

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b> <u>HON. ARLENE P. BLUTH</u> <i>Justice</i></p> <p>-----X</p> <p>NICHOLAS SPADA</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>ASPEN UNIVERSITY INC.,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <u>IAS MOTION 14</u></p> <p><b>INDEX NO.</b> <u>656752/2020</u></p> <p><b>MOTION DATE</b> _____</p> <p><b>MOTION SEQ. NO.</b> <u>002</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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NYSCEF Doc. Nos. 17-33 were considered on this motion and cross-motion.

The motion by defendant to dismiss the first amended complaint is granted and the cross-motion by plaintiff to amend is denied.

**Background**

Plaintiff contends that on February 29, 2012, defendant signed a convertible note in favor of plaintiff in the amount of \$50,000. He claims that defendant was supposed to pay back the note, plus interest, within 2 years of the date of execution. Plaintiff claims that the note went into default on September 22, 2015 after he made a demand for the outstanding payment on September 17, 2015.

Plaintiff brings three causes of action: for breach of contract, unjust enrichment and declaratory relief. The first two causes of action relate to the loan described above and the third concerns shares that plaintiff contends he received. Plaintiff insists that defendant improperly concluded that plaintiff ceased being a stockholder on September 25, 2015.

Defendants point out that pursuant to the terms of the agreement, the note’s maturity date was March 1, 2014. They insist that this bars the instant action on statute of limitations grounds

because the instant action was not filed until December 4, 2020, well more than six years after the note became due. Defendant argues that plaintiff's attempt to side-step this issue by claiming that there was an event of default in September 2015 is without merit.

With respect to the third cause of action, defendant relies upon the affidavit of Michael Matthews, an officer of defendant. Mr. Matthews claims that on September 24, 2015, "Plaintiff requested that his 450,000 shares of Aspen Group, Inc. be cancelled and put into 'street name', specifically in the name of Raymond James & Associates Inc." (NYSCEF Doc. No. 18, ¶ 4). He also claims that plaintiff obtained additional shares in 2019 pursuant to a settlement but that plaintiff again asked for the shares be reissued to another entity (*id.* ¶ 6). Mr. Matthews concludes that the transfer records of defendant shows that plaintiff does not own any shares of defendant or its parent company.

In opposition and in support of his cross-motion to amend, plaintiff claims that the note provides him with an option to declare a default and send a notice. He insists that the date of default must stem from when he sent the notice rather than the maturity date. Plaintiff maintains that defendant's view of the note would create new restrictions on plaintiff's rights that were not bargained for in the note. Plaintiff also moves to amend to name defendant's parent company, Aspen Group, Inc.

In reply, defendant insists that the key date for statute of limitations purposes is when plaintiff had the right to sue, not when he chose to seek relief pursuant to the note. Defendant also argues that plaintiff has not raised any issues of fact about his ownership of shares. It insists that plaintiff only offers vague assertions about possible shares that he might own. Defendant concludes that this case should not be maintained to allow plaintiff to conduct a fishing expedition about what shares he owns.

### **Statute of Limitations**

“Under CPLR 213 (2), a claim for breach of contract is governed by a six-year statute of limitations. As a general principle, the statute of limitations begins to run when a cause of action accrues that is, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court. In contract actions, we have recognized that a claim generally accrues at the time of the breach” (*Hahn Automotive Warehouse, Inc. v Am. Zurich Ins. Co.*, 18 NY3d 765, 770, 944 NYS2d 742 [2012] [internal quotations and citations omitted]). The statute of limitations is “triggered when the party that was owed money had the right to demand payment, not when it actually made the demand” (*id.* at 771.).

Here, the note specifically contains a maturity date two years from the date of the note (NYSCEF Doc. No. 29). That bars plaintiff’s two causes of action (for breach of contract and for unjust enrichment) based on the six-year statute of limitations. Plaintiff’s right to sue accrued on March 1, 2014—that he did not demand payment until 2015 is of no moment. Plaintiff’s reading of the contract—that he had to declare a default in order to start the statute of limitations—is not supported by the applicable case law. The fact is that plaintiff did not commence this lawsuit within six years of when he had a right to demand payment on the loan.

### **Third Cause of Action**

The Court also grants the branch of the motion that seeks to dismiss the third cause of action. In support of its motion, defendant attached an affidavit from its officer (NYSCEF Doc. No. 18) and related documentation showing that plaintiff’s shares were cancelled at his instruction (NYSCEF Doc. Nos. 21-23). In opposition, plaintiff failed to sufficiently oppose this point. An affidavit from plaintiff was not submitted to rebut the documentary evidence provided by defendant. Moreover, the complaint (which was not verified by plaintiff) only contains vague

allegations about the shares that plaintiff owns (outside of the 450,000 shares that defendant cancelled at plaintiff’s request). The Court is unable to find that plaintiff stated a cognizable cause of action by alleging that “On or about May 9, 2012, Plaintiff obtained additional shares of Defendant” (NYSCEF Doc. No. 15, ¶ 49).

Once defendant met its prima facie burden on this branch of the motion, through the affidavit and exhibits of Mr. Matthews, it was plaintiff’s burden to show that he stated a cognizable cause of action for a declaratory judgment; plaintiff failed to do that. After all, this cause of action seeks a declaration that plaintiff is a shareholder but plaintiff did not attach anything, such as an affidavit from plaintiff or a statement from defendant, to substantiate that claim. The only documentation was provided by defendant and defendant insists that plaintiff is no longer a shareholder.

Because the Court grants defendant’s motion, the cross-motion for leave to amend (to add defendant’s parent company) is denied as moot.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted, the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor, and the cross-motion by plaintiff is denied.

ARLENE P. BLUTH, J.S.C.

4/13/2021  
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE