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United States District Court,
S.D. New York.
Robert A. SPIRA, Plaintiff,
v.
J.P. MORGAN CHASE and Mait, Wang & Simmons, Defendants.
No. 09cv8412 (GBD).

Sept. 29, 2010.

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge.

***1** Defendants J.P. Morgan Chase ("Chase Bank") and the law firm of Mait, Wang & Simmons ("Mait") individually move to dismiss Plaintiff Robert A. Spira's Complaint pursuant to Fed. R Civ. P. 12(b)(6). Chase Bank froze Plaintiff's accounts in response to a restraining order obtained by Mait. [FN1] Chase Bank later turned over all funds from one of Plaintiff's accounts to the Sheriff of New York County.

> FN1. Following a state court default judgment entered against the Plaintiff on July 20, 2000, *see* Ex. F to Tarson Aff., Chase Bank was served with a Restraining Notice and Information Subpoena on July 28, 2000. Def. Chase Mem. of Law at 2; Ex. C to Tarson Aff.

Plaintiff alleges that Mait violated the Exempt Income Protection Act ("EIPA") and the Fair Debt Collection Practices Act ("FDCPA") when it failed to identify itself as a debt collector in communications with Plaintiff, and failed to provide notice before serving a restraining order on Plaintiff's Chase Bank account. Additionally, Plaintiff brings suit for four causes of action against Chase Bank for the restraint placed on Plaintiff's account, which he alleges contained only social security benefits. Plaintiff alleges that when Chase Bank restrained Plaintiff's account, Chase Bank: (1) violated 42 U.S.C. § 407 (the Social Security Act); (2) violated the EIPA; (3) breached its contract with the Plaintiff; and (4) violated § 349 of New York's Consumer Protection from Deceptive Acts and Practices Statute (" § 349"). Defendant Chase Bank's motion to dismiss all claims asserted against it is GRANTED; Defendant Mait's motion to dismiss all claims asserted against it is also GRANTED.

BACKGROUND

On October 19, 1983, Plaintiff became a limited partner of Harlan Coal Processors Limited ("HCPL"). Ex. A to Tarson Aff. at ¶ 5. Plaintiff executed and delivered a promissory note in the amount of $42,500.00, which he promised to pay to HCPL in five annual installments. *Id.* at ¶ 6. HCPL assigned the note to Royal Bank as partial collateral for a loan agreement, in accordance with the terms of Plaintiff's promissory note and Royal Bank's loan agreement. *Id.* at ¶ 9. Pursuant to Plaintiff's request, Union Indemnity Insurance Company of New York ("Union Indemnity") issued an investor bond guaranteeing payments on Plaintiff's note to Royal Bank, as obligee, in the event that Plaintiff should default on payments. *Id.* at ¶ 10. Plaintiff also agreed to indemnify Union Indemnity for all payments made on his behalf in the event of default. Ex. F to Tarson Aff. at 3. Plaintiff subsequently defaulted on the note payments and, pursuant to the bond, Royal Bank demanded the amount due from Union Indemnity. Ex. A to Tarson Aff. at ¶ 12.

On July, 16, 1985 Union Indemnity was declared to be insolvent and was placed into liquidation. *Id.* at ¶ 3. The Superintendent of Insurance was appointed as liquidator of Union Indemnity, and Royal Bank was enjoined from bringing any action against Uni-

on Indemnity to recover on its claim. *Id.* at ¶¶ 1, 13. Royal Bank then sought the payments defaulted on by the Plaintiff in the Liquidation Proceedings, and ultimately recovered a judgment against the Superintendent of Insurance. The Superintendent of Insurance then paid Royal Bank $42,500.00, the principal due on Plaintiff's note. *Id.* at ¶ 17.

