To be argued by:
Paula J. Warmuth
15 Minutes

New York Supreme Court

Appellate Division - Second Department

GRACA FERNANDES,

Plaintiff-Respondent-Appellant,

-against-

Docket No. 2023-01418

MARIA FERNANDES and AUGUSTO FERNANDES,

Defendants-Respondents,

-and-

HORSEBLOCK HOLDING ASSOC.,

Defendant-Appellant-Respondent,

MANUEL FERNANDES and CLASSIC CONCRETE ASSOCIATES, INC.,

Counterclaim Defendants-Respondents.

REPLY BRIEF OF DEFENDANT-APPELLANT-RESPONDENT, HORSEBLOCK HOLDING ASSOC. and DEFENDANTS-RESPONDENTS, MARIA FERNANDES and AUGUSTO FERNANDES

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On the Brief

Suffolk County Clerk's Index No. 620847/2017

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APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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Counter-Statement of Issues Presented for Review

1. Where one partner sues the other partner for damages for conversion, unjust enrichment and breach of fiduciary duty before there has been an accounting, should these causes of action be dismissed as premature? [The lower court answered this question in the affirmative.]

2. Where one partner sues the other partner, partnership and the managing agent for damages for

conversion, unjust enrichment and breach of fiduciary duty accruing over a ten year period, does the statute of limitations bar all but the claims accruing during the three years immediately preceding the commencement of the action? [The lower court answered this question in the affirmative.]

Concise Counter-Statement of Facts

This case is a family dispute. Augusto [Carlos] Fernandes and Manuel Fernandes are brothers (A35[1]). Maria Fernandes and Graca Fernandes are sisters (A35). Augusto is married to Maria (A35). Manuel is married to Graca (A35). Maria and Graca are 50/50 partners in Horseblock Holding Assoc. (A36). The partnership owns real property at 2074 Horseblock Road, Medford, NY (A12). Augusto was the managing agent of the property until a receiver was appointed (A36). Manuel is now the managing agent (A-18, ¶30).

Graca brought an action against Maria, Augusto and the partnership (A39-A49). The complaint alleges three causes

[1] Page references preceded by A refer to pages in the Joint Appendix.

of action against all three defendants. The first cause of action is for conversion of Maria's share of the rents and proceeds of the laundry facility between January 2007 to October 2017. In the alternative, the second cause of action alleges unjust enrichment. The third cause of action alleges breach of fiduciary duty by failing to provide Maria with her portion of the profits and allowing partnership funds to be spent on expenses that were not legitimate expenses. The wherefore clauses in the complaint seek monetary damages of $1,000,000.

Maria, Augusto and the partnership answered the complaint and alleged several affirmative defenses (A50-A62). Among those affirmative defenses were statute of limitations (second affirmative defense) and that this action is premature because a partner cannot sue another partner for damages until there has been an accounting (fifth affirmative defense).

Maria, Augusto and the partnership timely made a motion for partial summary judgment (A9-A10). The motion was supported by the affirmation of Paula J. Warmuth (A11-A29), the affidavit of Augusto Fernandes (A30-A34), and the statement of material facts (A35-A38). To the extent relevant to this appeal, the defendants sought to dismiss

the three causes of action of the complaint on various grounds including the fifth affirmative defense (action premature) and partial summary judgment dismissing those parts of the three causes of action which were barred by the statute of limitations (second affirmative defense).

Richard Stafford, Esq. submitted an affirmation in opposition (A117-A131). He annexed the deposition transcripts of Manuel, Maria and Augusto along with an old affidavit of Graca which had been submitted in support of an earlier motion for a receiver (A132-A779). The statement of material facts was not disputed.

Mr. Stafford argued that the Court should mandate a formal accounting; that information about the partnership's account could be obtained in disclosure; that Graca's tort claims sounded in breach of contract so they should be governed by the six year statute of limitations; and that Manuel should be entitled to offset the rent he owed against monies owed to him because the de facto partners of the partnership were really Manuel and Augusto, and Manuel was entitled to partnership distributions (A128).

Mrs. Warmuth submitted an affirmation in reply (A780-A788). Mrs. Warmuth argued that there was no basis to mandate a formal accounting. Graca had filed a note of

issue with a jury demand. Graca was seeking damages. If she had sought an equitable accounting, she would not be entitled to a jury. She had made her election.

Mrs. Warmuth pointed out that Graca had also raised the same defense in her answer that a partner cannot sue another partner for damages until there has been an accounting (A52). There was no surprise that the damages sought by Graca were premature. Graca had raised the same defense.

Mrs. Warmuth pointed out that this case was certified for trial and information about the partnership's account could not be obtained in disclosure. Disclosure was complete. It was too late to recast this action.

Mrs. Warmuth pointed out that the tort claims could not be recast as breach of contract. The only parties to the partnership were Maria and Graca. There could not be breach of contract claims against Augusto or the partnership. They were not parties to the partnership agreement.

In addition, if the tort claims with a three year statute of limitations were recast as breach of contract or accounting, they would be governed by the six year statute of limitations to the prejudice of the defendants.

Finally, Mrs. Warmuth pointed out that Manuel did not raise offset as a defense in his answer (A784, A65-A67) nor did Manuel submit an affidavit in support of his alleged offset claim in opposition to the motion for summary judgment.

By order dated December 23, 2022, the Court granted summary judgment dismissing the three causes of action against Maria (A6-A8). The Court stated:

> 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]).

The Court also granted partial summary judgment limiting the three causes of action against Augusto and the partnership to the three years immediately preceding the commencement of the action (A6-A8). The Court stated:

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 NYS3d 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 (*Greenberg v Wiese,* 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.)*.

Maria appealed by notice of appeal dated January 20, 2023 (A4-A5).

POINT I

WHERE ONE PARTNER SUES THE OTHER PARTNER FOR DAMAGES FOR CONVERSION, UNJUST ENRICHMENT AND BREACH OF FIDUCIARY DUTY BEFORE THERE HAS BEEN AN ACCOUNTING, THESE CAUSES OF ACTION SHOULD BE DISMISSED AS PREMATURE.

Graca is suing her partner, Maria, for monetary damages. There has never been an accounting (A30, ¶10). The defendants raised as their fifth affirmative defense that a partner cannot sue another partner for damages until there has been an accounting and this action is premature (A52, ¶¶12-13).

It is well settled that a partner cannot sue another partner unless there has been an accounting. In *Miske v Berdon*, 189 AD2d 594 (1st Dept. 1993), the Court stated:

> "[i]t is well established 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.)" (*Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489, 490.)

In *1056 Sherman Ave. Assoc. v Guyco Constr. Corp.*, 261 AD2d 519 (2nd Dept. 1999), this Court held that this is rule is well established, This Court stated:

> It is precisely this kind of controversy that is aptly governed by the well established rule 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 concerns a partnership transaction which may be determined without an examination of partnership accounts (*see, Miske v Berdon,* 189 AD2d 594; *Goodwin v MAC Resources,* 149 AD2d 666; *Kriegsman v Kraus, Ostreicher & Co.,* 126 AD2d 489; *Munyan v Curtis Mallet-Prevost, Colt & Mosle,* 99 AD2d 716). Accordingly, insofar as the parties have yet to account, their various claims for damages may not be decided.

This well-established rule has been applied to both conversion and breach of fiduciary duty cases. In *Kriegsman v Kraus, Ostreicher & Co.,* 126 AD2d 489 (1st Dept. 1987), the Court held that the charges must be resolved in an action for an accounting. The Court stated:

> It is well established 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.) In the instant situation, respondent contends that the financial disputes between him and petitioner were caused by the latter's fraud, conversion, embezzlement, breach of the partnership agreement and breach of fiduciary duty.

