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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 63

-----X

MICHAEL H. STEINHARDT,

Plaintiff,

-against-

Index No.
157819/14

ZEESY SCHNUR,

Defendant.

-----X

Motion

71 Thomas Street
New York, New York
May 5, 2015

B E F O R E:

HONORABLE ELLEN M. COIN,

JUSTICE

A P P E A R A N C E S:

LAW OFFICES OF DAVID J. SHAPIRO, PC
ATTORNEYS FOR THE PLAINTIFF

43 WEST 43RD STREET, SUITE 45
NEW YORK, NEW YORK 10013

BY: DAVID J. SHAPIRO, ESQ.,

LEONARD S. REISS, ESQ.,
ATTORNEY FOR THE DEFENDANT

15 WEST 44TH STREET
NEW YORK, NEW YORK 10036

VINCENT J. PALOMBO, RMR, CRR
OFFICIAL COURT REPORTER

PROCEEDINGS

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2 THE COURT: Michael Steinhardt versus Zeesy
3 Schnur.

4 This is defendant's motion to dismiss in the
5 first instance. I'll hear from you first.

6 MR. REISS: Thank you, your Honor. Leonard
7 S. Reiss, for the defendant.

8 Your Honor, this is a fairly straightforward
9 motion to dismiss on statute of limitations ground.
10 The loan, there's no dispute, was made in May of 1996.
11 And depending on whether you look at the promissory
12 note that is attached to our motion or even the
13 promissory note which the plaintiff has attached to its
14 motion, the statute of limitations would have had to
15 run by 2003, at the latest, your Honor.

16 The action --

17 THE COURT: Was this an action on the
18 promissory note or an action on the guarantor -- the
19 loan guarantee --

20
21 MR. REISS: The defendant would like to you
22 believe that -- it's an action to recover this \$200,000
23 loan. That's what it is all about. The defendant --

24 THE COURT: From the promissor?
25

26 MR. REISS: Yes, because the promissor is the

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2 party being sued here, your Honor. The defendant
3 attempts to real -- realize that bar the defendant --
4 the plaintiff, I'm sorry, your Honor, attempts to
5 circumvent that bar, and it really -- if you accept the
6 plaintiff's argument to extend the statute of
7 limitations indefinitely, because now --

8 THE COURT: Wasn't the plaintiff here the
9 guarantor of Schnur's loans?

10
11 MR. REISS: That's how he, quote, unquote,
12 set it up --

13 THE COURT: That's what he contends -- his
14 account was debited, wasn't it?

15
16 MR. REISS: He gave the monies to my
17 client --

18 THE COURT: No, no, the account was debited
19 for her debt; correct?

20
21 MR. REISS: That's what he alleges. Now,
22 whether the money came from that account or another
23 account of his, the monies clearly came from
24 Mr. Steinhardt.

25 THE COURT: So the issue is at what point in
26 time were those monies taken by the bank --

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2 MR. REISS: Not really, your Honor, because
3 the real issue is when was the loan made? Who was the
4 loan made by? And when was a demand made to repay that
5 loan?

6 There's no question the loan was made in
7 1996. The demands were made, certainly not only by
8 Mr. Steinhardt, but his entity that he says funded the
9 loan in 2002. Attached as Exhibit H to their papers is
10 a demand from that entity realizing the statute of
11 limitations is about to run to say we want the money
12 back.

13 The money clearly was never repaid, and at
14 that point, the statute of limitations has run -- and
15 what I've provided your Honor with our cases that show
16 whether it is a guarantor versus a -- the primary
17 obligor or vice versa, one cannot extend -- the law is
18 clear one cannot extend the statute of limitations for
19 the other voluntarily.

20 They provided no cases to the Court where
21 that has been done. The three cases that they provided
22 to the Court were all educational cases where the
23 guarantor, the higher education services paid the money
24 at a time where the underlying obligor was still
25 obligated to pay that money within that six year time
26 period. In none 91 those cases had that six year time

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period expired.