***2** Under the requirements of Plaintiff's indemnity obligations, the Superintendent of Insurance sought reimbursement for its payment to Royal Bank in the Supreme Court of the State of New York, New York County. Ex. F to Tarson Aff. at 3-4. Default judgment was entered against Plaintiff on July 20, 2000. *See* Ex. C to Tarson Aff.; Compl. at ¶ 8. On July 28, 2000, Mait, as counsel for the Superintendent of Insurance, served a restraining order on Chase Bank to freeze all of Plaintiff's accounts. Compl. ¶ 12; Mait Def. Mem. of Law at 3; Chase Bank Def. Mem. of Law at 2. After Chase Bank restrained his accounts, Plaintiff moved to vacate the default judgment. *Id.* On September 19, 2000, the state court granted Plaintiff's application to vacate "on condition that [he] agree that all restraints placed on his assets continue until final determination of this matter." Ex. E to Tarson Aff.

On December 4, 2000,[FN2] after oral arguments were heard, Judge Ira Gammerman granted the Superintendent of Insurance's motion for summary judgment on indemnity obligations. Ex. F to Tarson Aff.; Chase Bank Def.'s Mem. of Law at 2. Judge Garnrnerman entered a judgment in the amount of $42,500.00 against the Plaintiff. *Id.* Judge Garnrnerman also referred the issue of interest and attorneys' fees to a Special Referee because he could not determine the appropriate award from the parties' motion papers. Ex. F to Tarson Aff. at 7. Plaintiff appealed this judgment on June 13, 2000. Ex. B to PL's Mem. of Law. Plaintiff's motion for leave to appeal to the Court of Appeals was thereafter dismissed. *Id.;* Pl. Mem. of Law at 1.

> FN2. Judge Garnrnerman ruled from the bench on December 4, 2000. Ex. F to Tarson Aff. Judge Garnrnerman "so ordered" the December 4th transcript on December 8, 2000. *Id.* On January 10, 2001, notice of entry of judgment was entered stating that the Superintendent of Insurance was to recover from Plaintiff "the sum of $42,500.00, and that [the Superintendent of Insurance had] execution therefore." Ex. A to Pl. Reply Mem. of Law.

On October 8, 2008, two executions with Notice to Garnishee were sent to the Sheriff regarding the $42,500.00, January 10, 2001 judgment and another judgment entered on February 14, 2008. Chase Bank Def. Mem. of Law at 2-3. On November 18, 2008, Chase Bank turned over the entire contents of Plaintiff s Chase Bank account to the Sheriff of New York County. Chase Bank Def. Mem. of Law at 3.[FN3] In December 2008, Judge Karla Moskowitz adopted the Special Referee's recommendation regarding the appropriate amount of interest and attorneys' fees. Ex. C to Pl. Reply Mem. of Law.

> FN3. Defendant Chase Bank contends that the funds were relinquished on November 18, 2008. Chase Bank Def. Mem. of Law at 3. In his complaint, Plaintiff contends that the funds of the account were turned over to the Sheriff on or about January 9, 2009. Compl. ¶ 16.

On September 8, 2009, Plaintiff filed the instant complaint in this Court alleging that Mait violated the FDCPA and the EIPA when it issued the restraining notice on Chase Bank. Compl. ¶ 39. Plaintiff further alleges that the money in the restrained account ultimately relinquished to the Sheriff was only Social Security payments, and that Chase Bank restrained all funds in the account without giving Plaintiff any advance notice in breach of their bank customer contract and in violation of 42 U.S.C. § 407, the EIPA, and § 349. Compl. ¶¶ 18, 21, 23, 32, 34.

EIPA CLAIM

Dismissal of Plaintiff's EIPA claim against Defendants Chance Bank and Mait is warranted because the EIPA was not in effect when the alleged violations occurred. The alleged violation arising from the restraining notice occurred on July 28, 2000. The EIPA went into effect after the alleged violations took place, on January 1, 2009, and was not retroactive. Accordingly, the EIPA claim is not a viable cause of action.