Sasson v Lichtman, 276 AD 932 (2nd Dept 1950), is similar to the case at bar. In *Sasson,* the was a cause of action by one partner against another partner to recover his claimed share of money allegedly fraudulently withdrawn by means of false invoices over a period of time. This Court reversed the order denying the appellant's motion to

dismiss for insufficiency and granted the motion. This Court held:

> An action at law may not be maintained by one partner against another for any claim arising from the partnership business until there has been a full accounting of such business, a balance struck and an express agreement to pay. (*Belanger v. Dana*, 52 Hun 39, 42; *Arnold v. Arnold*, 90 N.Y. 580, 583; *Dalury v. Rezinas*, 183 App. Div. 456, 460, affd. 229 N.Y. 513.)

The defendants have a compilation prepared by the parties' accountant and given to Augusto (A97-A98). Graca does not agree with this compilation. Graca disputes the amount of the monthly rent, the property rented, the bills that were paid, the management fees paid to Augusto, the distributions to partners, etc. There has not been an accounting where there has been an examination of the partnership accounts and the resolution of all these issues. Until such accounting, the action by Graca is premature.

The three causes of action for monetary damages against the defendants were properly dismissed.

Graca argues that because the partnership is at an end, she should be entitled to have her claims heard under a single action. The partnership is not at an end. There is no such claim in the pleadings, the depositions, the

affidavits, or the motions. This claim is raised for the first time on appeal. This statement is dehors the record.

In *Matter of Robert P.,* 16 AD3d 512 (2nd Dept. 2005), this Court stated that matter outside the record is not properly before the Court. This Court stated:

> The appellant's claim of ineffective assistance of counsel involves matter which is dehors the record and not properly before us on direct appeal (*see Matter of Mikhail V., supra; cf. People v Zimmerman,* 309 AD2d 824; *People v Boyd,* 244 AD2d 497).

In *Galassi v. County of Nassau,* 6 Misc. 3d 136(A) (App Term 2005), the Appellate Term explained that not only are matters dehors the record not to be considered, but also argument based upon them. The Court stated:

> "In making our determination, we have not considered matter[s] in the plaintiffs' brief which [are] dehors the record, nor their argument based upon [them]" (*Ceglia v Marine Midland Bank,* 296 AD2d 473, 474 [2002]; *see also Chimarios v Duhl,* 152 ad2d 508, 509 [1989]; Katz v Rodolfo Valentin Salon, Spa & Hairpieces, 3 Misc 3d 126[A], 2004 NY Slip Op 50312[U] [App Term, 9th & 10th Jud Dists]).

As explained in *Galassi, supra,* the argument based on this false statement that the partnership is at its end, should not be considered.

In any event, that statement is false and in fact the partnership continues. There have been no proceedings to end this partnership. Since 2017, when this action was

commended, the partnership has filed income tax returns, paid real estate taxes, collected rent, litigated with the Town to resolve the condemnation issues, filed Town of Brookhaven biennial commercial property registrations, etc. Manuel is the new managing agent (A18, ¶30).

Graca argues that all claims have accrued and are in front of the Court. That is not true. Graca is suing for damages for events leading up to the filing of the summons and complaint in 2017. Since then, the partnership has continued. Monies have been collected and/or disbursed by Horseblock, Augusto, the Receiver, Manuel, Mr. Stafford and Mrs. Warmuth. The Court can take judicial notice of the so-ordered stipulation dated December 23, 2020 at document #38 on the NYSCEF system in the lower Court filed under Index No. 614533/2017 (a case consolidated for disclosure with this case) which references various disbursements. When the partnership is at an end, the actions of all of these people will be the subject of the accounting. It is only then that the balance can be struck (*see Sasson, supra*).

Graca has filed a note of issue with a jury demand (A73-A75). If she had actually brought an equitable cause

of action for an accounting, she would not have been entitled to a jury. She made her election to seek damages.

This case has already been certified for trial. Disclosure is complete. If this were actually an action for an accounting, the defendants would have deposed the accountant, Mr. Desmond, and questioned the witnesses about accounting issues (A782). It is too late to recast this action.

