

SHORT FORM ORDER

INDEX No. 620847/2017
CAL. No. 202101285CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5/13/22
ADJ. DATE 7/6/22
Mot. Seq. #003 MotD

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GRACA FERNANDES,

Plaintiff,

- against -

MARIA FERNANDES, AUGUSTO
FERNANDES, and HORSEBLOCK
HOLDING ASSOC.

Defendants,

MANUEL FERNANDES and CLASSIC
CONCRETE ASSOCIATES, INC.,

Counterclaim Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants, dated April 15, 2022, and supporting papers; (2) Affirmation in Opposition by the plaintiff and counterclaim defendants, dated June 21, 2022, and supporting papers; and (3) Reply Affirmation by the defendants, dated July 5, 2022, and supporting papers; it is

ORDERED that the motion by the defendants for an order pursuant to CPLR 3212, granting summary judgment (i) dismissing the complaint or, at a minimum, dismissing all claims in the complaint that are barred by the statute of limitations, and (ii) on the first counterclaim, in their favor and against the counterclaim defendants in the amount of \$58,800 for unpaid rent plus interest, is granted to the extent of granting summary judgment dismissing the complaint against defendant Maria Fernandez and limiting the plaintiff's potential recovery against defendants Augusto Fernandes and Horseblock Holding Assoc. in the manner specified below, and is otherwise denied.

This action arises out of the operation of a family business known as Horseblock Holding Association ("Horseblock"), a partnership which owns property at 2074 Horseblock Road, Medford,

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New York consisting of multiple residential apartments, a coin-operated laundry for use by the tenants, and two storage yards. Graca (“the plaintiff”) and Maria Fernandes are sisters and 50/50 partners in Horseblock; Graca’s husband, Manuel, and Maria’s husband, Augusto, are brothers. Manuel was the president of Classic Concrete Associates, Inc. (“Classic”). Augusto was the managing agent for the partnership, responsible for collecting rents, collecting proceeds from the laundry facility, maintaining the property, maintaining the bank account, paying the bills, and filing tax returns.

It appears from the complaint that from January 2007 through October 2017, Maria, Augusto, and Horseblock (collectively, “the defendants”) withheld from the plaintiff all rents collected and other proceeds from the property, totaling approximately \$10,000 per month, despite their knowledge that the plaintiff was entitled to receive 50% of the profits; it also appears that, except for \$300 of quarters she once received from Augusto for one month of laundry proceeds, the plaintiff never received any dividend, distribution, or partnership share of the profits from the rents and other proceeds collected. The plaintiff pleads three causes of action, all seeking monetary damages: the first, for conversion, the second, for unjust enrichment, and the third, for breach of fiduciary duty.

In their answer, the defendants allege, in part, that Manual and Classic rented one of the two storage yards from Horseblock but, without the consent of Maria and Augusto, stopped paying rent in or about 2013. The defendants plead three counterclaims, only the first of which, which is to recover from Manual and Classic the sum of \$53,035.36 for back rent for the storage yard through September 12, 2017, is relevant to this determination.

Now, discovery having been completed and a note of issue having been filed on December 17, 2021, the defendants timely move for summary judgment dismissing the complaint on the grounds (i) that the action is premature, as a partner cannot sue another partner for any claim arising out of the partnership unless there has been an accounting, which has not yet taken place, (ii) that the plaintiff’s claims are barred, at least in part, by applicable statutes of limitation, and (iii) that unjust enrichment does not lie against Augusto and Horseblock because they were not enriched. The defendants also move for summary judgment in their favor on the first counterclaim for unpaid rent, based on a “compilation,” ostensibly prepared by an accountant and subsequently given to Augusto, which purports to show payments made by Manual and Classic to Horseblock from May 2006 through April 2018.

To obtain summary judgment on the merits of a case, it is necessary that a party establish its cause of action or defense “sufficiently to warrant the court as a matter of law in directing judgment” in its favor (CPLR 3212 [b]), and that it do so “by tender of evidentiary proof in admissible form” (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]; *accord Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

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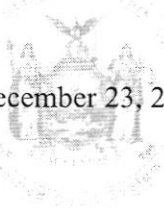
Addressing first the defendants' request for summary judgment dismissing the complaint as against Maria, it is well settled that an action at law may not be maintained by one partner against another for any claim arising out of the partnership until there has been a full accounting, except where the alleged wrong involves a partnership transaction which can be determined without an examination of the partnership accounts (*St. James Plaza v Notey*, 95 AD2d 804, 463 NYS2d 523 [1983]). Here, the plaintiff is not seeking to vindicate a specific wrong perpetrated against her but rather a series of alleged wrongs allegedly to have been committed over a period of more than 10 years. Since the plaintiff's claims against Maria cannot be resolved without an examination of the partnership books and records, the resolution of those claims must await an accounting. Accordingly, those claims are dismissed as premature (*see 1056 Sherman Ave. Assoc. v Guyco Constr. Corp.*, 261 AD2d 519, 690 NYS2d 657 [1999]).

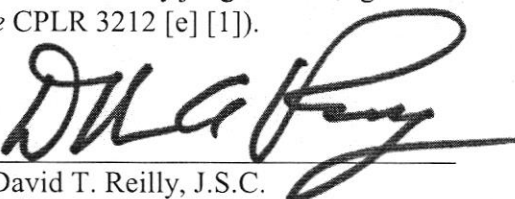
As to the defense of statute of limitations, the defendants correctly note that the applicable period of limitation for each of the plaintiff's three causes of action, all of which seek monetary relief, is three years (*see CPLR 214 [3], [4]; Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 637 NYS2d 342 [1995] [conversion]; *Ingrami v Rovner*, 45 AD3d 806, 847 NYS2d 132 [2007] [unjust enrichment]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 879 NYS2d 355 [2009] [breach of fiduciary duty]). However, the plaintiff's allegations clearly make out a continuous wrong which accrued anew each time the defendants improperly withheld rents and proceeds from the plaintiff (*see Greenberg v Wiesel*, 186 AD3d 1336, 131 NYS3d 36 [2020]; *Barash v Estate of Sperlin*, 271 AD2d 558, 706 NYS2d 439 [2000]). Relative to this defense, then, summary judgment is granted only to the extent of limiting the plaintiff's potential recovery to those rents and proceeds collected and retained by Augusto and Horseblock during the three years immediately preceding the commencement of this action (*see id.*).

In all other respects, the defendants' motion is denied. Their request for summary judgment dismissing the cause of action for unjust enrichment against Augusto and Horseblock—based on the claim that they were not enriched, unjustly or otherwise—is unsupported by any reference to evidentiary proof. And as to their further request for summary judgment on the first counterclaim, it suffices to note that the compilation on which they rely, which is nothing more than a list of dates and dollar amounts purporting to establish the rent balance due, is neither verified, certified, nor supported by an affidavit from its preparer; by failing to submit proof in evidentiary form, they failed to establish their entitlement to judgment as a matter of law (*see Spodek v Feibusch*, 267 AD2d 299, 701 NYS2d 91 [1999]).

The Court directs that the claims as to which summary judgment was granted are hereby severed and that all remaining claims shall continue (*see CPLR 3212 [e] [1]*).

Dated: December 23, 2022




 David T. Reilly, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION