To Be Argued By:
Richard B. Stafford
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No. 2023-01418

GRACA FERNANDES,

Plaintiff-Respondent-Appellant,

against

MARIA FERNANDES and AUGUSTO FERNANDES,

Defendants-Respondents,

HORSEBLOCK HOLDING ASSOC.,

Defendant-Appellant-Respondent,

and

MANUEL FERNANDES and
CLASSIC CONCRETE ASSOCIATES, INC.,

Counterclaim Defendants-Respondents.

BRIEF FOR PLAINTIFF-RESPONDENT-APPELLANT AND COUNTERCLAIM DEFENDANTS-RESPONDENTS

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Suffolk County Clerk's Index No. 620847/2017

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PRELIMINARY STATEMENT

This action arises out of a partnership agreement and the withholding of partnership funds and distributions from an equal share partner. Plaintiff and Defendant, Maria Fernandes, were equal partners in Horseblock Holding Assoc., an entity that owned New York property consisting of rental units and laundry units. Maria's husband was responsible for the collection of rents and management of the property. According to the partnership agreement, Maria was required to sequester and, upon request, forward Plaintiff her portion of the partnership distributions.

Plaintiff became aware that Defendants were withholding rent monies, property profits, and distributions from her. Plaintiff claims that from 2007 through 2017, Defendants collected approximately $10,000.00/month rent and other proceeds from the on-site laundry facility at the Premises and withheld same from her—despite knowing her status as 50% partner.

Plaintiff brought this suit against Defendants under theories of conversion, unjust enrichment, and breach of fiduciary duty. The Supreme Court, Suffolk County, in part, dismissed Plaintiff's claims against Maria and limited her relief to three years preceding the commencement of the action. These findings should be reversed.

The Supreme Court incorrectly dismissed Plaintiff's claims against Maria as premature because Plaintiff's claims can and should be decided in a single action. Despite the general rule that an accounting is required prior to suit against partners, the underlying purposes of this rule do not apply in this case—Plaintiff's claims span a limited period, the partnership is at an end, and all claims have accrued and are before the Court.

It was also in error for the Supreme Court to limit Plaintiff's potential recovery to three years preceding the action because the claims sound in contract and should be subject to the six year' limitations period. Plaintiff's claims arise out of the contractual relationship between the parties –absent the contract between them, Defendants would not have any obligations and there would have been no claims.

QUESTIONS PRESENTED

I. Whether the lower court erred by dismissing Plaintiff's claims against Defendant, Maria Fernandes, and requiring Plaintiff to first bring a separate action for an accounting when the claims are limited to a certain period, the partnership is at an end, and all claims and parties are before the court?

II. Whether the lower court erred by limiting Plaintiff's potential recovery to three years when her claims arise out of the parties' contractual partnership agreement?

III. Whether the lower court correctly decided the that Defendants did not establish their prima facie entitlement to unpaid rent monies?

STATEMENT OF THE CASE

This litigation arises from the breakdown of a family business and claims that Defendants withheld years of rent monies from Plaintiff, an equal business partner. Sisters, Maria Fernandes ("Maria") and Graca Fernandes ("Graca" or "Plaintiff"), were 50/50 owners/partners in defendant corporation, Horseblock Holding Assoc. ("Horseblock"), with its address at 2074 Horseblock Road, Medford, New York ("Premises") (A-100). According to the partnership agreement, Maria was required to sequester and, upon request, forward Graca her portion of the partnership distributions (A-102).

The Premises consisted of multiple residential apartments, a laundry facility, and two yard for storage of construction equipment (A-99). Defendant, Augusto Fernandes ("Augusto"), Maria's husband, acted as an employee and agent of Horseblock, responsible for, *inter alia,* collecting rents, collecting monies from the coin-operated washer and dryer, maintaining the property, maintaining the bank account, paying bills and filing the tax returns for Horseblock A-100).

Graca claims that from 2007, through 2017, Defendants collected approximately $10,000.00/month rent and other proceeds from the on-site laundry facility at the Premises and withheld same from her—despite requests for same and knowledge of her status as 50% partner (A-100); (A-31). Defendants used these proceeds personally as well as depositing them in corporate business accounts

under their exclusive control. Nor did Graca ever receive a dividend, distribution, or partnership share of the profits from rent or other proceeds collected at the Premises (save $300 in quarters from laundry profits) (A-100).

On October 26, 2017, Graca filed her Complaint alleging causes of action for conversion, unjust enrichment, and breach of fiduciary duty arising out of the partnership agreement (A-39). On November 15, 2017, Defendants filed their Verified Answer with Counterclaims (A-50). Defendants state, as an Affirmative Defense, that Graca cannot sue Maria for damages until there has been an accounting, and as a Counterclaim, that Graca and Counterclaim Defendants, Manuel Fernandes ("Manuel") and Classic Concrete Associates, Inc. ("Classic Concrete") owe $53,035.36 for back rent for a storage yard utilized by Classic Concrete (A-50 – 59).

On March 27, 2018, an RJI was filed, and on January 7, 2019, an order was made appointing a receiver (A-88). The receiver was authorized to collect rent and other powers by order dated May 7, 2019 (A-89). On March 13, 2020, the receiver was discharged by court order and thereafter, by agreement, the Premises was managed by Counterclaim-Defendant, Manuel Fernandes (A-95). Following a small fire at the Premises, the Premises was condemned by the Town on June 14, 2020. The Premises has been vacant since.

On April 15, 2022, Defendants filed a Notice of Motion for summary judgment (A-9). On December 23, 2022, the Hon. David T. Reilly, J.S.C., granted summary judgment, in part, dismissing the Complaint against Maria as premature and limiting Plaintiff's potential recovery to the three years immediately preceding the commencement of the action. Specifically, in dismissing Plaintiff's claims against Maria as premature, the lower court stated that:

> 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 . . . Here, the plaintiff is not seeking to vindicate a specific wrong perpetuated against her but rather a series of 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.
> (A-8)

In limiting Plaintiff's relief, the court reasoned that:

> . . . the defendants correctly note that the applicable period of limitation for each of the plaintiff's three causes of action, all which seek monetary relief, is three years . . . 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 . . . 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.
> (A-8)

The lower court also discussed the defendants request for summary judgment concerning the unpaid rent of the Counterclaim defendants. In limiting the Defendant's relief, the court reasoned that:

> … 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. (A-8)

In all other respects, the court denied Defendants' motion (A-8).

Graca and Defendant, Horseblock, filed a Notice of Appeal on January 21, 2023, and January 24, 2023, respectively(A-3).

ARGUMENT

This Court should reverse, in part, the lower court. The lower court erred when it granted summary judgment in favor of Defendants, dismissing Plaintiff's claims against Defendant, Maria Fernandes, and limiting Plaintiff's relief to three years preceding this action.

I. The lower court erred when it dismissed Plaintiff's claims against Maria as premature because the partnership is at an end and all claims have accrued and are before the courts—all claims should be heard in a single action.

This Court should reinstate Plaintiff's claims against Maria in the interest of judicial economy. Plaintiff's claims against Maria should not have been dismissed as premature and she should be permitted to adjudicate all of her claims in a single action.

The general rule is that partners cannot sue each other at law unless there is an accounting, prior settlement, or adjustment of the partnership affairs. *Agrawal v Razgaitis*,149 AD2d 390, 390 (2d Dept 1989). The rule was meant to expedite the total settlement of disputes, not hinder them, *Auld v Estridge*, 86 Misc.2d 895, 900 (1976), and reflects the judicial desire to avoid entering into the day-to-day management of the partnership and to avoid piecemeal adjustments of the amount due each partner. *St. James Plaza v Notey*, 95 AD2d 804, 805 (2d Dept 1983). With this in mind, courts have found exceptions to this rule when its underlying purpose will not be served. *Id*.

In *Seiden v Gogick, Seiden, Bryne & O'Neill LLP*, the lower court dismissed a former partner's counterclaims against his law firm and former partners as premature prior to an action for an accounting. 278 AD2d 302, 303 (2d Dept 2000). In reversing, the appellate court noted that "the interests of judicial economy, and the desire to avoid entering into the day-to-day management of a partnership and calculating the piecemeal adjustments of the amount due each partner . . . will best be served by the resolution of all the issues raised in this litigation in a single action." *Id*. The court explained:

> "the law partnership at issue is at an end, and all of the claims and counterclaims alleged between the partners have accrued. Thus, any determination by the Supreme Court in this matter will neither involve interference with the day-to-day management of the partnership nor result in a piecemeal adjustment of amounts, if any, owed by one party to the other. To the contrary, a single action, with the appropriate order and directing of the sequence of the action, will prevent such piecemeal adjustments . . . For example . . . the amount, if any found to be due to the plaintiff may be offset by damages, if any, award the defendants-counterclaim plaintiffs."

Id. at 304.; *see also Metzger v Goldstein*, 139 AD3d 918, 920 (2d Dept 2016) (citing *Seiden* and concluding that the supreme court properly denied defendant's cross motion to dismiss plaintiff's unjust enrichment and breach of fiduciary duty claims as premature, properly permitting the plaintiffs to adjudicate all of their claims in a single action). Again, the *Metzger* court noted that, "where the law partnership is at an end, and all the claims and counterclaims alleged between the

partners have accrued . . . any determination by the Supreme Court . . . will neither involve interference with the day-to-day management of the partnership nor result in piecemeal adjustment of the amounts, if any, owed to by one party to any other."

Just like in the above cases, Graca, too, should be entitled to have her claims heard under a single action because the underlying purposes for the general rule requiring an accounting as a perquisite do not apply here. In dismissing plaintiff's claims against Maria as premature, the lower court stated that,

> 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 perpetuated against her but rather a series of 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.

While the court correctly noted the exception that an accounting is not required "where the alleged wrong involves a partnership transaction which can be determined without an examination of the partnership accounts," it overlooked the other underlying purposes of the rule.

And, as mentioned above, a separate accounting action would not serve the underlying purposes of the rule. First, the Premises has been condemned by the

town and the partnership between Graca and Maria is no longer—any court determination will not involve interference with the day-to-day management of the partnership. Second, all parties have been joined in this action and all claims have accrued and are in front of the Court, removing any concern about calculation of piecemeal adjustment of amounts due to each party. Finally, the illegalities of which Plaintiff complains occurred during a fixed period, 2007-2017; they are not subject to change. Thus, there is no danger of "premature piecemeal judgements between partners which may later require adjustment when all the business of the partnership is reviewed." *St. James Plaza v Notey*, 95 AD2d 804, 805 (1983).

Moreover, where the *Seiden* court found that hearing plaintiff's claims in a single action would actually prevent piecemeal adjustments, the same logic applies to this case; the amount found to be due to Graca could be offset by any damages awarded to Defendants. 278 AD2d at 303. Having Plaintiff proceed with claims against Horseblock and Augusto, only to later pursue her same claims against Maria, goes against the interest of judicial economy and the underlying purposes of first requiring an accounting. As an aside, there is little that can be determined in an action for an accounting that cannot be just as well decided in action at law using modern discovery devises. *Hotel Prince George Affiliates v Marouslis*, 98 AD2d 652 (1st Dept 1983).

This Court should reinstate Graca's claims against Maria and permit her to adjudicate all of her claims in a single action.

II. The lower court properly found that Graca's' claims were not time barred based on the 'continuous wrong' doctrine but erred when it limited her potential recovery to three years.

This Court should reverse the lower court's finding and apply the six-year Statute of Limitations to Graca's claims because the genesis of her claims is contractual—absent the parties' contractual partnership agreement, express or implied, Plaintiff's claims would be moot.

Fundamental to the difference between tort and contract actions is the nature of the interests protected. *Baratta v Kozlowski*, 94 AD2d 454, 460 (2d Dept 1983). Tort actions were created to protect the interests in freedom from various kinds of harm and are based primarily on social policy, while contract actions derive from agreements entered into between the parties. *Id*. Where tort and contract theories are both available to a plaintiff, the critical question often has been whether the plaintiff is entitled to the more favorable limitation period or whether the court must itself decide on the particular facts pleaded that the "gravamen" of the action is one or the other. *Baratta v Kozlowski*, 94 AD2d 454, 460 (2d Dept 1983); *see also Rodriguez v Cent. Parking Sys*, 10 Misc.3d 435 (2005) (noting that the same conduct will sometimes constitute both a breach of contract and the tort of conversion and that where a party can establish a cause of action in contract, the

six-year statute applies, even though such party might conceivably recover in tort); *see also Frank Mgt.*, 145 Misc.2d 995, 999 (1989) (pointing out that the mere fact that a breach of fiduciary duty is actionable in tort does not preclude a cause of action for contract as well); *see also Marine Midland Bank v Jerry Hamam, Inc.*, 96 AD2d 1137, 1138 (4th Dept 1983) (concluding that while the claim may be viewed as pleading a cause of action for conversion, it nonetheless alleges breaches of an agreement governing the relationship of the parties and therefore pleads a cause of action for breach of contract); *see also Western Elec. Co. v Brenner*, 41 NY2d 291, 294 (1977) (finding that it is clear that the controversy arises out of and relates to the contract which is the genesis of the relationship and the consequent duty . . . it is of no moment that the causes of action are framed in commercial tort.")

In resolving conflicts between the tort and contract limitations periods, the judiciary historically has looked toward the "essence of the action." However, in recent times, the Court of Appeals has recognized that different policy considerations are involved in actions for damages to property or pecuniary interests. *Baratta v Kozlowski*, 94 AD2d 454, 460 (2d Dept 1983); *see also Loenggard v Santa Fe Indus.*, 70 NY2d 262, 266 (1987) (explaining that the choice of the applicable Statute of Limitations depends on the substantive remedy which the plaintiff seeks). In *Sears, Roebuck v Enco Assoc.*, the court held that when

damage to property or pecuniary interests is involved, the six year statute governs regardless of how the theory of liability is described, as long as the asserted liability "had its genesis in the contractual relationship of the parties." 43 NY2d 389, 396 (1977); *see e.g. Steiner v Wenning,* 43 NY2d 831, 832 (1977) (noting that the complaint stated a good cause of action in contract and sought no greater recovery then would be allowed under the law of damages with respect to contract liability); *see also Video Corp. of Am. V Frederick Flatto Assoc.*, 58 NY2d 1026, 1028 (1983) (explaining that an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to pecuniary interests recoverable in a contract action is governed by the six-year contract Statute of Limitations).

The *Sears* court explained,

> "all obligations . . . whether verbalized as in tort . . . or as in contract . . . arose out of the contractual relationship between the parties – i.e., absent the contract between them, no services would have been performed and thus there would have been no claims. It should make no difference then how the asserted liability is classified or described . . . it suffices that all liability alleged in this complaint had its genesis in the contractual relationship of the parties." *Id.*

In sum, courts must look to the underlying claim and the "nature of the relief sought" to determine the applicable period of limitation. *Vigilant Ins. v Hous. Auth.*, 87 NY2d 36, 41 (1995). *See e.g. Baratta v Kozlowski*, 94 AD2d 454, 460 (2d Dept 1983) (holding that a cause of action for breach of fiduciary was not

barred because the asserted liability had its genesis in the contractual relationship of the parties). Notably, the six-year period has been applied where damages alone have been sought. *Frank Mgt. v Weber*, 145 Misc.2d 995, 999 (1989).

Here, the genesis of Plaintiff's claim is contractual. The lower court erred by not applying the six-year Statute of Limitations because the remedy sought is damages relating solely to the Plaintiff's pecuniary loss which arose out of the parties' contractual relationship. In its order, the lower court stated that

> . . . the defendants correctly note that the applicable period of limitation for each of the plaintiff's three causes of action, all which seek monetary relief, is three years . . . 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 . . . 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.

The lower court misconstrued the facts and law when it found that Plaintiff's three causes of action were subject to three year' limitations periods. The Complaint adequately sets forth allegations entitling Plaintiff to relief on a contract theory of recovery, a theory of recovery which more closely corresponds with the essence of the situation.

The gravamen of Plaintiff's action is that she is a 50/50 partner and entitled to an equal distribution of the Premises proceeds. The Complaint states that

Horseblock is a partnership in which Maria and Graca were fifty (50) percent owner/partners, each entitled to equal shares profits. (A-100); (A-31). With this partnership agreement in mind, Graca states that Defendants "converted said rents and other proceeds . . . to the exclusion of Plaintiff's rights." (A-44). Moreover, Defendants were only unjustly enriched and in breach of fiduciary duties because of the contractual agreement. In this sense, Plaintiff's claims are substantially related to the subject matter of the substantive agreement and should be subject to the six-year Statute of Limitations, even though they may permit recovery in a tort action.

Given that Plaintiff is solely seeking pecuniary contract damages and her claims derive from Defendants' breaches of the partnership agreement governing the parties' relationship, any limitation to Plaintiff's potential relief should be subject to the six-year limitation period. Regardless of how Plaintiff described Defendants' liability in the Complaint, the asserted liability has its genesis in contract law and the six-year Statute of Limitations should govern. *Sears, Roebuck v Enco Assoc.*, 43 NY2d 389, 396 (1977).

This Court should reverse the lower court and find that the six-year limitations period applies to Plaintiff's claims. The breach of fiduciary obligation, unjust enrichment, and conversion claimed in this case had their genesis in the contractual relationship between the parties.

III. This Court should affirm the lower court's finding that Defendants did not establish their prima facie entitlement to unpaid rent monies.

Defendants failed to meet their burden of demonstrating the absence of any material issues of fact. On a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference. *Negri v Stop & Shop, Inc.*, 65 NY2d 625 (1985). Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Vega v Restani Constr. Corp.*, 965 NE2d 240 (2012).

Defendants seek partial summary judgment and compute unpaid rent at $700 from May, 2013, when Manuel Fernandes allegedly refused to pay rent until May, 2019, when the receiver took over, totaling $58,800. (A-26). Defendants seek this amount "without prejudice to the partnership's claim regarding the monthly rent increase and additional space rent increase as shown in the compilation which is reserved for trial." (A-26). However, Despite the above, the compilation Defendants rely on computes monthly rent at $826.42.

Defendants contend that they included five submissions of proof that should have warranted a finding of summary judgment: 1. a statement of material facts that they claim was not disputed by Counterclaim Defendants and should have been deemed admitted; 2. Augusto Fernandes's affidavit regarding unpaid rent; 3. a letter from Manuel Fernandes allegedly refusing to pay rent for 2013; 4. Manuel

Fernandes's deposition testimony stating that he stopped paying rent; and 5. the abovementioned accountant's compilation of rent payments.

In denying Defendants' request for summary judgment on their first counterclaim, the lower court concluded that, "the compilation on which [Defendants] 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." While Defendants argue that their remaining submissions warrant a finding of summary judgment in their favor, this argument is misguided.

Defendants' insufficient and contradictory attempts to resolve this matter piecemeal were properly rejected by the lower court. There are no funds due to Defendants at this time, if ever, since Defendants present contradictory allegations that do not consider the entire circumstances. While Defendants would like to separate and attain partial rent monies allegedly due, they present contradictory submissions as to the rent amount. Further, a review of the entire relationship between the parties is required to fully understand why these monies will likely be offset through funds owed to Counterclaim Defendants.

a. The lower court was not required to deem Defendants' statement of material facts admitted.

As a preliminary matter, Defendants' contention that the lower court was obliged to deem their statement of material facts admitted, pursuant to NYCRR 202.8-g(b), is in error—they attempt, incorrectly, to have their statements admitted on a strict interpretation of when rules and regulations are implemented. First, although a court had discretion under NYCRR 202.8-g(b) to deem material facts admitted, it is not required to do so. *Leverman v Instantwhip Foods, Inc.*, 207 AD3d 850, 850-1 (3d Dept 2022) (explaining that the regulation's use of mandatory language is not necessarily of paramount importance in determining whether the provision in question is in fact mandatory or permissive and the focus must instead be on the "intent of the provision, the policy to be promoted, and the results which would obtain if one conclusion were followed to the exclusion of another"); *see also On the Water Prods., LLC v Glynos*, 211 AD3d 1480 (4th Dept 2022) (concluding that although it would have been better practice for defendants to submit a paragraph by paragraph response to plaintiff's statement, the court abused its discretion in deeming the entire statement admitted). In sum, blind adherence to the procedure set forth in 22 NYCRR 202.8-g is not mandatory if the proof does not support granting summary judgment or the circumstances otherwise warrant a departure from that procedure. *Al Sari v Alishaev Bros., Inc.*, 121 AD3d 506, 506-7 (2014). Notably, the regulation was modified in July, 2022, making a

statement of material facts no longer mandatory and expressly providing the court discretion whether to deem a fact admitted.

This Court should not deem Defendants' statements of material fact to be admitted based on NYCRR 202.8-g(b). Defendants' submissions do not warrant blind adherence to the regulation, and the modification of the regulation—just months after the motion was brought—to expressly provide courts more discretion in deeming facts admitted calls for a departure from the outdated procedure. Defendants seek to have their statement of material facts admitted, namely:

> 26. The last rent payment made by Classic Concrete and Manuel was the $6,900 paid in January 2012
>
> 27. Neither Classic Concrete nor Manuel ever sent in the amount of $8,400 nor did they make an subsequent rent payments.
> (A-38)

However, given that Defendants submitted conflicting evidence as to rent amounts, deeming these statements admitted would run counter to the record. The compilation submitted by Defendants clearly evidences different monthly rental rates, as well as the payment of different rates. *Arguendo*, even if Counterclaim Defendants admitted to not paying rent in 2013, Defendants own submissions of proof establish that there is an issue of fact as to amount.

Further, the regulation was modified in July 2022, mere months after Defendants' motion was brought—the intent and policy was clearly to provide the court discretion regarding which facts to deem admitted; as the case law above,

Defendants' rigid interpretation is in error. Defendants' self-serving, contradictory statement of material facts should not be deemed admitted.

b. Defendants' conflicting submissions demonstrate a triable issue of fact as to the alleged rent amount due (if any).

Defendants own contradictory submissions involve credibility issues, and a choice between competing facts. Resolution of such choices is not for a court as a matter of law but rather for a trier of fact. *See e.g. Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004). The total rent amount Defendants seek is vague and unclear according to Defendants' unverified, uncertified compilation, warranting a trial on the issue.

Defendants remaining submissions of proof conflict with their own compilation and fail to establish that there is no triable issue of fact. Defendants use Augusto Fernandes's affidavit in an attempt to establish that the last rent payment was $6,900.00 ($575.00/monthly) and no further rent was paid. Defendants also submit a letter allegedly from Manuel Fernandes that he will not be sending in the check for 2013, and Manuel Fernandes deposition that he believed that he stopped paying rent in 2013 or 2014. Finally, Defendants submit an uncertified, unverified compilation that purports to establish that no payments were made past 2013. *If anything*, these submissions merely establish that rent was not paid past a certain point.

However, turning to the merits, the Supreme Court properly determined that Defendants failed to meet their initial burden of establishing that they are owed $700/monthly from 2013 until 2019. Defendants' own compilation shows a higher monthly rent due than that allegedly paid by Counterclaim Defendants, with a balance (right column of compilation) that never seems to be addressed. Further adding to the contradiction, while Defendants claim a monthly rent of $700 for the year 2013, the compilation inconsistently sets it at $862.42. Given this conflicting evidence, there is a dispute of material fact as to the monthly rate allegedly due and owing.

c. The Court can properly consider Counterclaim Defendants' offset defense raised in opposition, warranting a trial on the merits.

Even though Defendants failed to meet their burden and the Court need not address the sufficiency of the opposing papers, Counterclaim Defendants still raise a triable issue that warrants trial—namely, the amount of monies to be offset against Defendants' Counterclaim of rent monies due.

Merely because an affirmative defense was not raised in answer does not mean that such defense has necessarily been waived. *See Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, reargmt den 57 NY2d 674 (1982) (explaining, "when a plaintiff moves for summary judgment, it is proper for the court to look beyond the defendant's answer and deny summary judgment if facts are alleged in opposition to the motion, which, if true, constitute a meritorious

defense"); *see also Primiano Elec. Co. v HTS-NY, LLC*, 2018 NY Slip Op 31859 (acknowledging that defendants had not raised any claim or affirmative defense alleging offset, but entertaining the defense as the parties had addressed the offset defense on the merits); *see also Blue Wolf Capital Fund II, LP v American Stevedoring, Inc.* 2011 NY Slip Op 33872 (stating that it is appropriate to look beyond the answer and deny summary judgment based upon true facts constituting a meritorious defense alleged in opposition to the motion for summary judgment).

In this case, the Court may properly consider Counterclaim Defendants' defense of offset. Although Defendants argue that the defense of offset was only raised in response to Defendants' Summary Judgment Motion, this Court may properly look beyond Counterclaim Defendants' answer and deny summary judgment where facts pled constitute a meritorious defense. *see Primiano Elec. Co. v HTS-NY, LLC*, 2018 NY Slip Op 31859. In addition, Affirmative Defense 24 of Counterclaim Defendants' Answer to Defendants' Counterclaim reserved the right to rely on any additional affirmative defenses.

Indeed, Counterclaim Defendants address their meritorious defense of offset on the merits: the Opposition to Defendants' Motion for Summary Judgment sets forth the factual basis for Counterclaim Defendants' common law right to offset. Manuel Fernandes claims he is owed over $1,000,000 by Augusto Fernandes, inclusive of the many jobs he worked for him as well as partnership profits. (A-

155); (A- 156). Manuel Fernandes would render services and cited several jobs performed on Augusto Fernandes's behalf, where payment remains outstanding (A-156).

Furthermore, Counterclaim Defendants make a meritorious case that Manuel Fernandes and Augusto Fernandes are the de facto partners of the partnership (Augusto admitted in deposition that "[Graca and Maria] just got the names and the paper," "they make no decision. Always decision between the . . . brothers") and, as such, Manuel Fernandes should have received partnership distributions. It would be inequitable to allow Defendants to recover rental proceeds while denying Manuel partnership profits. At the very least, the issue warrants a trial.

CONCLUSION

For the aforementioned reasons, this Court should reverse the lower court's holding, in part, reinstating Graca's claims against Maria and limiting Graca's potential recovery to six years.

Respectfully submitted,

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