UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC. CASE NO. 96-61376
Chapter 11
Debtors Substantively Consolidated

RICHARD C. BREEDEN, Trustee of
THE BENNETT FUNDING GROUP, INC., et al

Plaintiff

vs. ADV. PRO. NO. 02-80088

ERIE ISLANDS RESORT & MARINA,
AN OHIO PARTNERSHIP, ERIE ISLANDS
RESORT & MARINA, INC., JOHN GRONVALL
AND BEVERLY GRONVALL

Defendants

APPEARANCES:

HISCOCK BARCLAY SAPERSTON & DAY THOMAS F. KNAB, ESQ.
Attorneys for Plaintiff Of Counsel
1100 M&T Center
Three Fountain Plaza
Buffalo, New York 14203-1486

BYRNE, COSTELLO & PICKARD, P.C. TERRY R. PICKARD, ESQ.
Attorneys for Defendants Of Counsel
100 Madison Street - Suite 800
MONY Tower I
Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Presently before the Court is a motion to dismiss or, in the alternative, for summary judgment ("Motion") filed by Erie Islands Resort & Marina ("Defendant" or "Erie Islands") on May 31, 2002, in connection with a complaint filed against it by Richard C. Breeden ("Plaintiff" or "Trustee") as chapter 11 trustee of The Bennett Funding Group, Inc. ("BFG") and the consolidated estates (collectively, the "Debtors")[1] on April 11, 2002. The Trustee seeks to recover $7,870,898.95, which he asserts to be the outstanding principal balance of a note signed by the Defendant and delivered to two of the Debtors' subsidiary corporations,[2] plus interest accrued from April 17, 1996, the date of the Defendant's alleged default by virtue of its failure to make the payment demanded of it.[3]

In its motion, the Defendant contends alternatively that the complaint should be dismissed pursuant to Rule 7012 (b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") or that

---

[1] The Debtors are comprised of eight related entities, including The Bennett Funding Group, Inc., Bennett Receivables Corporation, Bennett Receivables Corporation II, Bennett Management and Development Corporation, The Processing Center, Inc., Resort Service Company, Inc., American Marine International, Ltd., and Aloha Capital Corporation. BFG filed its bankruptcy petition on March 29, 1996.

[2] The two companies are Resort Funding, Inc. ("RFI"), the predecessor corporation to Resort Service Company, Inc. ("RSC"), and a subsidiary of debtor BFG; and Aloha Capital Corporation ("Aloha").

[3] RFI subsequently entered into a transaction with Hemlock Investors Associates ("Hemlock"), pursuant to which RFI transferred this note to Hemlock. On November 22, 2000, however, Hemlock entered into a Stipulation with the Trustee under which it relinquished to the Trustee its rights under the note. On November 28, 2000, the Court issued an order approving this stipulation, thereby vesting title to the note in the Trustee.

summary judgment should be granted in the defendant's favor pursuant to Fed.R.Bankr.P. 7056, both contentions grounded on the same statutory basis, namely, that the statute of limitations applicable to the Plaintiff's complaint had expired prior to the filing thereof. The Defendant filed memoranda of law in support of its motion on May 31, 2002, and August 26, 2002. The Trustee filed his opposition to Defendant's Motion on June 20, 2002, to which the Defendant filed its reply on June 28, 2002.

The motion was heard on June 27, 2002, at the Court's motion term in Utica, New York. Following oral argument, the Court provided the parties an opportunity to file supplemental memoranda of law, and conducted further argument on August 27, 2002. The matter was then submitted for decision on August 27, 2002.

JURISDICTIONAL STATEMENT

The Court has non-core related to jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(3) and 157(c)(1). *See* Discussion *infra.*

FACTS[4]

---

[4] The facts recited herein are those alleged in the Plaintiff's complaint. Although many of these allegations were denied, in whole or in part, by the Defendant's answer, since this matter is before the court on the Defendant's motion to dismiss or, in the alternative, for summary judgment, the Court accepts as true all facts pleaded by the non-moving party, here, the Plaintiff. See, e.g., *Meltzer v. Atlantic Research Corp.*, 330 F.2d 946, 947 (4th Cir.), cert. denied, 379 U.S. 841, 85 S. Ct. 80, 13 L. Ed. 2d 47 (1964).

On September 30, 1988, Erie Islands and RFI entered into a Loan and Security Agreement, whereby RFI agreed to extend to Erie Islands a line of credit in the amount of $20,000,000, to be available to Erie Islands to draw upon for a period of five years, or until September 30, 1993, with a minimum draw of $100,000. To secure the line of credit, Erie Islands provided to RFI an Open-end Mortgage, Assignment of Rents and Proceeds and Security Agreement. These documents, all of which were dated September 30, 1988, were duly recorded in the Office of the Ottawa County, Ohio, Recorder on November 14, 1988. At the same time, on or about September 30, 1988, John Gronvall and Beverly Gronvall ("the Gronvall Defendants") entered into a General Guarantee, whereby they personally guaranteed repayment of Erie Islands' obligations to RFI under the Loan and Security Agreement. Following the execution of these agreements, Erie Islands drew upon the line of credit provided in the loan and security agreement on a number of occasions.

On September 8, 1989, Erie Islands and Aloha entered into a Master Lease Agreement, whereby Aloha agreed to lease certain items of machinery, equipment and other personal property to Erie Islands. Subsequent to this date, Erie Islands and Aloha entered into several rental agreements covering individual items leased under the Master Lease Agreement.

On October 10, 1990, Erie Islands and RFI entered into an amendment agreement modifying the 1988 agreement, replacing the previously granted line of credit with a new line of credit of up to $20,000,000 plus the principal balance of the previous line of credit.

On or about December 20, 1991, Erie Islands, RFI and Aloha entered into an agreement consolidating all of the amounts Erie Islands owed to both RFI and Aloha into a single Consolidation Note (the "Consolidation Agreement"), thereby cancelling the line of credit originally created by the

1990 amendment to the 1988 Loan and Security Agreement. This agreement was carried into effect when, on January 27, 1992, Erie Islands executed the Consolidation Note envisioned by that agreement. That Note, which included among its terms the statement that it represented the total amount owed by Erie Islands to both RFI and Aloha, carried a face amount of $9,641,864.94, with interest to accrue on the unpaid balance. The Consolidation Note included a payment and amortization schedule setting forth Erie Islands' payment obligations under the note.

At some subsequent time, RFI conveyed title to the Consolidation Note to Hemlock. (*See* footnote 3, *supra*.) Following the filing of a Chapter 11 bankruptcy petition by BFG, the Plaintiff sought the avoidance of this conveyance, and pursuant to a stipulation Hemlock relinquished the note to the Plaintiff.

One of the provisions contained in the Loan and Security Agreement defined an "event of default" as the failure of the lender to receive when due and payable or within five days of receiving notice of such failure any amount that the borrower is obligated to pay according to the terms of the note.[5] The agreement further provides that in the event of Erie Islands' failure to make any payment within five days of receiving notice of default, RFI had the right to accelerate all sums due under the agreement.

On April 12, 1996, Hemlock, pursuant to the terms of the agreement, provided written notice

---

[5]Although, as indicated above, the 1988 Loan and Security Agreement was twice superseded by subsequent agreements, the Consolidation Note of December 20, 1991, executed on January 27, 1992, states, in relevant part: "Should a Primary Event of Default occur and be continuing (as set forth in the Loan & Security Agreement dated September 30, 1988) . . . ." The definition of "Primary Event of Default" contained in the 1988 agreement was thus imported into the 1991 Consolidation Note.

of default to Erie Islands based upon the latter's failure to make a monthly installment payment due under the note on March 20, 1996, and invoked the acceleration clause. Erie Islands failed to make the payment demanded within five days after receiving notice of default. As of April 17, 1996, the principal balance due on the note was $7,870,898.95.

ARGUMENTS

Erie Islands argues in support of its motion for summary judgment in its favor on the plaintiff's complaint that, following its failure to make the payment due on March 20, 1996, pursuant to the terms of the Consolidation Note, the subsequent notice of default and invocation of the acceleration clause all relate back to the due date of the missed payment, thereby making March 20, 1996, the relevant date for computation of the statute of limitations. Based on this date, Erie Islands argues that the plaintiff's commencement of this action on April 11, 2002, was therefore untimely. In support of its contention that the relevant date is the date of the missed payment and not the date on which Hemlock issued the notice of default exercising its acceleration option, Erie Islands relies on § 2027, WILLISTON ON CONTRACTS, which provides that "the Statute [of Limitations] will run from the date of default upon which the election [to accelerate] is based, not from the date of the election itself."

In opposition to the motion for summary judgment, the Trustee argues that, as a matter of New York law, the six-year statute of limitations began to run when Hemlock, its predecessor in interest, gave notice of acceleration. In support of this contention, the Trustee relies on cases decided by the New York State Supreme Court, Appellate Division, that conclude that a note holder's cause of action

pursuant to the acceleration clause of a note accrues only after the holder exercises its option to accelerate the note following a default, and does not relate back to the date of the initial default. The trustee thus argues that it would be improper to apply the § 2027 of WILLISTON ON CONTRACTS, because it is contrary to New York common law. The Trustee also argues that the rule stated in WILLISTON has been rejected by the courts that have considered it in favor of the accrual-on-election rule.

DISCUSSION

Subject Matter Jurisdiction

The Court's subject matter jurisdiction is defined in 28 U.S.C. §§ 157 and 1334. *See Plaza at Latham v. Citicorp, N.A.*, 150 B.R. 507, 510 (N.D.N.Y. 1993). This Court has subject matter jurisdiction with respect to (1) cases "under title 11," (2) civil proceedings "arising under title 11," (3) civil proceedings "arising in" a case under title 11 and (4) civil proceedings "related to" a case under title 11. 28 U.S.C. § 157(a). "Bankruptcy judges *may hear and determine* all cases under title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments. . . ." 28 U.S.C. § 157 (b)(1) (emphasis added).

> A bankruptcy judge may also *hear* non-core proceedings that are otherwise related to a title 11 case. In such a proceeding, however, the bankruptcy judge may not *determine* the issue, but may only submit proposed findings of fact and conclusions of law to the district court.

In re Best Products, Inc., 68 F.3d 26, 30 (2d Cir. 1995), citing 28 U.S.C. § 157(c)(1).

Section 157(b)(3) authorizes the bankruptcy judge to make a determination whether a proceeding is a "core" proceeding or otherwise related to the bankruptcy case. In this regard, a review of the legislative history of 28 U.S.C. § 157 supports the conclusion that Congress intended "a broad interpretation of the parameters of a core proceeding." *See id.*, at 31, citing *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir.), *vacated*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 408 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991).

Whether or not a proceeding is a "core" proceeding depends on the nature of the proceeding if it is not one of those specifically set forth in 28 U.S.C. § 157(b)(2). *See In re Kings Falls Power Corp.*, 185 B.R. 431,438 (Bankr. N.D.N.Y. 1995), citing *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 707 (2d Cir. 1995). The Court's main focus of inquiry must be on whether the essence of the proceeding is "'at the core of the federal bankruptcy power.'" 28 U.S.C § 157(b)(2), quoting *Northern Pipline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). A determination of whether the defendant is obligated, pursuant to the terms of the consolidation note, to pay the entire principal balance and accrued interest, alleged to exceed $7.8 million, may ultimately impact on the administration of the estate by the Trustee. However, the determination of that question arises under New York state contract law and the Uniform Commercial Code, not the Bankruptcy Code. Furthermore, the alleged default by the defendant in its payments on the note took place prior to the commencement of the bankruptcy case. Therefore, the Court concludes that the matter is not a "core" proceeding.

The Court must then consider whether it is "related to" the bankruptcy case. In *In re Turner*,

724 F.2d 338, 340-41 (2d Cir. 1983), the Second Circuit Court of Appeals held that in order to be found to be "related to" the bankruptcy case, the proceeding must have a "significant connection" to the debtor's bankruptcy case.[6] The Second Circuit subsequently clarified its position in this regard in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992), in which it indicated that, "The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *See id.* At 114 (citations omitted).

Clearly, this matter falls into this definition because an adjudication whether the defendant is obligated, pursuant to the terms of the note, to pay the entire principal balance and accrued interest of the note is likely to have a "conceivable effect" on the bankruptcy estate. If the defendant is found to be liable on the note, proceeds potentially exceeding $7.8 million will be brought into the estate and would be available to pay unsecured claims against the Debtor's estate. Accordingly, the Court concludes that it has "related to" jurisdiction.

Motion for Summary Judgment

As an initial matter, although the Defendant's Motion is entitled "Motion to Dismiss . . . / Summary Judgment," the Court will treat it only as a motion for summary judgment. Fed.R.Bankr.P. 7012 (b) provides, in relevant part: "Rule 12(b) - (h) F.R.Civ.P. applies in adversary proceedings."

---

[6] This approach has been found by some courts to be overly narrow. *See, e.g., In re Gen. Am. Communications Corp.*, 130 B.R. 136, 156 (S.D.N.Y. 1991). The more frequently cited test is that found in *Pacor, Inc. V. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), which required the court to consider whether the outcome of the proceeding would have any "conceivable effect" on the bankruptcy estate.

Rule 12(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") in turn provides, in relevant part: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Paragraph 1 of the Affirmation in Support of Motion states, in relevant part that the complaint should be dismissed "on the basis that the Complaint fails to state a claim upon which relief can be granted," which is the defense numbered (6) in Fed.R.Civ.P. Rule 12(b). Since the motion has attached to it several affidavits and exhibits, all of which constitute "matters outside the pleading . . . presented to and not excluded by the court," it "shall be treated as [a motion] for summary judgment" only. See *In re Sevko*, 143 B.R. 167, 171 (N.D. Ill. 1992); see also, *Carter v. Stanton*, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972); *RJR Services, Inc. v. Aetna Casualty & Surety Co.*, 895 F.2d 279, 281 (7th Cir.1989). Accordingly, the Court treats the motion purely as one for summary judgment.

"Summary judgment is appropriate where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law,' Fed.R.Civ.P. 56(c)), i.e., '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)." *Goldberg v. Cablevision Systems Corp.*, 261 F.3d 318, 324 (2d Cir. 2001).

In this case, the Defendant seeks summary judgment on the basis that the applicable statute of limitations has expired with respect to the cause of action set forth in the complaint. The first issue to be resolved, therefore, is what is the applicable statute of limitations governing the Plaintiff's claim.

The Plaintiff's claim seeks damages for Erie Islands' alleged breach of the Loan and Security Agreement in the amount of the outstanding principal balance of $7,870,898.95, plus applicable interest. A security agreement is defined as "an agreement which creates or provides for a security interest" (UCC § 9-105[1][l]). It is therefore a specific form of contract. Accordingly, the claim is, at its essence, nothing more than a garden variety suit for breach of a contract, albeit in the context of a Chapter 11 bankruptcy. Section 108 of the Bankruptcy Code ("the Code"), 11 U.S.C. § 108, provides, in relevant part:

> (a) If applicable nonbankruptcy law ... fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of –
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) two years after the order for relief.

Since, in this case, the order of relief was issued far more than two years ago,[7] paragraph (1) applies, and dictates that the statute of limitations applicable to the Plaintiff's claim is that fixed by applicable nonbankruptcy law. In New York,[8] the applicable nonbankruptcy law is New York Civil Practice Law & Rules ("C.P.L.R.") § 213, which provides in relevant part:

> The following actions must be commenced within six years: . . .

---

[7]As previously noted, *see* footnote 1 *supra*, BFG filed its petition on March 29, 1996. Section 102(6) of the Code defines "order for relief" as the entry of such an order. The Code's legislative history states that "[i]n a voluntary case, the entry of the order for relief is the filing of the petition commencing the voluntary case." S. REP. NO. 95-989, at 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5814; *see also* H.R. REP. NO. 95-595, at 315 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6272.

[8]The final paragraph of the Consolidation Note provides, in relevant part: "This Note . . . shall be . . . governed by and construed in accordance with the laws of the state of New York." Thus the relevant applicable nonbankruptcy law is the New York law of contracts and the rules governing the time limitations within which an action may be brought for breach of a contract.

> 2. an action upon a contractual obligation or liability, express or implied . . . .

C.P.L.R. § 203(a) provides that, "The time within which an action must be commenced . . . shall be computed from the time the cause of action accrued . . . ." The proper application of this rule to causes of action sounding in contract was recently explained by the Appellate Division of the New York State Supreme Court as follows:

> A cause of action in contract accrues on the date on which it is breached. . . . As stated in *Phillips Constr. Co. v. City of New York*, 61 N.Y.2d [949,] 952-953, 475 N.Y.S.2d 244, 463 N.E.2d 585 ([Cooke, C.J., dissenting in part]), "the Statute of Limitations begins to run when an injury occurs so that the party knows that a suit may be brought, although the full amount of damages may not be known at the time . . . ."

Koren-DiResta Construction Co., Inc. v. New York City School Construction Authority, 293 A.D.2d 189, 740 N.Y.S.2d 56 (1st Dept. 2002). In *Koren-DiResta*, it is noteworthy that the court's reference to the fact that "the party knows that a suit may be brought" is merely made as the natural result of the occurrence of the injury, not as indicating that acquisition of such knowledge is the event constituting the accrual of the cause of action.

