IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SACOR FINANCIAL INC., Successor in interest to Wells Fargo Bank, Plaintiff	:	NO. 11 – 01,169
	:	CIVIL ACTION - LAW
vs.	:	
JULIANNE E. MILLER, Defendant	:	Non-jury Trial

OPINION AND VERDICT

Before the court is Plaintiff's claim for principal and interest alleged to be due as a result of Plaintiff's predecessor in interest[1] having loaned to Defendant a certain sum on a line of credit in 2006 and Defendant having failed to repay such. A trial was held February 7, 2017, following which counsel for both parties requested and were granted the opportunity to file post-trial briefs. Plaintiff's brief was filed March 6, 2017; Defendant's brief was filed March 7, 2017.

The parties do not dispute that (1) Wells Fargo Bank issued to Defendant a line of credit on or about September 6, 2006, (2) Defendant drew on that line shortly thereafter, and (3) Defendant made several payments but there remains an outstanding balance. Rather, the dispute centers on two legal issues.

Defendant claims that since her last payment was on January 22, 2007 but suit was not filed until July 11, 2011, Pennsylvania's four-year statute of limitations bars Plaintiff's claim. Plaintiff claims, on the other hand, that the matter is governed by South Dakota's six-year statute of limitations, but even if the shorter statute of limitations applies in this matter, a payment made on August 22, 2008 served to toll the statute of limitations such that the suit was filed timely.

[1] The Complaint alleges that Sacor Financial, Inc. is the successor in interest to Wells Fargo Bank, N.A.

Defendant disputes making that August 2008 payment and disagrees with Plaintiff as to its legal effect. Finally, Defendant contests Plaintiff's standing to bring suit, arguing that Plaintiff failed to demonstrate ownership of her account.

The court must therefore decide these two issues: which statute of limitations applies and, if the shorter period would otherwise bar the suit, did the August 2008 payment act to toll the statute?[2]

South Dakota or Pennsylvania?

The parties' written agreement governing Defendant's line of credit contains the following provision: "Regardless of where You may live or use this Account, this Agreement shall be governed by and interpreted in accordance with federal law and the laws of the State of South Dakota."[3] Plaintiff thus claims that South Dakota's six-year statute of limitations[4] applies.

Similar language was at issue in Unisys Finance Corporation v. U.S. Vision, Inc., 630 A.2d 55 (Pa. Super. 1993): "the lease shall in all respects be governed by and construed in accordance with the laws of the State of Michigan." The court nevertheless applied Pennsylvania's statute of limitations based on "[t]he long-standing rule of Pennsylvania … that the law of the forum determines the time within which a cause of action shall be commenced." Id. at 58. The Court ruled that the choice of law provision of the lease did not apply to the question of the applicability of the chosen state's statute of limitations because the lease did not "expressly so provide." Id.

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[2] Whether Plaintiff has standing need not be discussed as the court finds the suit barred in any event.
[3] Plaintiff's Exhibit 1, page 3/5 (paragraph 27).
[4] S.D. Codified Laws Section 15-2-13.

In the instant case, the agreement does not expressly provide that South Dakota's statute of limitations is to be applied and thus the court must fall back on the general rule "that the law of the forum determines the time within which a cause of action shall be commenced". Id. Pennsylvania's four-year statute applies.

Was the statute tolled by the August 22, 2008 payment?

Initially, the court should discuss the payment itself. Such was evidenced by Plaintiff's Exhibit 4, the relevant portions of which are displayed here:

WELLS FARGO

Transaction Statement

Wells Fargo Account Number: 832-663-0567116-XXXX

JULIANNE E MILLER
PO BOX 1118
ZAPATA, TX 78076-1118

Statement Period: 06/25/2007 - 08/22/2008

STATEMENT SUMMARY

Original Balance	$20,890 31	AUX Number:	A010402200624051005OO
Current Balance	$20,890.31	Statement Date:	June 27, 2012
Note Date:	09/05/2006		
Product	ILA		

TRANSACTIONS

Proc Date	Eff Date	Tran Code	Action	Interest	Principal	Misc 1	Misc 2	Misc 3	Total Pmt	Prin Bal
06/28/2007	09/26/2007	48 L	Late Charge	$0 00	$0 00	$87.00	$0.00	$0 00	$0 00	$20,890 31
08/22/2008	08/22/2008	30 A	Payment	($105 01)	$0 00	$0.00	$0.00	$0 00	$105 01	$20,890.31

Case No: 6723036

Document Type	Account #	Paper Count	Total Copies
Free Form	XXXXXXXXXX0001	0	0
The source of payment in the amount of $105.01 on 8/22/08 was DDA #0534512868.			

Total Copies Delivered: 0

This document was explained by Plaintiff's collection manager as being a transaction statement (as opposed to a monthly statement) generated as a result of

a single payment event. The document shows a payment from a Demand Deposit Account in the amount of $105.01, applied to the line of credit debt at issue on August 22, 2008. By way of stipulation as to her testimony, Defendant testified that she herself did not make that payment, and in response to speculation that the payment may have been "taken" by Wells Fargo by "sweeping" Defendant's account with them, Defendant testified that she did not authorize such action, other than under the general terms of the agreement.[5] As it turns out, the nature of this payment is determinative of the issue.

The statute of limitations with respect to enforcement of a debt may be tolled or its bar removed by a subsequent promise to pay the debt. *See* Huntingdon Finance Corp. v. Newtown Artesian Water Company, 659 A.2d 1052 (Pa. Super. 1995). This rule is known as the "acknowledgement doctrine", and was explained by the Superior Court in Huntingdon Finance as follows:

> A clear, distinct and unequivocal acknowledgement of a debt as an existing obligation, such as is consistent with a promise to pay, is sufficient to toll the statute. There must, however, be no uncertainty either in the acknowledgement or in the identification of the debt; and the acknowledgement must be plainly referable to the very debt upon which the action is based; and also must be consistent with a promise to pay on demand and not accompanied by other expressions indicating a mere willingness to pay at a future time. A simple declaration of an intention to discharge an obligation is not the equivalent of a promise to pay, but is more in the nature of a desire to do so, from which there is no implication of a promise. *Gurenlian v. Gurenlian*, 407 Pa. Super. 102, 114 595 A.2d 145, 151 (1991), quoting *Maniataksi' Estate*, 258 Pa. 11, 101 A. 920 (1917).

[5] The agreement contains language which allows Wells Fargo to automatically apply funds in a debtor's deposit account with Wells Fargo to any outstanding obligation under the agreement if the debtor does not make payments on the loan as agreed. See Plaintiff's Exhibit 1, page 3/5 (paragraph 24).

Id. at 1054. There, the Court found that by paying the principal of the debt, the debtor "unquestionably acknowledged its obligation with respect to the principal of the debt. There can be no more clear and unequivocal acknowledgement of debt than actual payment, thus removing the statute of limitations with respect to the principal." Id. As for the interest, however, the Court found that "payment of principal cannot be construed as a promise to also pay the interest *when appellee never acknowledged such a duty*." Id. (emphasis added).

It thus appears that to find a clear, distinct and unequivocal acknowledgement of a specific debt, there must be evidence that the debtor *intended* to pay *that* debt. The following excerpt from Barr v. Luckenbill is especially instructive:

> On October 5, 1931, plaintiff, Raymond D. Barr, gave to defendant, R. S. Luckenbill, $6,500 and on February 14, 1933, $1,000, which he was to invest for plaintiff in securities to be approved by the latter. Pending such investment defendant was to have the use of the money for his own purposes and to pay 3% interest thereon.
>
> On January 25, 1933, defendant notified plaintiff that he had "made arrangements" to lend to one Zuber, on his note to plaintiff in that amount, $4,500 at 6% interest. Zuber was the brother of a former wife of defendant, and plaintiff was acquainted with him. Defendant stated: "this will leave me owing you 3,000," upon which "I will still pay you 3%." Plaintiff repeatedly thereafter inquired of defendant in regard to the Zuber loan, the first time in April, 1933, and the last in the middle of 1934; he made requests for the interest and that defendant either endorse the note or obtain security for it. Defendant "most generally always" replied that he was having it "fixed up" and that "he was working on it". After February 1, 1933, defendant paid interest only on $3,000 instead of on the $6,500 as theretofore. No interest was ever received on the $4,500 loan, nor has any part of the principal been repaid by Zuber.

On July 26, 1940, defendant assigned to plaintiff two mortgages aggregating $2,687.64, and, shortly thereafter, some building and loan association stock amounting to $773.34 but from which plaintiff realized, in liquidating dividends, only $208.02. Defendant, in a letter of November 14, 1940, reminded plaintiff that, after making the Zuber loan, he had retained $3,000, and that the mortgages and stock "amounts to $3460.98 for which you destroy my note of $3000 or send it back to me"; from that time on, defendant ceased paying interest on the $3,000. Plaintiff admitted in his testimony that the mortgages and the proceeds of the building and loan association stock were accepted by him in full payment of the $3,000 indebtedness.