Now, once that is paid by a guarantor at that point, yes, then you can have six years once you repay it to move forward; if you make that payment within the original six year underlying statute of limitations period, but if you go beyond that and pay it voluntarily after that time, your Honor -- well, that's on you. You can't extend the statute of limitations for the primary obligor at that time or vice versa. A guarantor cannot do it to a primary obligor or a primary obligor to a guarantor. The law is clear, from the Court of Appeals case I cited to your Honor from 1937 and the law has not changed on that.

THE COURT: Mr. Shapiro, I'll hear from you.

MR. SHAPIRO: Yes, your Honor. If it's helpful I created --

THE COURT: By the way, has issue been joined here?

MR. SHAPIRO: Has the issue been joined?

THE COURT: Has the issue been joined. Has the complaint been answered?

MR. SHAPIRO: No, they moved to dismiss.

THE COURT: You are cross moving for summary judgement?

MR. SHAPIRO: Yes, ma'am.

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2 THE COURT: Doesn't that require that issue
3 be joined?

4 MR. SHAPIRO: I don't think so --

5 THE COURT: I think the Appellate Division
6 has said that it does. So let's move on to their
7 motion to dismiss.

8 MR. SHAPIRO: Sure. Judge, if it's helpful,
9 last night I created a short demonstrative which I
10 think would help the Court and the parties.

11 May I hand it up?

12 THE COURT: No, it's not part of the papers.

13 MR. SHAPIRO: Sure.

14 The facts here -- and my adversary is wrong
15 on two points. Number one, we are not suing pursuant
16 to the underlying contract and promissory note between
17 what was originally Bear Stearns and later JP Morgan,
18 those are not the facts here.

19 What Mr. Steinhardt did is he guaranteed an
20 account. And I think, respectfully, your Honor, that's
21 what I really want to focus on today just for a few
22 minutes, because this is not a breach of contract
23 action on a promissory note.

24 What we've got here is a common law action
25 for reimbursement.

26 THE COURT: Right.

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2 MR. SHAPIRO: I respectfully disagree with
3 counsel's characterization of the cases I brought to
4 the court's attention as somehow being irrelevant
5 because they dealt with education.

6 I think what they did is they illustrated the
7 common law, which is summarized quite nicely, I think,
8 in some of the New York Jurors which I've cited in the
9 papers that -- look, it's real simple. If person A
10 guaranteed person's B obligations, whether it's an
11 account, a promissory note, once the guarantor, also
12 known as the surety, Mr. Steinhardt, fulfills his
13 obligations, that's when the clock starts sticking.

14 THE COURT: That's when the cause of action
15 on behalf of your client accrues.

16 MR. SHAPIRO: Yes.

17 THE COURT: I have your point. Move on.

18 MR. SHAPIRO: So those are the facts, and on
19 the law, the cases that Mr. Reiss cites to you simply
20 do not stand for -- respectfully, they do not stand for
21 the proposition that he is putting forward that somehow
22 JP Morgan and Bear Stearns would have had to make
23 demands or would have had to force Mr. Steinhardt to
24 pay the money within that six years. That's within --
25 as my brain works, that's within the box of what if
26 this was a breach of contract promissory case. But

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what happened here --

THE COURT: Which it is not.

MR. SHAPIRO: Which it is not..

THE COURT: Move on to the failure to state a cause of action claim by the defense; your opposition to their contention that the complaint fails to state a cause of action.

MR. SHAPIRO: Yes.

We've alleged facts which we say don't even have to be accepted as true, but I think we've now proven them through the documentary evidence that there was a surety principal relationship between Mr. Steinhardt and Ms. Schnur, that pursuant to that relationship once Mr. Steinhardt, as the guarantor or as the surety, makes the payment, she owes him money. So the common law basically says, as I read it, says in a nutshell, look, we've got an implied contract, we've got a contract based on equity, we can't have principals getting off scot free for lack of a better phrase.

I've got cases, I think, that go back a long time, as well, and the more recent cases.

So under the fact box, we've got a surety principal relationship, everything is set forth in the documents. We honored that guarantee in July of 2014

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and sued a month later.

THE COURT: Right.

MR. SHAPIRO: And one other thing I would say with your Honor's permission is the defendant here originally said the following: There's no such thing as a cause of action for reimbursement and that's why your complaint --

THE COURT: It's called indemnity.

MR. SHAPIRO: I found so many terms in the case law --

THE COURT: It's called indemnity in the law. Okay.

