jurisdiction (see Williams v Congregation Yetev Lev, 2004 WL 2924490 *7 [SDNY 2004]). Indeed, Delaware's highest court has held that the literal application of its tolling provision "would result in the abolition of the defense of statutes of limitation in actions involving non-residents" (Hurwich v Adams, 155 A2d 591, 593-594 [Del. 1959]).

There is no indication that King ever resided in Delaware, nor is there any indication from the case law that Delaware intended for its tolling provision to apply to a nonresident like King. Therefore, we conclude that Delaware's tolling provision does not extend the three-year statute of limitations. Moreover, contrary to Portfolio's contention, it is of no moment that Portfolio was unable to obtain personal jurisdiction over King in Delaware; this Court has held that it

is not inconsistent to apply CPLR 202 in such a situation (see Insurance Co. of N. Am. v ABB Power Generation, 91 NY2d 180, 187-188 [1997]).

Applying Delaware's three-year statute of limitation, the instant action should have been commenced not later than 2002. Because the contract claims were not brought until 2005, they are time-barred in Delaware, where the causes of action accrued, and therefore they are likewise time-barred in New York upon application of the borrowing statute. This holding is consistent with one of the key policies underlying CPLR 202, namely, to prevent forum shopping by nonresidents attempting to take advantage of a more favorable statute of limitations in this State (see Antone v General Motors Corp., 64 NY2d 20, 27-28 [1984]).

As a final matter, we note that only Portfolio sought summary judgment below. Absent a cross motion for summary judgment by King, we are not empowered to now grant that relief (see Stern v Bluestone, 12 NY3d 873, 876 [2009]; Falk v Chittenden, 11 NY3d 73, 78-79 [2008]; Merritt Hill Vineyards v Windy Hgts. Vineyard, 61 NY2d 106, 110-111 [1984]).

Accordingly, the order of the Appellate Division should be reversed, with costs, and Portfolio's motion for summary judgment should be denied.

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Order reversed, with costs, and plaintiff's motion for summary judgment denied. Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided April 29, 2010