The Defendant claims that the relevant statute of limitations applicable to this case is C.P.L.R. § 206. Section 206, which is entitled, "Computing periods of limitation in particular actions," sets forth special rules for computing the statute of limitations period in certain cases. Although the Defendant does not specify either in its motion, affirmation in support thereof, memoranda of law or during oral argument before this court which one of these in particular it relies on, the only one capable of application to this case is subsection (a), which provides, in relevant part:

> (a) Where demand necessary. Except as provided in article 3 of the uniform commercial code, where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete . . .

The Practice Commentary accompanying this section of the statute explains the type of situation to which section 206 (a) applies: "[T]his section states the general rule that when a demand is *necessary* as a *procedural precondition* to suit (e.g., a demand upon the corporation in a shareholder's derivative suit), then the statute of limitations begins to run when the right to make the demand is perfect." (Emphasis added.) The commentary explains further, using the example of two potential defendants in a lawsuit by the true owner to recover stolen goods – the thief and the innocent purchaser who buys the goods from the thief:

> When a defendant steals property belonging to the plaintiff, no demand is necessary to create a cause of action. The defendant becomes liable for the tort of conversion, and the three-year statute of limitations . . . begins to run on the day of the theft, even if the plaintiff is unaware of the theft.
>
> Problems abound when the thief later transfers the property to an innocent purchaser for value. . . . [I]n most jurisdictions the statute of limitations runs against the innocent purchaser for value just as it does against the thief. See Restatement (Second) of Torts, § 229, comment h (1965). New York, however, has decided that to avoid stigmatizing an innocent purchaser as a tortfeasor, he is *not* liable for conversion until the plaintiff makes a *demand* upon him that is ignored.

Examination of cases in which the courts of New York have found section 206 (a) applicable or inapplicable will be instructive. In *State v. City of Binghamton*, 421 N.Y.S.2d 950 (App. Div. 1979), the state sought to recover from the City of Binghamton its share of the acquisition costs for land

used to build a new arterial highway in Binghamton. The court found that the right to demand payment vested in the state 60 days following the date of completion of the project, pursuant to State Highway Law § 349-c, which provides, "Any sum due the state shall be paid by such city within sixty days after the date of the transmittal of said statement." The court noted that the statute section just quoted makes clear the city has no obligation to pay until "the transmittal of said statement," but the state had a right to payment as of the date of completion of the project, so that the statute of limitations would begin to run when the right to demand payment vested in the state, for "the plaintiff will not be permitted to prolong the statute of limitations simply by refusing to make a demand."

In *Baratta v. Kozlowski*, 464 N.Y.S.2d 803 (App. Div. 1983), the bank for which the defendant served as officer had purchased bonds for the account of the plaintiff. When the plaintiff eventually requested return of them, he was informed that the defendant had converted them to his own use. The court stated that, "because the bonds were not to be returned at a set time . . . accrual must therefore be computed from the time of demand." The court reasoned, "where there is a delivery of personal property 'not to be returned specifically or in kind at a fixed time or upon a fixed contingency' an action for conversion does not accrue until there is a demand for return of the property," and thus did not apply § 206 to the case.

In a number of cases, New York courts have declined to apply § 206 to cases alleging nothing more than breach of contract. *See Niagara Recycling, Inc. V. Sevenson Environmental Services, Inc.*, 265 App. Div. 2d 852, 695 N.Y.S.2d 652 (4th Dept. 1999) ("That section is not applicable because the time for performance was fixed by contract."); *Jaskol v. Fred F. French Security Co.*, 153 N.Y.S.2d 361, 363 (N.Y. Sup. Ct., Kings Cty., 1956) ("These provisions, however, have no

application to the present situation. Plaintiff's right grew out of the breach of contract. No demand was necessary to entitle her to bring her action.")

In this case, the parties' contract provided for payment on the consolidation note to be made in installments. "[W]hen a contract provides for the payment of money in installments, . . . the Statute of Limitations runs on each installment from the date it becomes due (*Phoenix Acquisition Corp. v. Campcore, Inc.*, 81 N.Y.2d 138, 141, 596 N.Y.S.2d 752, 612 N.E.2d 1219; *Matter of the Estate of Philippe*, 31 Misc.2d 193, 220 N.Y.S.2d 924, *aff'd*, 19 A.D.2d 587, 240 N.Y.S.2d 936, *aff'd* 14 N.Y.2d 600, 198 N.E.2d 263; *see also*, 18 Williston, Contracts § 2026C, at 787 [3d ed 1961])." *Vigilant Insurance Company of America et al. v. Housing Authority of the City of El Paso, Texas, et al.,* 87 N.Y.2d 36, 45, 660 N.E.2d 1121, 637 N.Y.S.2d 342 (1995).