Is there something you want to respond to here?

MR. REISS: Yes, your Honor, just briefly. One is that to accept this argument -- if accepted, then going forward in the future, it would be very easy to advise clients to avoid a statute of limitations on a loan by simply saying, look, I don't want the money to come from you. You are going to have it come from a third part which essentially is controlled by you, a bank account, a lender, and I'm just going to guarantee the loan, and when I feel I want the money back, I'll ask for it and the statute of limitations wouldn't

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2 begin to run until that point, whether that's five
3 years, ten years or 50 years.

4 So to accept that argument, that's where this
5 is going, your Honor.

6 And just a couple of points regarding --
7 quickly, on his papers. The documentary evidence he
8 can't vouch for it as the attorney. He wasn't the
9 party around --

10 THE COURT: This is a motion to dismiss by
11 you.

12
13 MR. REISS: Correct.

14 THE COURT: With respect to his motion for
15 summary judgement, clearly it's premature --

16
17 MR. REISS: Okay, thank you.

18 THE COURT: I'm going to rule.

19 First I address so much of the motion to
20 dismiss the complaint as is predicated on the statute
21 of limitations. On a motion to dismiss a cause of
22 action on the ground that it is barred by the statute
23 of limitations, a defendant bears the initial burden of
24 proving prima facie that the time in which to sue has
25 expired. I cite here Benn versus Benn, 82 AD3d, 548.
26 In considering the motion, a court must take the

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2 allegations in the complaint as true and resolve all
3 inferences in favor of the plaintiff.

4 Again, I cite the Benn case.

5 Further, plaintiff's submissions in response
6 to the motion must be given their most favorable
7 intendment. Again, I cite the Benn case.

8 While defendant claims that this is an action
9 on her promissory note, plaintiff has produced
10 documentary evidence to support his claim that he acted
11 as surety for defendant on her loan from Bear Stearns
12 Securities Corp. and that he repaid her loan to the
13 lender successor on July 8, 2014.

14 A surety is equitably entitled to full
15 indemnity against the consequences of the default of
16 the principal obligor. I cite here DeForge versus
17 Karwoski, 87 AD3d, 1323. If the facts are as portrayed
18 by plaintiff, his cause of action accrued when he paid,
19 and the statute of limitations began to run at that
20 time.

21 I cite here Blanchard versus Blanchard, 201
22 NY 134, and State of New York Higher Education Services
23 Corp. versus Sferrazza 84 AD2d 874. Given the facts as
24 submitted by plaintiff, they're most favorable
25 intendment, the motion to dismiss on the ground that
26 the statute of limitations has expired is denied.

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2 On a motion to dismiss for failure to state a
3 cause of action, the Court will accept the facts as
4 alleged in the complaint as true, accord plaintiff the
5 benefit of every possible favorable inference and
6 determine only whether the facts as alleged fit within
7 any cognizable legal theory. I cite here Nonnon versus
8 City of New York, 9 NY3d 825. The criterion is whether
9 the proponent of the pleading has a cause of action,
10 not whether has stated one. I cite here Leon versus
11 Martinez, 84 NY2d 83. While Plaintiff has couched his
12 cause of action as one for reimbursement, he pled a
13 claim for indemnity. I cite here DeForge against
14 Karwoski, 87 AD3d 1323. So much of the instant motion
15 as sought dismissal based on the characterization of
16 the cause of action is also denied.

17 The Court notes that here defendant elected
18 to move to dismiss the complaint and issue has not been
19 joined. Summary judgement is premature prior to
20 joinder of issue. I cite here CPLR 3212 (a) and Miller
21 versus Schreyer, 257 AD2d 358. Had issue been joined,
22 plaintiff's motion would be denied in the absence of
23 affidavit proof supporting it. The complaint is
24 unverified and cannot support a summary judgement
25 motion. The cross motion is denied as premature.

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MR. REISS: Thank you, your Honor.

MR. SHAPIRO: Thank you, your Honor.

* * *

CERTIFIED THE FOREGOING IS
A TRUE AND ACCURATE TRANSCRIPTION
OF THE PROCEEDINGS, THIS DATE.



VINCENT J. PALOMBO, RMR