

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

<p>_____</p> <p>WELLS FARGO BANK, successor in interest to NORWEST BANK SOUTH DAKOTA, N.A.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>SOUREN A. ISRAELYAN a/k/a SOUREN ISRAELYAN,</p> <p style="text-align: center;">Defendant.</p> <p>_____</p>	<p>x</p> <p>x</p>	<p>Index Number <u>19602</u> 2003</p> <p>Motion Date <u>July 12,</u> 2005</p> <p>Motion Cal. Number <u>40</u></p>
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The following papers numbered 1 to 26 were read on this motion by the plaintiff, pursuant to CPLR 3212, to strike the affirmative defenses interposed in the defendant's answer and for summary judgment on the complaint; and, cross motion by the defendant, pursuant to CPLR 3211[a][5], 3212 and General Obligations Law § 5-327, to dismiss the complaint based upon discharge in bankruptcy and res judicata, for summary judgment dismissing the complaint on the same grounds, and for the costs, expenses and attorney's fees incurred in defending this action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-14
Reply Affidavits	15-19
Other Additional Submissions.....	20-26

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

The plaintiff Wells Fargo Bank (Wells Fargo) commenced this action to recover on a law school student loan which was embodied in a promissory note executed by the defendant Souren A. Israelyan a/k/a Souren Israelyan (Israelyan).¹ The complaint alleges that the total amount due is \$16,960.82, plus interest from July 2, 2003.

In response to the complaint, Israelyan interposed 21 affirmative defenses, only three of which are relevant to the motion and cross motion; namely, discharge in bankruptcy, res judicata and failure to state a cause of action as a result of CPLR 4544.

The note annexed to the complaint is dated March 1, 1999 and characterizes the loan as a "P.L.A.T.O. Education Loan" (PLATO loan). Upon executing the note, Israelyan acknowledged that the proceeds of the loan would be used for educational purposes only. The back of the note contained terms and conditions including Section 11, entitled "Miscellaneous." In that section, Israelyan acknowledged that the loan was an education loan made under a program funded in whole or in part by a nonprofit organization and, as such, was not dischargeable in bankruptcy. Within the same section is a choice-of-law provision indicating that the note is to be construed in accordance with federal law and the law of South Dakota, without regard to conflict of law provisions.

On or about March 8, 2002, Israelyan filed a Chapter 7 petition in United States Bankruptcy Court for the Eastern District of New York (Case No. 02-12991). The petition listed, inter alia, the PLATO loan in the amount of \$16,000.00 as an unsecured nonpriority claim. Service of that petition was made at the PLATO loan servicing center in South Dakota on or about May 13, 2002.

By order dated August 23, 2002, the bankruptcy court (Milton, J.) granted Israelyan a discharge under 11 USC § 727; however, annexed to that order was a notice advising Israelyan that

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Certifications by the Comptroller of the Currency and Administrator of National Banks, dated November 1, 2000 and February 20, 2004, indicate that the title of "Norwest Bank South Dakota, National Association" was changed to "Wells Fargo Bank South Dakota, National Association," and the latter institution and numerous other banks were consolidated into the plaintiff Wells Fargo.

certain debts were not discharged in a chapter 7 bankruptcy case, including "Debts for most student loans."

II. Motion, Cross Motion and Interim Memorandum

Wells Fargo moved for summary judgment on the note asserting, inter alia, that: (1) the PLATO loan was made pursuant to a program funded in whole or in part by a nonprofit organization, so the debt was not discharged in bankruptcy as Israelyan never proved undue hardship; and, (2) CPLR 4544 concerning the point size of the typeface on consumer loans is inapplicable to student loans.

Israelyan cross-moved to dismiss the complaint or for summary judgment dismissing the complaint asserting that: (1) Wells Fargo is a for-profit institution and the PLATO loan was a private credit-based loan like any other credit-card loan; (2) as a result, the loan was dischargeable in bankruptcy as it did not qualify as a loan issued by a nonprofit institution; (3) the discharge in bankruptcy is res judicata with respect to his liability on the debt; (4) the point size of the typeface on the promissory note violates CPLR 4544; and, (5) pursuant to GOL § 5-327, he is entitled to all costs, expenses and attorney's fees.²

Wells Fargo responds that: (1) the requirements of CPLR 4544 are inapplicable as the document is to be construed in accordance with the laws of South Dakota; (2) in any event, Israelyan ratified the note and loan by paying for two years and listing it on his bankruptcy petition; (3) the PLATO loan program is part of EduCap, Inc., a nonprofit corporation, so there was no discharge in bankruptcy; (4) the web site printouts submitted by Israelyan are inapplicable to the PLATO loan issued by EduCap, Inc.; and, (5) as a result, the PLATO loan was not discharged and res judicata does not apply.³

Israelyan replies, inter alia, that EduCap, Inc. is not a party to this action and Wells Fargo failed to prove by admissible evidence that EduCap, Inc. issued the PLATO loan.

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In support Israelyan annexed, inter alia: (1) the affidavit of a professional typesetter stating that the point-size of the typewritten terms of the note do not meet the requirements of CPLR 4544; and, (2) various web site printouts indicating that the PLATO loan program and Wells Fargo are for-profit institutions.

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In support, Wells Fargo annexed a web-site for EduCap, Inc., stating that EduCap, Inc. is a nonprofit corporation which includes the PLATO private student loan program.

Upon the submission of the motion and cross motion, by memorandum decision dated May 3, 2005 this court (Polizzi, J.), adjourned the motion and cross motion pending the submission by Wells Fargo of sufficient evidentiary proof that the loan was issued in whole or in part by Educap, Inc. and that Educap, Inc. is a nonprofit organization.

In response to the memorandum decision, Wells Fargo submitted an affirmation by its attorney annexing certified documents, business records and other documents indicating, inter alia, that: (1) the predecessor to Educap, Inc. was University Support Services, Inc. (USS), a nonprofit entity exempt from tax under IRS section 501[a]; and (2) USS changed its name to Educap, Inc., which is a nonprofit organization.

Israelyan replies, inter alia, that the documents are not in an admissible form, and Wells Fargo failed to prove that Educap, Inc. is a nonprofit organization.

III. Decision

Pursuant to 11 USC § 523[a][8], the discharge of a debtor pursuant to particular sections of the bankruptcy code does not discharge the debtor from any debt made, inter alia, pursuant to any program funded in whole or in part by a nonprofit institution, unless excepting such debt from discharge will impose an undue hardship on the debtor and the debtor's dependents (see e.g. In re O'Brien, 318 BR 258 [SDNY 2004], affd __ F2d __, 2005 US App LEXIS 17126 [2d Cir, August 15, 2005]). Included under 11 USC § 523[a][8] are all loans made under a program in which a nonprofit institution plays any meaningful part in providing loans, and the focus is on the loan program, not on an individual loan (see In re O'Brien, supra).

Where the loan falls within 11 USC § 523[a][8], the creditor is not obligated to file a complaint to determine the nondischargeability of a student loan and, instead, the debtor must file an adversary proceeding to show undue hardship (see Educational Credit Mgmt. Corp. v Whelton, 312 BR 508 [D. Vt 2004]; New Jersey Higher Educ. Assistance Auth. v Pennell, 377 NJ Super 13 [NJ Super Ct, App Div 4/8/05]; see also State Higher Educ. Servs. Corp. v Quell, 104 AD2d 11 [1984], appeal dismissed 64 NY2d 1129 [1985][concerning predecessor statute to 11 USC § 523]; Southwest Student Servs. Corp. v Ma, 5 Misc 3d 884 [2004]).

Where the undue hardship proceeding and determination is not brought and made and the loan falls within 11 USC § 523[a][8], the student loan debt is not discharged (see Educational Credit Mgmt. Corp., supra; New Jersey Higher Educ. Assistance Auth., supra; see also State Higher Educ. Servs. Corp., supra; Southwest Student

Servs. Corp., supra). In contrast, where the student loan is issued by a strictly for-profit entity, it will be discharged (see e.g. Jones v H&W Recruiting Enters., 242 BR 441 [WD Tenn 1999]).

In response to Wells Fargo's prima facie demonstration of its entitlement to summary judgment based upon the language on the note and other documents, Israelyan failed to raise any issue of fact with respect to his defenses of discharge in bankruptcy and res judicata. Israelyan's assertions concerning the admissibility of the business records of Wells Fargo and other certified documents lacks merit (see e.g. CPLR 4518; 4540; see also Gryphon Domestic VI, LLC v APP Int'l Fin. Co., B.V., 18 AD3d 286 [2005]; Pelkey v Viger, 289 AD2d 899 [2001], appeal dismissed, 98 NY2d 707 [2002]).

Israelyan's remaining defenses concerning the point size of the typewritten terms of the note and his entitlement to attorney's fees, costs and expenses lack merit, as he failed to demonstrate that the loan at issue is a consumer credit transaction or consumer contract (see Gulf Ins. Co. v Kanen, 13 AD3d 579 [2004]; Cruz v NYNEX Info. Resources, 263 AD2d 285 [2000]; Saxon Assocs. v Barton, 143 Misc 2d 602 [1989]), or that it is subject to the laws of New York.

Accordingly, the motion by Wells Fargo is granted in its entirety, and the cross motion by Israelyan is denied in its entirety.

Dated: September 6, 2005

J.S.C.