REMAINING CLAIMS AGAINST CHASE BANK

***3** Plaintiff alleges that Chase Bank's act of restraining his accounts on July 28, 2000, constituted a violation of 42 U.S.C. § 407, which prohibits the execution and attachment of social security payments. Plaintiff also alleges that "Chase's failure to provide Plaintiff with copies of his bank statements and its failure to properly notify Plaintiff of the restraints on the Account constitute deceptive business practices as defined by Section 349 New York's Consumer Protection Statute." Compl. at ¶ 34; *see* also N.Y. C.L.S. Gen. Bus. § 349. Finally, Plaintiff alleges that Chase Bank breached their bank customer contract.[FN4]

> FN4. Plaintiff alleges that Chase Bank's "failure to provide information concerning the account, as well as Chase's failure to properly deal with the restraining notices ... constituted a material breach of Chase's contract with Plaintiff." Compl. ¶ 32. This conclusory allegation fails to state a cause of action for breach of the terms of any contract. Plaintiff's only factual allegation is that Chase Bank failed to *mail* him copies of his bank statements, and that he was "compelled to visit Chase in person on many occasions to obtain printouts of the statements that Chase should have provided by mail." Compl. at ¶ 31. Even if this could state a breach, such a breach would not be material.

Plaintiff's claims are time-barred. The longest statute of limitations applicable to any of the claims is six years.[FN5] Defendant Chase Bank argues, and Plaintiff does not contest, that the statute of limitations began to run no later than December 4, 2000, the date the state court entered summary judgment and a final judgment allowing Chase Bank to continue the restraint.[FN6] Chase Bank Def. Mem. of Law at 2-3. By that date, Plaintiff's restraint-based claims were ripe. Plaintiff had until December 4, 2006, to assert his breach of contract claim; however, Plaintiff failed to commence the present action until September 8, 2009. Therefore, all of the claims are untimely.

> FN5. For § 407 causes of action, a three-year statute of limitations applies under New York law. *See* N.Y. C.P.L.R. § 214(2) (2010); *Curto v. Edmundson,* 392 F.3d 502, 503-04 (2d Cir.2004) (holding that where 28 U.S.C. § 1658 is inapplicable, courts look to state limitations periods). 28 U.S.C. § 1658, which provides for a four year statute of limitations for statutory causes of action without specified statutes of limitations, is inapplicable because § 407 has an effective date (January 1, 1940) before December 1, 1990. For § 349 causes of action, New York applies a three year statute of limitations. N.Y. C.P.L.R. § 214(2) (2010); N.Y. C.P.L.R. § 213(2) (2010). Finally, for common law causes of action such as breach of contract, New York applies a six year statute of limitations. N.Y. C .P.L.R. § 213(1) (2010).

> FN6. The limitation period begins to run when the Plaintiff's cause of action accrues. *See S.W. v. Warren,* 528 F.Supp.2d 282, 302 (S.D.N.Y.2007) (quoting *Gaidon v. Guardian Life Ins. Co. of Am.,* 96 N.Y.2d 201 (N.Y.2001) (noting that "in general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action

> have occurred, so that the plaintiff would be entitled to relief.")).

Plaintiff does not dispute that the statute of limitations for the aforementioned claims would have begun to run on or about December 4, 2000. Plaintiff argues instead that "[t]he original restraint ... was the subject of several appeals, each of which tolled the statute of limitations." PL's Mem. of Law at 2. However, Plaintiff's appeals of the state court judgment did not toll any of his claims asserted here. Plaintiff has failed to identify either an applicable tolling provision or a well-established ground for equitable tolling.[FN7] Moreover, Plaintiff's present claims are wholly independent of whether Plaintiff could have prevailed in his attempt to vacate the indemnity obligations judgment entered against him. Plaintiff's claims were ripe when he became aware of the restraint, and were not contingent upon or otherwise affected by the outcome of the appeal. All of his claims against Chase Bank are therefore precluded by the statute of limitations.

> FN7. *O'Hara v. Bayliner*, 89 N.Y.2d 636, 646 (N.Y.1997) explains that: "Federal courts have typically extended equitable relief only sparingly" (*Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The well-settled and limited circumstances for equitable tolling of the Statute of Limitations are summarized as follows: (1) the plaintiff timely filed the complaint in the wrong forum, *see Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965); *Herb v. Pitcaim*, 325 U.S. 77 (1945); *Maxwell v. Swain*, 833 F.2d 1177 (1987); *see also American Pine & Constr. Co. v. Utah*, 414 U.S. 538 (1974); (2) the defendant actively misled the plaintiff, *see Glus v. Brooklyn E. Term.*, 359 U.S. 231 (1959); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); or (3) the plaintiff in some extraordinary way had been prevented from complying with the limitations period, *see Osbourne v. United States*, 164 F.2d 767 (1947).

FDCPA CLAIM AGAINST DEFENDANT MAIT

Dismissal of Plaintiff's FDCPA claim against Defendant Mait is warranted. The FDCPA does not apply to Plaintiff's case since his business loan does not constitute a consumer debt as defined by the statute. Congress defined the purpose of the FDCPA as "[eliminating] abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 118 n. 9 (2d Cir.1998). The FDCPA defines a "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5) (2010).

***4** While the Second Circuit has not explicitly addressed the issue of whether a promissory note assigned for purposes of a business loan is outside FDCPA coverage, a district court of the Southern District of New York has held that promissory notes signed by an individual and insured by a surety are not a consumer "debt" within the meaning of FDCPA § 1692a(5). *See Nat'l Union Fire Ins. Co. of Pittsburgh. PA. v. Hartel*, 741 F.Supp. 1139, 1140-41 (S.D.N . Y.1990). In addition, other circuits have held that the FDCPA applies only to transactions that are primarily for household purposes, not to business loans. *See Slenk v. Transworld Sys.*, 236 F.3d 1072, 1074 (9th Cir.2001) (The FDCPA "precludes debt collectors from implementing unlawful debt collection tactics against consumers. Consequently, the FDCPA applies to consumer debts and not business loans."); *see also Lingo v. City of Albany Dep't of Cmty. Econ. Dev.*, 195 Fed. Appx. 891, 893 (11th Cir.2006) ("The statute [FDCPA] does not apply to the loan obtained by [the Defendant], which was a loan for a business, not for 'personal, family, or household

purposes' ") (quoting 15 U.S.C. § 1692a(5) (2010)).

Plaintiff was a limited partner of HCPL whose surety, Union Indemnity represented by the Superintendent of Insurance as liquidator, sought enforcement of an indemnity agreement upon Plaintiff's default. The promissory note given by Plaintiff to HCPL is not a debt that was intended to be covered under the FDCPA. *See Staub v. Harris*, 626 F.2d 275, 278 (3rd Cir.1980) (There is nothing in the language or the history of the FDCPA to lead us to believe that Congress intended to extend the scope of the Act to encompass debtors of any kind other than consumer debtors). Plaintiff's promissory note was assigned by HCPL to Royal Bank as partial collateral for a loan agreement. *See* Ex. A of Tarson Aff. at ¶¶ 8, 9.

Plaintiff argues that his purchase of an interest in HCPL "was not a consumer loan in the traditional sense of the word," but was made for "personal purposes rather than business purposes," and that he "derived no benefit from, and received no proceeds from" the HCPL transaction. That argument fails to transform the nature of the HCPL loan from a business loan to a consumer debt covered by the FDCPA. Pl. Mem. of Law at 1; *See Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir.1992) ("The fact that a loan is informal or that the lender may have loaned the money for personal reasons does not make it a personal loan under the FDCPA. The Act characterizes debts in terms of end uses, covering debts incurred 'primarily for personal, family or household purposes.' Neither the lender's motives nor the fashion in which the loan is memorialized are dispositive of this inquiry.") (quoting 15 U.S.C. § 1692a(5) (2010)). Plaintiff does not qualify for protection under FDCPA.

Conclusion

Defendant Chase Bank's motion to dismiss all claims asserted against it is GRANTED. Defendant Mait's motion to dismiss all claims asserted against it is also GRANTED. All of Plaintiff's claims against Chase Bank and Mait are hereby DISMISSED.

***5** SO ORDERED.

S.D.N.Y.,2010.
Spira v. J.P. Morgan Chase
Slip Copy, 2010 WL 3910290 (S.D.N.Y.)

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