This case, however, does not present the garden variety installment contract, for the contract here included an acceleration clause, pursuant to which all sums due under the contract would become immediately due upon demand.[9] The effect of such a provision on the commencement of the running of the statute of limitations has been described as follows:

> When the acceleration provision is optional with the holder of the note, the statute of limitations does not run until the note is due according to its terms, in the absence of an exercise of the option to declare it due upon the default; in other words, the default does not ipso facto start

---

[9]The last paragraph on the first page of the parties' Consolidation Note provides, in relevant part:

> Should a Primary Event of Default occur and be continuing (as set forth in the Loan & Security Agreement dated September 30, 1988) . . . then the Lender, by notice to the Borrower, may declare all payments due hereunder to be due and payable and same shall thereupon immediately become due and payable.

> the running of the statute as to the entire debt, but only as to the installment or interest which is in default. This is so because the acceleration provision is solely for the creditor's benefit, and he may or may not take advantage of it. Until he does, the statute should not run.

81 N.Y. JUR. 2D *Negotiable Instruments* § 704 (1989).

This view of the matter is supported by several cases, albeit none of them of recent vintage. In *General Public Loan Corp. v. Polley*, 81 N.Y.S.2d 107, 108 (N.Y. Sup. Ct. 1948), the defendants made out a note in the sum of $300 on January 10, 1939, providing for twenty successive monthly installments, ending on September 10, 1940. The defendants failed to make the payment due in February, 1939, and so the plaintiff invoked the acceleration provision, declaring the entire sum, including interest, due effective February 17, 1939. The plaintiff brought his action, however, on May, 18, 1945, more than six years following its invocation of the acceleration clause, and the court dismissed the case upon the defendants' assertion that the statute of limitations had expired.

In *Duval v. Skouras*, 44 N.Y.S.2d 107 (N.Y. Sup. Ct. 1943), *aff'd*, 46 N.Y.S.2d 688 (App. Div. 1st Dept. 1944), *aff'd*, 61 N.Y.S.2d 379 (App. Div. 1st Dept. 1946), the defendant was the guarantor of bonds containing an acceleration provision, which the payee invoked in October, 1932. The payee thereafter brought an action on the bonds in June, 1943. The court stated, with respect to the acceleration clause: "If [creditors] choose to exercise the option of accelerating maturity, the entire debt becomes due and payable immediately, and the statute of limitations begins to run at once. If they see fit to waive the option, the principal debt does not become due and payable until the date of maturity and the statute of limitations does not begin to run until that date." *Id.,* 655. The court did not, however, grant the motion for summary judgment, finding that there was a question of fact, namely,

whether the parties had intended New York or Illinois law to apply, the two states having at that time different applicable statutes of limitations.

In *In re Steinway's Estate*, 21 N.Y.S.2d 31 (N.Y. Sur. Ct. 1940), the court stated that "the great weight of authority seems to support the view that the statute does not commence to run until the specified maturity date, *unless the creditor take some affirmative action to mature the claim earlier*." *Id.*, 556. (Emphasis added.) Here, of course, the creditor did take some "affirmative action to mature the claim earlier" by invoking the acceleration clause.

Notwithstanding the foregoing cases in which the courts of New York have held that, in the case of an installment contract containing an acceleration clause, the statute of limitations begins to run only upon the earlier of (a) the nonbreaching party's invocation of the acceleration clause or (b) the date fixed in the contract for its final completion, the defendant points this court to Section 2027 of WILLISTON ON CONTRACTS (3RD ED.). That section of Professor Williston's treatise provides, in relevant part: "[W]hen the election is manifested, the Statute will run from the date of the default on which the election is based, not from the date of the election itself." Before turning to the interpretation of this section, it is noted that no case in the New York courts could be found in which this section was mentioned, let alone relied upon for authority. Even assuming, *arguendo*, that a New York court presented with the issue would rely on this section, however, the construction contended for by the defendant has not been adopted universally by those courts that have construed it.

