

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

WELLS FARGO BANK, NA, :  
 : C.A. No: K15C-03-003 RBY  
 Plaintiff, :  
 :  
 v. :  
 :  
 EARL STRONG, :  
 :  
 Defendant. :

*Submitted: September 17, 2015*  
*Decided: October 6, 2015*

*Upon Consideration of Defendant's*  
*Motion to Dismiss*  
**GRANTED**

**ORDER**

Daniel T. Conway, Esquire, Atlantic Law Group, LLC, Georgetown, Delaware for  
Plaintiff.

Earl Strong, *pro se*.

Young, J.

## **SUMMARY**

\_\_\_\_\_ Wells Fargo Bank, NA (“Plaintiff”) filed an action to recover the outstanding balance and interest owed on a Promissory Note (“the Note”) by Earl Strong (“Defendant”). Defendant filed a Motion to Dismiss the case for failure to state a claim, or alternatively, as untimely. Because the statute of limitations for this claim expired after six years pursuant to 10 *Del. C.* § 8109, Plaintiff’s claim is time barred. Therefore, Defendant’s Motion to Dismiss is **GRANTED**.

## **FACTS AND PROCEDURE**

Defendant executed a Promissory Note in October 2004 for the purchase of a house at 11 Gooseneck Lane, Smyrna, Delaware (“the Property”). Defendant’s first default on payments occurred on December 2, 2004. In a prior *in rem* mortgage foreclosure action filed in June 2005 for possession of the Property (“the First Action”),<sup>1</sup> the Superior Court determined that neither the mortgage nor the Note was under seal.<sup>2</sup> Therefore, the Court found that the instrument was not enforceable at law. The Court dismissed the First Action in October 2011, to be filed in the Delaware Court of Chancery within 60 days.<sup>3</sup>

Following the Superior Court’s dismissal in the First Action, Plaintiff sought an equitable lien on the Property in the Court of Chancery by their

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<sup>1</sup> *MERS v. Strong*, C.A. No. 05L-06-008 (Del. Super. June 10, 2005).

<sup>2</sup> *MERS v. Strong*, 2011 WL 5316766 (Del. Super. Oct. 19, 2011).

<sup>3</sup> The mortgage and Note were assigned to Plaintiff in November 2010 by the prior holder MERS, who was the plaintiff in the First Action.

complaint filed in May 2013 (“the Second Action”).<sup>4</sup> The Court of Chancery ultimately dismissed the Second Action as untimely in November 2014.

Plaintiff filed a Complaint on a Promissory Note against Defendant in March 2015 (“the Third Action”),<sup>5</sup> seeking a judgment for the remaining principal on the Note with interest from October 1, 2005. Plaintiff filed a Motion for Default Judgment on July 15, 2015, claiming Defendant had been served the Complaint and failed to file a timely Answer. Plaintiff sought a Writ of *fieri facias* (“the Levy Motion”) on August 19, 2015 to enforce the judgment. The Court issued a Levy Motion against Defendant on August 24, 2015. On August 28, 2015, Defendant sent a letter of objection to the Court presenting a Motion to Dismiss pursuant to both Superior Court Civil Rule 12(b)(6) and the statute of limitations under 10 *Del. C.* § 8106 and § 8109. In his letter to the Court, Defendant stated that he first learned of the Third Action on August 25, 2015. Plaintiff’s reply to Defendant’s letter does not deny that the statute of limitations has expired, but instead asserts that Defendant has waived the defense because of procedural flaws in Defendant’s court filings.

### **STANDARD OF REVIEW**

\_\_\_\_\_The Court’s standard of review on a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6) is well-settled. The Court accepts all well-pled allegations as true.<sup>6</sup> Well-pled means that the complaint puts a party on notice of

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<sup>4</sup> *Wells Fargo Bank, NA v. Strong*, C.A. No. 8538-MA (Del. Ch. May 8, 2013).