In December, 1942, defendant, summoned to the office of plaintiff's counsel, delivered to him the Zuber note of $4,500 dated February 10, 1933. Whether plaintiff accepted and retained it, or refused to receive, it, is not clear from the testimony.

On April 2, 1943, plaintiff instituted the present suit, alleging that of the original $7,500 he had been repaid $3,460.98, leaving a balance of $4,039.02, with interest due at 3% from February 1, 1933, to July 26, 1940, on $4,500 and thereafter on $4,039.02.

…

The $3,000 which defendant retained for himself having admittedly been repaid, the only present question is in regard to the item of $4,500 (diminished, as plaintiff views the situation, by a credit of $460.98 paid in excess of the $3,000). Even if the loan to Zuber was unauthorized, defendant, by making it, repudiated any further obligation on his part for the $4,500, and plaintiff's right of action to recover that sum thereupon arose. As this occurred more than ten years before the present suit was begun, the claim would clearly seem to be barred by the statute of limitations.

Plaintiff relies on two circumstances, which, he contends, tolled the statute. The first of these was the assignment on July 26, 1940, of the mortgages and the proceeds of the building and loan association stock, which, he asserts, constituted a part payment on account of the indebtedness of $7,500 and started anew the running of the statute as of that date. But "the [constructive] acknowledgment [of a debt arising from part payment within six years before suit brought] must not only be clear, distinct, and unequivocal of the

> existence of a debt, but… it must also be plainly referable to the very debt upon which the action is based": Burr v. Burr, 26 Pa. 284, 285. "To take a debt out of the bar of the statute of limitations **the identification of it must be made by the debtor at the time of the promise, or payment or act relied on. An identification by mere inference of the jury from other collateral matters is not sufficient**": Rosencrance v. Johnson, 191 Pa. 520, 533, 43 A. 360, 361; Whie v. Pittsburgh Vein Coal Co., 266 Pa. 145, 150, 109 A. 873, 875. **Nor is it controlling that the payment was appropriated by the creditor to the debt for which recovery is sought; the debtor must have intended that it should be so applied**: Montgomery's Estate, 259 Pa. 12, 417, 103 A. 223, 224. "It must plainly appear, and not be a matter of conjecture merely, that the payment relied upon was made on account of the very debt which is in dispute": McPhilomy v. Lister, 341 Pa. 250, 253, 19 A.2d 143, 145. Defendant showed that he had no thought of turning over the securities to plaintiff in 1940 as part payment of any debt he conceived to be then owing by him to plaintiff. The understanding between the parties seems to have been that $3,000 of the $7,500 originally given to defendant was properly used by him for his own purposes, and that he was to continue to pay interest thereon as long as he retained this money; when he assigned the securities it was in full payment of that item and was accepted as such by plaintiff. The theory that the securities represented an overpayment on the $3,000 of $460.98 which was to be credited on account of an acknowledged remaining indebtedness of $4,500 is **wholly artificial and unwarranted**, for defendant at all times treated the Zuber loan as an investment made on plaintiff's behalf which released him from any further obligation as a debtor for that amount. The assignment of the securities, therefore, did not serve to delay the operation of the statute.

Barr v. Luckenbill, 41 A.2d 627, 629 (Pa. 1945)(emphasis added).

In the instant case, the payment on August 22, 2008 cannot be considered a "clear, distinct and unequivocal acknowledgement" of the debt. Defendant testified that she did not make the payment and the court finds that testimony

credible based on the exhibit itself. Defendant also testified that she did not authorize the payment and that testimony is credible as well. It is a reasonable inference that Defendant did not even know about the payment until after it was made, and perhaps not until the exhibit was produced. Thus, Defendant did not "identify" the debt to be paid at the time of the payment and did not "intend" that such payment apply to the debt. Under these circumstances, for the court to consider the payment to constitute an acknowledgement by Defendant of the debt such that it revoked the bar of the statute would be "wholly artificial and unwarranted". The statute of limitations bars the instant suit.

VERDICT

AND NOW, this day of March 2017, for the foregoing reasons, Judgment is hereby entered on the Plaintiff's claim in favor of Defendant.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Robert Lascher, Esq., Davis Law Group
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Norman Lubin, Esq.
Gary Weber, Esq. (Lycoming Reporter)
Hon. Dudley Anderson