In *Sardi v. Metpath, Inc.*, No. CV90-0277963S, 1995 WL 459278, at *2 (Conn. Sup. Ct., J.D. of Fairfield at Bridgeport, July 26, 1995), a case involving an acceleration of a loan as in the present case, the lender accelerated the note and all payments due, the court cited the section of

Williston above mentioned and interpreted it to mean, "stating that the statute of limitations begins to run when the payments are accelerated." The court then stated that the cause of action accrued on the date which was ten days following the date of the demand letter, without referring to the earlier date on which the missed payment was due, as the defendant contends would be the proper application of Professor Williston's rule.

In *Anton M. Vreede, M.D., P.C., v. Koch et al.*, 380 S.E.2d 615, 616 (N.C. App. 1989), the Court of Appeals of North Carolina, considering an acceleration clause in a note, stated: "Without such a clause the obligee would have to wait until each installment was due and then sue for each individual defaulted installment. See generally 18 S. Williston, Contracts §§ 2027, 2027B at 791, 794-95 (3d ed. 1978) (hereinafter cited as Williston). Acceleration *does not occur automatically* upon default, even if the contract does not expressly provide for acceleration at the option of the obligee. Williston, § 2027 at 791." [Emphasis added.] Clearly, a court that would not find that acceleration occurred automatically upon default would also not find that acceleration, when invoked, relates back to the date of that default.

In *Thread & Gage Co. v. Kucinski*, 451 N.E.2d 1292, 1297 (Ill. App. Ct. 1983), the Appellate Court of Illinois, considering an acceleration clause similar in its terms to that in the present case stated:

> Where the creditor has the option of declaring all installments payable in the event of default on a single payment, and the creditor fails to exercise the option when the debtor defaults, the rule that each installment carries its own limitation still applies. (See Honn v. National Computer Systems, Inc. (Minn.1981), 311 N.W.2d 1; 18 S. Williston, A Treatise on the Law of Contracts § 2027 (3d ed. 1978); 4 Corbin, Contracts § 951 (1951).) The option is intended for a creditor's

> benefit and, therefore, a creditor's failure to take advantage of the optional provision *does not self-execute it to a creditor's detriment with respect to the running of the statute of limitations.* (See, e.g., Chase National Bank of City of New York v. Burg (D. Minn.1940), 32 F. Supp. 230; Frenzel v. Frenzel (1967), 260 Iowa 1076, 152 N.W.2d 157.)

[Emphasis added.]

This Court's review of the cases that have employed the Williston rule argued for by the defendant leads to two conclusions: (1) No New York state case has ever employed the rule, calling into serious question the Defendant's contention that this rule, never before invoked in a New York state court, is nonetheless the law of New York; and (2) the courts that have employed the rule in other states have not universally implemented it according to the Defendant's interpretation; indeed the Connecticut case quoted above employed the Williston rule and held that the event of acceleration triggering the running of the statute was the date of the demand letter, not the date on which the missed payment was due. Indeed, this court could find no case from any jurisdiction where the court employed § 2027 of Professor Williston's treatise, and then held that the statute of limitations began to run on the due date of the missed payment. Accordingly, in the absence of a clear rule of New York state law dictating otherwise, this court will continue to employ the tried and true rule that the statute of limitations begins to run on the first date that the plaintiff could have sued the defendant on the note, namely the date on which the plaintiff's predecessor in interest, Hemlock, provided notice of default to Erie Islands.

The cases and article from NEW YORK JURISPRUDENCE discussed above make it clear that the start of the running of the statute of limitations depended entirely upon whether or not the creditor chose to exercise the acceleration clause. The complaint alleges and, as noted above, the court must accept

the allegation as true for purposes of the pending motion, that, "[o]n April 12, 1996, Hemlock . . . provided written notice of default to Erie Islands based upon Erie Islands' failure to make a monthly installment payment . . . and advised that all sums due had been accelerated." (Complaint, at ¶ 29.) That act by Hemlock, the plaintiff's predecessor in interest, was the act that triggered the running of the statute of limitations. The plaintiff's filing of the complaint in this matter on April 11, 2002, six years less one day later, was, therefore, timely.

Based on the foregoing, it is hereby

RECOMMENDED to the United States District Court for the Northern District of New York pursuant to 28 U.S.C. § 157(c)(1) that the Defendant's Motion for Summary Judgment be denied.

Dated at Utica, New York

this 2nd day of January 2003

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge