ORDERED.

Dated: September 20, 2017

Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

TERRY CURTIS MCEWEN,

Debtor.
_____/

Case No. 6:15-bk-02283-CCJ
Chapter 7

MICHAEL A. PROZER,

Plaintiff,
v.

TERRY CURTIS MCEWEN,

Defendant.
_____/

Adversary No. 6:15-ap-00097-CCJ

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding came before the Court on the Defendant's Motion for Summary Judgment (Doc. No. 20; the "Summary Judgment Motion") as well as the various responses and replies filed by the parties (Doc. Nos. 29, 30, 43 and 45). Having considered the pleadings, the

argument of the parties, and the record in this case, the Court grants the Summary Judgment Motion for the reasons stated in open Court, as supplemented below.

Facts

On November 7, 2008, the Plaintiff loaned the Debtor $300,000 to fund the development of a website for the Debtor's business. The Debtor contemporaneously executed a promissory note in favor of the Plaintiff, promising to repay the $300,000, plus interest, within six months of signing the note (the "Note"). After six months, the Debtor failed to repay any portion of the Note.

Approximately two years after the Debtor defaulted on the Note (in December 2011), the Plaintiff sued the Debtor in State Court, alleging among other things a claim for breach of the Note (the "State Court Action"). Subsequently, the Plaintiff voluntarily dismissed the State Court Action. Three months after voluntarily dismissing the State Court Action, Plaintiff attempted to file an amended complaint in the State Court Action. The Circuit Court properly determined that the Plaintiff should have filed a new case instead and dismissed the complaint with prejudice. The Plaintiff appealed the dismissal with prejudice to the Second District Court of Appeal but failed to pay the appellate filing fee. The appellate court issued an order giving the Plaintiff forty days to either pay the filing fee or, if applicable, file a certificate or order from the circuit court finding him insolvent. When the Plaintiff failed to comply with the March order, the appellate court dismissed the Plaintiff's appeal.

The Debtor filed his Chapter 7 petition on March 17, 2015. The deadline to object to dischargeability was June 29, 2015. The Plaintiff timely moved to extend the deadline,[1] and the Court extended the deadline to object to August 25, 2015. The Plaintiff filed a Motion in Opposition to Discharge of Debt on August 17, 2015 (the "Motion in Opposition to Discharge"). By the Motion in Opposition to Discharge, the Plaintiff objects to the dischargeability of the Note

debt claiming it was obtained by fraud and is therefore non-dischargeable under Section 523(a)(2)(A) of the Bankruptcy Code. The Debtor/Defendant moves for summary judgment, arguing that (i) the Plaintiff's underlying claim is barred by Florida's statute of limitations, and (ii) the Plaintiff failed to timely file an adversary complaint. As set forth below, the Court determines that although the dischargeability action was timely filed, the underlying debt itself is time-barred and the Debtor is thus entitled to summary judgment as a matter of law.

Discussion

A court must grant summary judgment where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.", [2] The "movant bears the initial burden of showing the court, by reference to the record, that no genuine issues of material fact exist to be determined at trial."[3] Once the movant meets his burden of proof, it is up to the non-moving party to show by affidavit or otherwise that a genuine dispute of material fact exists.[4] The non-moving party does not meet this burden by pointing to disputes not relevant to the issue at hand.[5] Nor does any "earnest hope" to discover such evidence or promise to come up with such evidence suffice.[6] Rather, the non-moving party must identify specific record evidence that defeats summary judgment.[7] Summary judgment is a proper procedure for resolving a statute of limitations defense and should be granted where the undisputed facts show that under the law the statute of limitations bars the action.[8]

As a preliminary matter, the Court finds that the Plaintiff timely filed an adversary complaint. The Plaintiff properly moved within the sixty days after the first 341 meeting of creditors to extend the deadline to object to dischargeability. The Court granted the Plaintiff's request and extended the deadline. The Plaintiff filed the Motion in Opposition to Discharge approximately one week before the extended deadline expired. While it is true that the Plaintiff

failed to file this action as an adversary proceeding, the Court finds that the motion is sufficient. "This Court provides pro se parties wide latitude when construing their pleadings and papers."[9] Based on this wide latitude, the Court construes the Motion in Opposition to Discharge as an adversary complaint and there is no dispute that the Motion itself was timely.

As to the debt itself however, the Court agrees with the Debtor. Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge any "debt" obtained by fraud. A bankruptcy non-dischargeability analysis involves a two-step process; first, the Court must determine the validity of the underlying "debt", and only if that debt is enforceable, may the Court determine whether the debt is dischargeable (or here, whether that "debt" was "obtained by fraud").[10]

The "debt" at issue here is one for $300,000 (plus interest) allegedly owed by the Debtor to the Plaintiff under the Note. To determine whether that debt is enforceable, the Court must look to state law. Here, Florida law controls. Section 95.11 of the Florida Statutes provides that a debt arising from a contract, including a promissory note, must be brought within five years. [11]

Section 95.031 provides, in relevant part, that "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues."[12] A cause of action on a promissory note accrues on the date the note became due.[13]

The Debtor made the Note on November 7, 2008, and was to repay it by May 7, 2009 (six months later). Thus, the Plaintiff's cause of action on the Note accrued on May 7, 2009. Under Florida's five-year statute of limitations, the latest the Plaintiff could have filed a cause of action to establish the debt is May 7, 2014. Although the Plaintiff timely filed the State Court Action on the Note in 2011, he voluntarily dismissed the action. The State Court ultimately dismissed the State Court Action with prejudice.[14] The statute of limitations is not tolled during the period in which the dismissed action was pending, rather the time runs as if the action had never been filed.[15]

Plaintiff did not bring another action on the Note until he filed this adversary proceeding on July 15, 2015, over a year past the time permitted under Florida Statutes.

Because the undisputed facts demonstrate that the Plaintiff failed to file another action on the Note until he filed this adversary proceeding in July of 2015, the Debtor met his burden of proving the debt is time-barred. It was then up to the Plaintiff to bring forth evidence demonstrating a genuine dispute as to the relevant facts. The Plaintiff failed to do so. The Plaintiff filed a sworn statement in response to the Summary Judgment Motion as well as several pleadings.[16] Nothing in these pleadings disputes the fact that the Note became due on May 7, 2009.

Instead, the Plaintiff argues and represents in his sworn statement that the Debtor defrauded him and as such somehow the statute of limitations was equitably tolled.[17] The doctrine of equitable tolling does not however apply to contract actions.[18] The equitable tolling doctrine applies potentially only to a claim for fraud. In that regard, both parties spent much wasted time arguing whether or not Plaintiff's claim for *fraud* was timely. The debt at issue however, was one for monies owed under the Note and *not* a separate debt for fraud.[19] The issue of fraud arises only in determining whether the debt is non-dischargeable (as having been *obtained by fraud*). And since the undisputed facts demonstrate that the debt itself is time-barred, under the two step analysis required by law, the Court never gets to the issue of the Debtor's alleged fraud. For these reasons, the Note debt is time-barred and the Debtor is entitled to judgment as a matter of law.

Conclusion

It is ORDERED that the Motion is granted and summary judgment is awarded in favor of the Debtor and that any debt owed to Plaintiff is discharged.

Clerk's office is directed to serve.

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[1] Main Case Doc. No. 12.
[2] Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056.
[3] *James v. Montgomery Reg'l Airport Auth.*, 181 F. App'x 930, 931 (11th Cir. 2006) (citation omitted).
[4] See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).
[5] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).
[6] See *Balser v. Int'l Union of Elec., Elec., Salaried Mach. & Furniture Workers (IUE) Local 201*, 661 F.3d 109, 118 (1st Cir. 2011).
[7] See *Cutting Underwater Techs. USA, Inc. v. Erie U.S. Operating Co.*, 671 F.3d 512, 517 (5th Cir. 2012).
[8] *See AVCO Corp. v. Precision Air Parts, Inc.*, 676 F.2d 494 (11th Cir. 1982); *Rohner v. Union Pac. R. Co.*, 225 F.2d 272 (10th Cir. 1955).
[9] *S.E.C. v. Elliott*, 953 F.2d 1560, 1582 (11th Cir. 1992) (citations omitted).
[10] *In re Vanwinkle*, 562 BR 671, 677 (Bankr. E.D. Ky. 2016).
[11] Fla. Stat. § 95.11 (2)(b) (2017).
[12] Fla. Stat. § 95.031 (2017).
[13] *See State Farm Mut. Auto Ins. Co. v. Lee*, 678 So.2d 818, 820 (Fla. 1996).
[14] The Plaintiff argues that the State Court erred in dismissing the action in the first place. Under the Rooker-Feldman doctrine, this Court is without jurisdiction to go behind the state court ruling. See e.g. *Cavero v. One West FSB*, 617 Fed. Appx. 928, 930 (11th Cir. 2015).
[15] *McBride v. Pratt & Whitney*, 909 So.2d 386, 388-89 (Fla. 1st DCA 2015).
[16] Doc. No. 29.
[17] The Plaintiff further contends that he wants to take discovery to find further evidence that would allow his action to proceed. As set forth above, any "hope" or request for discovery is insufficient to defend against a summary judgment motion. The Plaintiff also spends much time arguing that the State Court erred in dismissing the action in the first place. Under the Rooker-Feldman doctrine, this Court is without jurisdiction to go behind the State Court orders. *See e.g. Cavero v. One West FSB*, 617 Fed. Appx. 928, 930 (11th Cir. 2015).
[18] *See Abecassis v. Eugene M. Cummings, P.C.*, 467 Fed. Appx. 809, 812 (11th Cir. 2012); *Roberta L. Marcus v. New Cingular Wireless PCS, LLC*, 2013 WL 12093810, *2 (S.D. Fla. 2013). ("Tolling doctrines, including equitable tolling, do not apply to a claim for breach of a written contract").
[19] Even if there were a separate debt for fraud (which there is not), any such claim is time-barred as well. Under Section 95.11, Florida Statutes, Plaintiff had four years from the date he reasonably knew of the fraud. By Plaintiff's own admission in his sworn statement, he knew of an alleged fraud by at least February of 2011. As such the deadline to assert an action for any such fraud claim was February of 2015.