

STATE OF MINNESOTA
COUNTY OF STEARNS

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CASE TYPE: CONSUMER CREDIT
CONTRACT

National Collegiate Student Loan Trust 2006-
2, a Delaware Statutory Trust,

File No. 73-CV-18-9213

Plaintiff,

and

Kelly Leen and Melissa Leen,

Responsive Memorandum of Law

Defendants.

INTRODUCTION

The Memorandum is submitted in response to Plaintiff's Motion for Summary Judgment. The pleadings, affidavits, and other matters of record show that there remains genuine issue as to material facts, and therefore Plaintiff is not entitled to judgment as a matter of law.

FACTS

Plaintiff attempted to initiate this action by personal service on Defendant Kelly Leen (Now Known as Zachary Leen) on October 31, 2017. The current spouse of Defendant Kelly Leen avers that service was not effectuated, because the individual supposedly attempting to serve Kelly Leen failed to offer her the envelope, which presumably contained the Summons and Complaint. (Aff. of Jezzette M. Leen ¶10.) Defendant Kelly Leen avers that he first learned of the initiation of this action when he received notice from this Court, dated November 8, 2018. (Aff. of Zachary John Leen ¶10.) By and through his attorney, Defendant Kelly Leen served (via EFS) and filed a Motion to Dismiss, under Minn. R. Civ. P. 12.02(d) and Minn. R. Civ. P. 12.02(e), on December 14, 2018. The Motion Hearing for the Defendant's motion was heard on February 2, 2019, at which time the Court ordered an evidentiary hearing be set to hear

testimony on the motions for May 31, 2019. The Court ordered the same in its Scheduling Order of February 11, 2019.

ISSUES

1. Whether Plaintiff is entitled to summary judgement against Defendant [Kelly Leen] for the contract balance on his [alleged] Education Loan Agreement.

DOCUMENTS WHICH COMPRISE THE RECORD

1. Summons and Complaint (Index #1);
2. Affidavit of Service (Index #2);
3. Plaintiff's Affidavit and Exhibits (Index #20);
4. Affidavit of Nikolas Schaal and Exhibits;
5. Affidavit of Jezette M. Leen (Index #12);
6. Affidavit of Zachary John Leen (Index #13);
7. Affidavit of Service by Mail (Index #22);
8. Affidavit of Service by Mail (Index #29);
9. Affidavit of Francis Herbert White III, Esq., and Exhibits.

LAW

In its memorandum of law accompanying its motion for summary judgment, Plaintiff has correctly cited the appropriate standard "the moving party bears the initial burden of those portions of the record that demonstrate the absence of a genuine issue of fact." *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955). However, Plaintiff failed to include or identify portions of the record which demonstrate the continuing existence of genuine issues of material fact. Namely whether service was effectuated within the statutory time period and when that time period began to run.

ARGUMENT

Plaintiff is not entitled to the balance remaining on Defendant's [Kelly Leen's] loan agreement, because Defendant Kelly Leen never made any payment on the loan he took with American Education Services in 2005. (*see* Aff. of Zachary John Leen ¶6). Consequently, the

statutory bar would have been exceeded six years after Defendant Kelly Leen went into default in 2009, six months after Defendant Kelly Leen graduated from St. Cloud State University. (*see* Aff. of Zachary John Leen ¶6). Accordingly, the six year statute of limitations would have run in 2015. Minn. Stat. 541.05, subd. 1(1).

This conclusion is supported by the Plaintiff's own records. In her Affidavit, Jacqueline Jefferis makes two conclusory statements which do not support the Plaintiff's position that there are no material facts in dispute. Ms. Jefferis averred that "[t]he Defendant's educational loan was in good standing and not in default on 6/8/2006." (Aff. and Verification of Account ¶11). What she does not offer testimony on is whether the account was in "good standing and not in default at any time after that date. Additionally, Ms. Jefferis averred that "[n]o payment has been made since 6/18/2012." (Aff. and Verification of Account ¶10). Ms. Jefferis does not state that any payments were made on or prior to this date; Ms. Jefferis is silent as to what, if any payments were actually made.

Included as Exhibit D to her Affidavit, Ms. Jefferis offers what she describes as "a true copy of the Loan Financial Activity demonstrating the loan balance from disbursement to charge off." (Aff. and Verification of Account ¶12). Exhibit D does include a number of numerical entries in the "TRAN AMOUNT" column that are followed by the letters "CR;" which might possibly mean "Credit" but Ms. Jefferis offers no explanation as to whether the letters do, in fact, indicate a credit to the account, or how the Court is to know that "CR" means a payment on the loan account. Ms. Jefferis offers no explanation as to how the Court is to read this document. As the Defendant Kelly Leen has averred, he has never made a payment to the Plaintiff (or its predecessor), there exists a question of material fact as to when the account was no longer in good standing and in default.

In its Memorandum of Law in support of the Plaintiff's Motion for Summary Judgment, Plaintiff described, only, the initial stages of the encounter between Ms. Jezette Leen and a purported process server. (Pl. Mem. of Law, at 6)¹. Plaintiff has misstated and expanded the statements made in Ms. Leen's affidavit. Plaintiff stated "[a]ditionally, she [Jezette Leen] admitted that this location was her residence" and cited, but did not pin cite, to Ms. Leen's affidavit. (Pl. Mem. of Law, at 6). This is inaccurate. Ms. Leen stated in her affidavit "[t]he individual [the purported process server] did not ask if that was [her] residence." (Aff. of Jezette M. Leen ¶8.). Nowhere in her affidavit did Jezette Leen admit "that she 'resided therein.'" . (Pl. Mem. of Law, at 6). What the Plaintiff omitted from its pleadings is the clear and unambiguous statement "[h]e [the purported process server] never attempted to hand me [Jezette Leen] the envelope, and when he departed he still had the envelope in his hand." (Aff. of Jezette M. Leen ¶10.). This omission can also be found lacking in Plaintiff's Memorandum of Law submitted in response to Defendant's Motion to Dismiss, dated 1/23/2019.

Plaintiff is correct in its assertion that Minnesota law is clear that the burden is on the Defendant to "overcome [the Plaintiff's] affidavit of service", and that the "[Defendant] ... must produce clear and convincing evidence. (Pl. Mem. of Law, at 6, *citing Imperial Premium Fin., Inc. v. GK Cab Co.*, 603 N.W.2d 853, 858 (Minn. App. 2000)). However, in asking the Court to grant its motion for summary judgment on the pleadings, the Plaintiff is putting the cart before the horse. The Court scheduled an Evidentiary Hearing for May 31, 2019 for this very purpose, and has, accordingly, not ruled on Defendant Kelly Leen's Motion to Dismiss.

Issues with service seem to be rife throughout this proceeding. Exhibit G to [Plaintiff's] Affidavit and Verification of Account, entitled "Loan Payment History Report," shows charges

¹ NB: Plaintiff omitted page numbers from its Memorandum of Law.

for “SVS OF PROCESS” and “FEES” (\$50.00 each) on February 5, 2015, September 8, 2015, and November 17, 2015; it should be noted that the same two charges in the same amounts are recorded on November 6, 2017. It appears that the Plaintiff may have attempted service three times in calendar year 2015, possibly prior to six years after the Defendant’s account went into default. The same document, apparently, shows that this case was filed twice, once on December 15, 2017, and again on November 02, 2018. (Aff. and Verification of Account Ex. G.).

Also indicative of Plaintiff’s pattern and practice to experience difficulties with the rules of service is the manner in which Plaintiff served its Memorandum in Response to Defendant’s Motion to Dismiss, and Plaintiff’s Motion for Summary Judgment. Under the clear and unambiguous language of Rule 14 of the General Rules of Practice, service on “Registered Users” must be accomplished using the E-Service. Since July 1, 2016,

[U]nless otherwise required or authorized by these rules, other rules of court, or an order of the court, Select Users in any case throughout the State of Minnesota shall file all documents electronically with the court through the E-Filing System and shall serve documents electronically through the E-Filing System as required under Rule 14.03(d) of these rules. Minn. R. Gen. Prac. 14.01(b)(1).

The term “Select Users” means the following appearing or submitting documents in a case:” included in the “following” is “Attorney.” Minn. R. Gen. Prac. 14.01(a)(10)(i).

The Rule further requires that Attorneys serve other Attorneys utilizing the E-Service system, with the exception of Discovery materials.

Unless personal service is otherwise required by statute, these rules, other rules of court, or an order of the court, a Registered User shall serve all documents required or permitted to be served upon another party or person in the following manner:

Service on Registered Users. Except as otherwise permitted in subpart (3) below, where the party or person to be served is a Registered User, who has either electronically filed a document in the case or designated an email address for receiving electronic service in the E-Filing system for the case and the Court has

accepted the initial filing in the case, *service shall be accomplished through the E-Filing System by utilizing the electronic service function of the E-Filing System.* Minn. R. Gen. Prac. 14.3(d)(1). *Emphasis added.*

Plaintiff served Defendant Kelly Leen's attorney its Memorandum in Response to Defendant's Motion to Dismiss, and supporting documents, as well as its Notice of Motion and Motion for Summary Judgment, and supporting documents, via US Mail, and not by utilizing the mandatory system. (Aff. of Francis Herbert White III, Esq.).

CONCLUSION

Plaintiff is not entitled to summary judgment because there remain genuine issues of fact before the Court. Plaintiff is not entitled to any recovery from Defendant as a matter of law because Plaintiff's claim is barred by the Statute of Limitations.

Dated: May 22, 19

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