<sup>5</sup> *Wells Fargo Bank, NA v. Strong*, C.A. No. K15C-03-003 (Del. Super. Mar. 3, 2015).

<sup>6</sup> *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at \*2 (Del. Super. Mar. 31, 2009).

the claim being brought.<sup>7</sup> If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.<sup>8</sup> The test for sufficiency is a broad one.<sup>9</sup> If any reasonable conception can be formulated to allow Plaintiff's recovery, the motion to dismiss must be denied.<sup>10</sup> Dismissal is warranted only when "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."<sup>11</sup>

### **DISCUSSION**

A cause of action arising from a promissory note must be commenced within six years from its accrual.<sup>12</sup> An action upon a promissory note accrues at the time of the first default. Where a cause of action is filed more than six years after its accrual, it follows that a complete defense to it exists, unless the Plaintiff can show some reason why it does not.<sup>13</sup>

The case now before the Court is the Third Action. Defendant initially denies that he received service of either the Plaintiff's Complaint or the

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<sup>7</sup> *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at \*2 (Del. Super. Apr. 24, 2001).

<sup>8</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Thompson v. Medimmune, Inc.*, 2009 WL 1482237, at \*4 (Del. Super. May 19, 2009).

<sup>12</sup> 10 *Del. C.* § 8109.

<sup>13</sup> *FDIC v. Brossman*, 1984 WL 553542 (Del. Super. June 12, 1984).

subsequent Levy Motion. Defendant claims that he was out-of-state during the proceedings.<sup>14</sup> Defendant highlights the mismatch between his alleged signature on the certified return receipt and his signature on other Court filings.<sup>15</sup> Because neither this Court nor the parties are qualified handwriting experts, the signature issue cannot be resolved. Thus, the Court cannot confirm that service of process occurred in this case. However, Defendant has submitted letters to the Court and presented a Motion which requires adjudication.

The parties disagree as to whether Defendant has waived the statute of limitations as an affirmative defense by failing to raise it in an Answer to Plaintiff's Complaint. The parties further dispute when the limitations period was triggered. Finally, the parties also dispute whether a valid claim has been stated.

Thus, the questions before the Court are as follows: 1) has Defendant waived the statute of limitations as an affirmative defense; 2) when did the applicable limitations period begin to run; and 3) has Plaintiff failed to state a claim upon which relief can be granted?

***1. Defendant Has Not Waived Statute of Limitations as Affirmative Defense***

Plaintiff asserts that Defendant has waived the statute of limitations as an

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<sup>14</sup> The Kent County Sheriff's returns twice indicated Defendant was not present at the Property when personal service was attempted. One Sheriff's return dated March 24, 2015 followed attempted service of Plaintiff's Complaint, while a second return dated August 27, 2015 followed attempted service of Plaintiff's Levy Motion.

<sup>15</sup> Compare *Wells Fargo Bank, NA v. Strong*, C.A. No. K15C-03-003 (Del. Super. 2015) Pl.'s Aff., Ex. C - Certified Return Receipt (June 24, 2015) with Def.'s Letter to the Ct. (August 28, 2015) and Def.'s Resp. to Pl.'s Resp. (September 15, 2015).

affirmative defense by failing to file a formal Answer raising the defense in accordance with the Rules of Civil Procedure for the Superior Court of the State of Delaware (“the Rules”). Although a limitation of action is not a favored defense, Plaintiff’s assertion fails for the following reasons: a) Defendant did not receive confirmed service of the Plaintiff’s Complaint; b) Defendant could not file an Answer to a Complaint which he did not receive; and c) Defendant has raised, not waived, the affirmative defense of statute of limitations in his first responsive pleading in accordance with the Rules.

***a. Defendant Did Not Receive Service of Complaint***

Under the Rules, service of process commences an action by giving notice to a defendant of the case asserted. Based on the dispute over signatures here, Defendant cannot be charged with notice of Plaintiff’s case until it is demonstrated that he first learned of the Third Action on August 25, 2015. This is the earliest date from which the Court can confirm that Defendant was aware of the Third Action pending against him.

Plaintiff’s best argument that Defendant had notice of the Third Action is that this case should be construed as a continuation of the First Action. However, in written reply to Defendant’s letter and orally at the hearing on Defendant’s Motion to Dismiss, Plaintiff argued that the First and Second Actions were *in rem* actions for possession based upon the mortgage. Plaintiff maintained that the Third Action was a distinct *in personam* action against Defendant for damages based upon the Note. Plaintiff has implicitly admitted that the *in rem* action has come and gone by way of the results in the first two actions.

***b. Defendant Could Not File an Answer to the Complaint***

Under the Rules, a plaintiff must properly serve a defendant in order to commence an action. Here, because it has not been demonstrated that Defendant did receive service of the Complaint, he cannot be held to have notice of the Third Action when the following events occurred: 1) when Plaintiff filed a Motion for Default Judgment; 2) when Plaintiff filed a Levy Motion; and 3) when the Court granted Plaintiff's Levy Motion. Simply put, assuming that absence of service, Defendant could not have filed an Answer to the Plaintiff's Complaint which he did not receive. Defendant was not bound to respond according to the Rules and any procedural deadlines therein until he received notice on August 25, 2015.

***c. Defendant Has Raised, Not Waived, Affirmative Defense***

The Rules expressly permit a defendant to raise the statute of limitations as an affirmative defense in either a motion to dismiss or in the first responsive pleading to the complaint.<sup>16</sup> Here, Defendant raised the limitations defense in compliance with the procedural rules by including it in his first responsive pleading, the letter of objection and Motion to Dismiss.

Moreover, even if Defendant had received service and could have filed an Answer to Plaintiff's Complaint, he also was permitted to raise the statute of limitations as an affirmative defense in his first responsive pleading. Because Defendant did raise the defense in his Motion, he has avoided waiver. The dispositive issue here is whether the statute of limitations on Plaintiff's action has expired.

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<sup>16</sup> See e.g., *Gadow v. Parker*, 865 A.2d 515, 519 (Del. 2005).

## ***2. Section 8109's Statute of Limitations Begins Running at Defendant's First Default***

Under § 8109, a six year statute of limitations applies to an action on a promissory note. A cause of action accrues at the time of first default. The statute of limitations is a question of law for the Court to decide. Here, Defendant first defaulted on payments under the Note on December 2, 2004.<sup>17</sup> Plaintiff seeks principal and interest from October 1, 2005.<sup>18</sup> Even applying the later date as the relevant default, Plaintiff's cause of action on the Note accrued over ten years ago. Thus, the limitations period expired on October 1, 2011 at latest. Plaintiff's Complaint in the Third Action was filed beyond the statute of limitations period. Therefore, Defendant's Motion to Dismiss is **GRANTED** pursuant to 10 *Del. C.* § 8109.

## ***3. Plaintiff's Claim Fails Due to the Expiration of 8109's Limitations Period***

Plaintiff's *in personam* action is subject to a six year statute of limitations. Defendant appropriately and timely raised the defense in his first responsive pleading. The statute of limitations provides a complete defense to the action. Defendant's Motion to Dismiss raised both a Rule 12(b)(6) challenge and the affirmative defense of statute of limitations under 10 *Del. C.* § 8106 and § 8109. Because Plaintiff's claim fails due to the expiration of the statute of limitations

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<sup>17</sup> See *Wells Fargo Bank, NA v. Strong*, C.A. No. K15C-03-003 (Del. Super. Sept. 8, 2015) (Pl.'s Reply to Def.'s Letter, Ex. A - Foreclosure Compl.).

<sup>18</sup> See *Wells Fargo Bank, NA v. Strong*, C.A. No. K15C-03-003 (Del. Super. Mar. 3, 2015) (Pl.'s Compl.).

