STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: January 16, 2015)

STEPHAN G. ERINAKES,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. KB-2014-0741**
	:	
THE ODEUM CORPORATION; EMMANUEL STEFAN COUTOULAKIS; ELISSA MARIE COUTOULAKIS; and KRISTEN JULIANN COUTOULAKIS,	:	
Defendants.	:	

DECISION

STERN, J. Before this Court is the Motion to Dismiss[1] submitted by the Defendant, The Odeum Corporation (Odeum or Defendant). The Defendant seeks a dismissal of Stephan G. Erinakes' (Erinakes or Plaintiff) Complaint on the grounds that the Plaintiff has failed to bring the cause of action within the applicable statute of limitations period. The Plaintiff's Complaint seeks a declaration from this Court that the promissory note (Blanch Note) and mortgage allegedly executed by Odeum is valid, and that the Blanch Note is secured by the alleged mortgage. The Defendant further alleges the Motion should be granted on the grounds that the Plaintiff does not possess authority to enforce the disputed Blanch Note. Plaintiff has filed an objection to the pending Motion. Jurisdiction is pursuant to Super. R. Civ. P. 12(b)(6).

[1] This Court will consider the current Motion as a Motion to Dismiss since, at the time the Defendant filed the pending Motion, the pleadings had not closed due to the fact that the Plaintiff had yet to answer Odeum's counterclaim.

I

Facts and Travel

The Plaintiff is a resident of East Greenwich, Rhode Island. Odeum is a domestic nonprofit corporation organized and existing under Rhode Island law, with a principal place of business in East Greenwich, Rhode Island. The current case concerns a dispute between the Plaintiff and Defendant regarding the validity and enforceability of a Blanch Note and mortgage issued by Odeum. (Am. Compl. ¶ 7). The property securing the Blanch Note is located at 59 Main Street, East Greenwich, Rhode Island, also known as the Greenwich Odeum. Id. at ¶ 8.

In the 1920s, the Plaintiff's family owned and operated a movie theatre known as the Greenwich Theatre. Id. at ¶ 9. By 1961, George Erinakes was the owner of the Greenwich Theatre. Id. at ¶ 10. After George Erinakes' death in 1973, the property passed to his wife, Blanch Erinakes.[2] Id. at ¶ 11. The Plaintiff is the son of George and Blanch Erinakes. Id. at ¶ 12. By January 1985, Blanch had transferred interest in Greenwich Theatre to the trustee of three separate trusts, with each trust receiving a 9.5238% interest in the property. Id. at ¶¶ 13-15. Each trust had one beneficiary, with Emmanuel Coutoulakis, Elissa Coutoulakis, and Kristen Coutoulakis each being named a beneficiary of a different trust. The Plaintiff was named the Trustee for each trust. Id. On December 29, 1984, Blanch Erinakes transferred an additional 9.5238% interest in the property to Mildred Gebbart[3], who later conveyed—on January 14, 1992—that interest to Odeum.[4] Id. at ¶¶ 16-17. In 1989, when the Greenwich Theatre closed, the Plaintiff and his friend, Philip Sidel, formed a nonprofit corporation to operate a theatre. Id.

[2] In documents submitted to the Court there are discrepancies in the spelling of Blanch Erinakes. For clarity, the Court will continue to refer to the Plaintiff's mother as Blanch Erinakes.

[3] Mildred Gebbart changed her last name sometime between 1984 and 1992. From that point forward, Mildred has gone by Mildred Bajakian.

[4] By 1992, Blanch Erinakes retained a 61.9048% interest in the property.

at ¶¶ 19-20.

On March 1, 1991, Odeum was created, with the Plaintiff as the president and Philip Sidel as vice-president. Id. at ¶ 21. On December 31, 1991, Blanch Erinakes deeded her remaining interest to Odeum, and, in return, Odeum issued Blanch Erinakes a $500,000 promissory note[5] and executed a mortgage.[6] Id. at ¶¶ 24-25. The Greenwich Theatre was reopened as the Greenwich Odeum in 1991 as a venue for live performing arts.[7] [8] Id. at ¶ 27. On December 30, 1994, Blanch Erinakes allegedly gifted a portion of the Blanch Note to Odeum, reducing the amount of the note to $450,000. Allegedly, on May 30, 1996, Blanch Erinakes assigned the Blanch Note to the Plaintiff. Id. at ¶ 46. On July 6, 1999, Blanch Erinakes passed away. Id. at ¶ 29. The Executor of her Estate, Bank of America, N.A., again allegedly, assigned Blanch Erinakes' interest in the Blanch Note and mortgage to the Plaintiff.[9] Id. at ¶ 30. In 1999, Plaintiff attempted to probate a will created by Blanch Erinakes on November 16, 1994, which was challenged by the Plaintiff's sister. The Supreme Court upheld the decision that Blanch Erinakes lacked testamentary capacity to make this will. During the period of 1991 through 2007, grants and revenues barely covered Odeum's expenses, and payments were not made on the mortgage or the Blanch Note. Id. at ¶ 32. During this time period, Odeum allegedly recognized the validity of both documents and acknowledged forbearance by the holder of the Blanch Note and mortgage to demand payment.[10] Id. at ¶ 33.

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[5] The terms of the Blanch Note called for fifteen years of 180 equal monthly payments to be made through January of 2007.

[6] At all times, according to the Plaintiff, Odeum was authorized to execute the Blanch Note and mortgage. Allegedly, the Blanch Note was signed by Odeum's Vice President, Philip Sidel.

[7] It operated as such a venue from 1991 to 2007.

[8] Odeum obtained tax exempt status and was exempt from property taxes beginning in 1992.

[9] Defendant alleges Plaintiff was appointed Executor pursuant to the terms of Blanch Erinakes' will, and, in his capacity, never made a demand for payment on the Blanch Note.

[10] From this time until now, there has still been no payment on the Blanch Note.

The Greenwich Odeum shut down in 2007, remaining closed until 2012. In 2012, local residents sought to reopen the Greenwich Odeum. By 2012, the Plaintiff was no longer on the Board of Directors of Odeum. Id. at ¶ 37. However, his name appeared on Odeum's 2008, 2009, and 2010 tax returns. During that time period, Plaintiff never made a demand for payment. On November 16, 2012, the Plaintiff demanded payment of the amount due under the Blanch Note. A board member for Odeum informed the Plaintiff that the Blanch Note and mortgage were not enforceable. Id. at ¶ 40. The Plaintiff alleges the Blanch Note and mortgage remained in effect from its creation on December 31, 1991, and that Odeum acknowledged and accepted Blanch Erinakes and the Plaintiff's forbearance from seeking payment under the promissory note.[11]

II

Standard of Review

"The 'sole function of a motion to dismiss' pursuant to Rule 12(b)(6) is 'to test the sufficiency of the complaint.'" McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting R.I. Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). In assessing a Super. R. Civ. P. 12(b)(6) motion to dismiss, this Court '"assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs."' Giuliano v. Pastina, 793 A.2d 1035, 1036 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). The motion "should be granted only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the claim." Siena v. Microsoft Corp., 796 A.2d 461, 463 (R.I. 2002) (citation omitted).

[11] Throughout this time, the Plaintiff alleges that Odeum acknowledged the Blanch Note as an obligation to the corporation and recognized the lien on the property as valid.

Ordinarily, the court's review of a motion to dismiss is confined to the complaint, Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009), and if the court goes outside the complaint, the court must convert the motion into a motion for summary judgment. See Coia v. Stephano, 511 A.2d 980 (R.I. 1986). This rule carries less force, however, where the pleading contains more than just a complaint. "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Super. R. Civ. P. 10(c). The motion justice may consider and refer to documents incorporated into a complaint by reference when ruling on a motion to dismiss. Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721 (R.I. 2003) (citing Super. R. Civ. P. 10(c)); 27A Federal Procedure § 62:509. Such documents "must be referred to explicitly," or be "exhibit[s] annexed to the complaint." 1 Kent, R.I. Civil Practice § 10.3 at 100 (1969); see also 5B Wright & Miller, Federal Practice and Procedure 3d § 1357 at 377. The rationale underlying this rule is that the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated when the plaintiff has actual notice that such documents would be considered because the plaintiff has relied upon these documents in framing his complaint. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3rd Cir. 1997).

III

Analysis

A

Authority to Enforce the Note

The Defendant first argues that the Plaintiff is not a holder and therefore has no authority to enforce the Blanch Note. The Defendant contends that the Blanch Note was not properly transferred in the two instances the Plaintiff relies on—the May 30, 1996 assignment and the

assignment from Blanch Erinakes' estate—to demonstrate that a valid assignment had taken place. Alternatively, the Plaintiff contends that the Blanch Note was validly transferred to him from his mother and therefore he has the authority to now enforce it against Odeum. Plaintiff alleges that the Blanch Note was assigned to him on two separate occasions, both of which he contends were valid. Finally, the Plaintiff argues that even though the instrument was not endorsed, the Plaintiff may still enforce the Blanch Note.

Section 6A-3-301 of the Rhode Island General Laws states in pertinent part:

> "Person entitled to enforce an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 6A-3-309 or 6A-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." Sec. 6A-3-301 (internal quotations omitted).

Negotiation refers to the transfer of possession of an instrument to another who becomes the holder. See § 6A-3-201(a). If payable to an identified person, negotiation requires transferring possession and its endorsement by the holder. See § 6A-3-201(b). An instrument is transferred "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Sec. 6A-3-203(a). Further, a "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. . . ." Sec. 6A-3-203(b) (emphasis added).

In this case, the Plaintiff contends to have received the Blanch Note on two separate occasions. According to the Plaintiff, the first assignment of the Blanch Note occurred on May 30, 1996 when Blanch Erinakes allegedly assigned the note to the Plaintiff. The Plaintiff alleges the second assignment took place after Blanch Erinakes had passed away, and the Executor of her Estate—Bank of America, N.A.—assigned the Blanch Note to the Plaintiff. It is at this time

that the Plaintiff claims to have received possession, which he, in fact, did. Delivery of the Blanch Note to the Plaintiff vests in him the same rights as his mother to demand payment under the note. See New Bedford Inst. for Sav. v. Calcagni, 676 A.2d 318, 320 (R.I. 1996) (holding an assignee of a nonnegotiable note may maintain an action); see also § 6A-3-203(a), (b). Viewing the facts in the Complaint in a light most favorable to the Plaintiff, and based on the oral arguments, the Plaintiff has authority to enforce the Blanch Note as a transferee. See Siena, 796 A.2d at 463. Therefore, the Defendant's contention that the Plaintiff's Complaint should be dismissed since the Plaintiff lacks authority to enforce the Blanch Note is without merit.

B

Statute of Limitations

The Defendant next argues that the Plaintiff's claim to enforce the Blanch Note is time-barred by the applicable statute of limitations. Conversely, the Plaintiff contends that the statute of limitations does not begin to run until demand for payment is made. In support of his argument, the Defendant contends that Odeum acknowledged the validity of the Blanch Note from 1991 through 2007, and that Odeum accepted Blanch Erinakes and Plaintiff's forbearance from demanding payment on the Blanch Note, thereby tolling the statute of limitations.

Pursuant § 6A-3-118(a),

> "[e]xcept as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." Sec. 6A-3-118(a).

A note is payable on demand when "it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment." Sec. 6A-3-108(a). Further, a note is payable at a definite time

> "(b) . . . if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event." Sec. 6A-3-108(b).

An "acknowledgment of an existing debt tolls the running of the statute of limitations." In re Giorgio, 62 B.R. 853, 860 (Bankr. D.R.I. 1986) (citing Ash v. Isaacson, 59 R.I. 407, 419, 195 A. 700 (1937)).

In this case, the Plaintiff relies on DiBattista v. Butera, 104 R.I. 465, 244 A.2d 857 (1968) to support his position that the statute of limitations does not bar the current action since the Defendant acknowledged and accepted the forbearance of the holder to demand payment on the note. In DiBattista, the Court held that ordinarily a promissory demand note is payable immediately, and no demand is necessary to start the running of the statute of limitations. 104 R.I. at 467, 244 A.2d at 859. The Court went on to further hold that an exception to this rule exists when the "circumstances under which [the note] is given show[s] that an actual demand or delay for payment was contemplated by the parties before the statute of limitations would start to run." Id. (citing 71 A.L.R. 2d 284, 309).

The facts before this Court are inapposite to the DiBattista case. Here, the Defendant did not sign a promissory demand note. The Blanch Note was payable semi-annually for fifteen years. Here, the language of the Blanch Note entered into on December 31, 1991 states that $500,000 will be repaid to Blanch Erinakes with interest at 8% per annum, payable semi-annually in 180 monthly installments, until the principal is paid—whether at or after maturity—and all installments of interest—whether at or after maturity—is paid. The language is unambiguous and the dates of payment are clearly ascertainable. Even if the Defendant did, in

fact, acknowledge the validity of the Blanch Note from 1991 through 2007, there is no evidence put forth demonstrating that the Plaintiff would not make a demand for payment upon the stated maturity date. What the Court can only assume to be the case is that if any forbearance took place, it was by the Plaintiff in agreeing not to receive its owed semi-annual payments. Therefore, the cause of action would still have to be brought within six years for a note payable at a definite time—which did not happen in this case.

The Plaintiff's reliance on Odeum's acknowledgement of the Blanch Note is to no avail. Since this Court finds the Blanch Note represents a note payable at a definite time, the Defendant's acknowledgment of the debt between the years of 1991 through 2007 does not change the time in which the Plaintiff had to bring his claim. For example, if December 31, 2007 was the last time Odeum acknowledged the Blanch Note, the Plaintiff would have six years from this date to bring suit. The Plaintiff's claims have not been brought within this period. Any demand for payment by the Plaintiff during this timeframe does not toll the statute of limitations. The Plaintiff still has to bring a timely suit, which he has failed to do.

IV

Conclusion

Therefore, the Court grants the Defendant's Motion to Dismiss since the Plaintiff has failed to timely file suit within the appropriate statute of limitations period. The Defendant shall prepare the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Erinakes v. The Odeum Corporation, et al.**
CASE NO:	**KB-2014-0741**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**January 16, 2015**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Vincent T. Cannon, Esq.**
For Defendants:	**Jeffrey H. Gladstone, Esq.** **Marvin Homonoff, Esq.** **Jennifer A. Minuto, Esq.** **Thomas J. Enright, Esq.**