The lower Court properly dismissed the claims against Maria.

POINT II

WHERE ONE PARTNER SUES THE OTHER PARTNER, THE PARTNERSHIP AND THE MANAGING AGENT FOR DAMAGES FOR CONVERSION, UNJUST ENRICHMENT AND BREACH OF FIDUCIARY DUTY ACCRUING OVER A TEN YEAR PERIOD, THE STATUTE OF LIMITATIONS BARS ALL BUT THE CLAIMS ACCRUING DURING THE THREE YEARS IMMEDIATELY PRECEDING THE COMMENCEMENT OF THE ACTION.

The defendants raise statute of limitations as their second affirmative defense (A51, ¶9).

CPLR §214 provides that the following actions must be commenced within three years. CPLR §214(3) applies to "an action to recover a chattel or damages for the taking or detaining of a chattel." CPLR §214(4) applies to "an action to recover damages for an injury to property except as provided in section 214-c." These are the statutes which apply to this case.

The first cause of action alleges that the defendants withheld rent between January 2007 to October 2017 and converted said rents (A44, ¶¶16, 17).

The second cause of action alleges that during the period of January 2007 through present (complaint filed October 26, 2017), the defendants engaged in a continuing course of conduct in which they intentionally and wrongfully secreted/misappropriated rents and were unjustly enriched (A45, ¶24).

The third cause of action alleges that during the period of January 2007 through present the defendants breached their fiduciary duties (A46, ¶31).

All three of the causes of action allege claims that go back to January 2007. The statute of limitations for all three claims – conversion, unjust enrichment and breach of fiduciary duty – is only three years. The statute of limitations bars all but the claims accruing during the three years immediately preceding the commencement of the action.

The first cause of action is for conversion. The statute of limitations for conversion is three years. This is confirmed in *Vigilant Ins. Co. of Am. v Housing Auth. of the City of El Paso, Tex.*, 87 NY2d 36 (1995), where the Court of Appeals held:

> Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Employers' Fire Ins. Co. v Cotten*, 245 N.Y. 102, 105; *Industrial & Gen. Trust v Tod*, 170 N.Y. 233, 245). For Statute of Limitations purposes, an action for conversion as well as an action for damages for the taking of a chattel are subject to a three-year limitation period (*see*, CPLR 214 [3]).

In *Delco Electrical Corp. v Wells Fargo Capital Finance, Inc.*, 265 F.Supp.3d 213 (E.D.N.Y. 2017), payments on a public project in excess of the amounts owed to the

subcontractor were put in a Lock Box Account and became Lien Law trust funds. The funds were transferred to Wells Fargo. The plaintiffs sued for conversion. The conversion cause of action was allowed and the three year statute of limitations was applied, relying on the Court of Appeals holding in *Vigilant*. The Court stated:

> Under New York law, a conversion claim is governed by a three-year statute of limitations, running from the date of the conversion. *Vigilant Ins. Co. of Am. v. Housing Auth. of El Paso, TX,* 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342, 660 N.E.2d 1121 (1995).

In *Pentacon, LLC v 422 Knickerbocker, LLC,* 165 AD3d 829 (2nd Dept. 2018), the owner of real property sued the tenant for conversion of air rights. The three year statute of limitations was applied. This Court stated:

> The defendants demonstrated, prima facie, that the cause of action alleging conversion is time-barred (*see* CPLR 214 [3]; *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]; *Matter of Imperato,* 149 AD3d 831*831 1072, 1075 [2017]; *Matter of Chung Li,* 95 AD3d 881, 882 [2012]). In opposition, the plaintiff failed to raise a triable issue of fact.

Graca also failed to raise a triable issue of fact on the motion for summary judgment.

The second cause of action is for unjust enrichment. The plaintiff seeks monetary relief. The statute of limitations for unjust enrichment where monetary relief is

sought is three years. This is confirmed in *Ingrami v Rovner,* 45 AD3d 806 (2nd Dept. 2007), where the Appellate Division held:

> Contrary to the plaintiff's contention, the three-year statute of limitations of CPLR 214 (3) governs here, since the plaintiff is seeking monetary, as opposed to equitable, relief (*see Lambert v Sklar,* 30 AD3d 564 [2006]; *cf. Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.,* 192 AD2d 501, 503 [1993]).

The third cause of action is for breach of fiduciary duties. The plaintiff seeks monetary relief. The statute of limitations for breach of fiduciary duties where monetary relief is sought is three years. This is confirmed in *IDT Corp. v Morgan Stanley Dean Witter & Co.,* 12 NY3d 132 (2009), where the Court of Appeals held:

> New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks (*Loengard v Santa Fe Indus.,* 70 NY2d 262, 266 [1987]). Where the remedy sought is purely monetary in nature, courts construe the suit as alleging "injury to property" within the meaning of CPLR 214 (4), which has a three-year limitations period (*see e.g. Yatter v Morris Agency,* 256 AD2d 260, 261 [1st Dept 1998]).

Graca's three causes of action allege wrongful conduct since January 2007. The complaint was not brought until October 2017. Partial summary judgment was correctly granted on the defendants' second affirmative defense

limiting plaintiff's potential recovery to three years immediately preceding the commencement of the action based on the statute of limitations.

Graca argues that because the genesis of her claims are contractual, the six year statute of limitations should apply. All of the ten cases cited by Graca discussed below are distinguishable.

In ***Baratta v Kozlowski,*** 94 AD2d 454 (2nd Dept. 1983), the "primary focus of these appeals is application of the Statute of Limitations when the same conduct or transaction produces separate causes of action sounding in tort and in contract." There were conversion and breach of contract claims. There was a challenge to timeliness since the essence of the action was tort and more than three years had elapsed. This Court held that the contract statute of limitations applied This Court stated:

> Since the claimed damage is to property or pecuniary interests and the asserted liability not only relates in part to an alleged failure to use due care, but also "had its genesis in the contractual relationship of the parties" (***Sears, Roebuck & Co. v Enco Assoc.***, ***supra***, p 396), application of the six-year Statute of Limitations to the claims against the Bank is mandated by ***Sears*** and ***Video Corp.*** (***supra***). Thus, the complaint against the Bank is not barred by the Statute of Limitations.

Unlike *Baratta,* in the case at bar, there were only three tort claims. There was no breach of contract claim.

In *Rodriguez v Central Parking Sys, of NY, Inc.,* 10 Misc. 3d 435 (Civil Ct. NY County 2005), there was a cause of action for breach of a bailment contract. The defendants claimed that this should be governed by the three year negligence statute of limitations. Since only contract damages were sought and there was a disclaimer of any theory of negligence, the Court held that the six year statute of limitations applied.

Unlike *Rodriguez,* in the case at bar, there was no breach of contract claim.

Rodriguez v Central Parking Sys. of NY, Inc., 17 Misc. 3d 108 (App Term, 1st Dept. 2007), affirmed the lower Court. The Court held:

> An action for failure to exercise due care in the performance of a contract, where the plaintiff seeks damages for injury to property or pecuniary interests, is governed by the six-year contract statute of limitations, provided that the plaintiff is willing to limit his or her recovery to contractual damages (*see Santulli v Englert, Reilly & McHugh,* 78 NY2d 700, 707 [1992]; *Video Corp. of Am. v Frederick Flatto Assoc.,* 58 NY2d 1026, 1028 [1983]; *Baratta v Kozlowski,* 94 AD2d 454, 463 [1983]; *see also* Weinstein-Korn-Miller, NY Civ Prac ¶ 214.11). In such an action, "the general tendency has been to allow the plaintiff to elect to sue in contract or tort, as he sees fit" (*Matter of Paver & Wildfoerster [Catholic High School Assn.],* 38 NY2d 669, 675 [1976]). If the claim is "substantially

> related to the subject matter of the substantive agreement ... it will not be barred merely because it also would permit recovery in a tort action at law" (*id.* at 676).

In the case at bar, Graca did not seek to limit her recovery to contractual damages. She elected, as she saw fit, to bring three tort claims instead.

In ***Frank Mgt., Inc. v Weber,*** 145 Misc. 2d 995 (Sup. Ct. NY Cty 1989), the defendant alleged counterclaims for breach of contract and several for breach of fiduciary duties. The plaintiff moved to dismiss on statute of limitations grounds. The Court held that the breach of contract limitation period applied. The Court stated:

> Finally, the mere fact that a breach of fiduciary duty is actionable in tort (***Apple Records v Capitol Records***, 137 AD2d 50, 55-57 [1st Dept 1988]) does not preclude a cause of action in contract as well and "if alternative theories can arguably support a claim, and any one of them carries a limitation period which would keep the claim alive, the claim should be sustained as timely" (***Matter of Allen [First Wallstreet Settlement Corp.]***, 130 AD2d 824, 826 [3d Dept 1987]).

Unlike ***Frank Management,*** in the case at bar, there was no breach of contract claim.

Marine Midland Bank, N.A. v Jerry Haman, Inc., 96 AD2d 1137 (4th Dept. 1983), was a foreclosure action. There was a counterclaim for oppressive and unconscionable course of conduct and a counterclaim for violation of agreements. On

summary judgment, the counterclaim was dismissed as time-barred. This was reversed on appeal. The Court held:

> Even though the counterclaim may incidentally sound in tort, it pleads a cause of action for breach of contract which is governed by the six-year Statute of Limitations of CPLR 213 (see ***Western Elec. Co. v Brenner***, ***supra***; see, also, ***Erbe v Lincoln Rochester Trust Co.***, 3 N.Y.2d 321).

Unlike ***Marine Midland Bank,*** in the case at bar, there was no breach of contract claim.

Western Elec. Co. v Brenner, 41 NY2d 291 (1977), was an action by an employer against an employee for money received in violation of his duty of loyalty. The complaint alleged two causes of action. One was for the breach of the duties of faithfulness and trust. The other was for breach of his contract of employment. The issue posed was whether the three year (tort) or six year (contract) statute of limitations applied. The lower Court found that the contract limitation applied and this was affirmed by the Appellate Division. The question to the Court of Appeals was whether the order of the Supreme Court, as affirmed by the Appellate Division, was properly made? The Court of Appeal answered "yes." The Court stated:

> The answer to the question posited is, in a word, yes. Contract, not tort, forms the basis of plaintiff's causes of action.

Unlike ***Western Electric,*** in the case at bar, there was no breach of contract claim.

In ***Loengard v Santa Fe Indus., Inc.,*** 70 NY2d 262 (1987), the plaintiffs brought an action for fraud under the Martin Act and breach of fiduciary duty. The Martin Act claim was dismissed. The breach of fiduciary duty claim sought equitable relief - the restoration of the minority to their status as full stockholders. Based on the fact that the relief sought was equitable, the six year statute of limitations in CPLR 213(1) was held to apply. The Court stated:

> We note that the relief demanded in the complaint here — the restoration of the minority to their status as full stockholders, or, alternatively, a determination of the fair value of their shares and an order directing defendants to pay that value for them — is equitable in nature and that a legal remedy would not be adequate.
>
> Thus, we conclude that the claim based on the breach of fiduciary duty described in the second certified question is an equitable claim governed by the six-year Statute of Limitations (CPLR 213 [1]; ***see***, ***Scheuer v Scheuer***, 308 N.Y. 447; ***Augustine v Szwed***, 77 AD2d 298 [Simons, J.]; ***Dolmetta v Uintah Natl. Corp.***, 712 F.2d 15 [2d Cir]; 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 213.01, at 2-129; Siegel, NY Prac § 36 [1978]).

Unlike *Loengard,* in the case at bar, Graca does not seek equitable relief. She seeks money damages. She has demanded a jury trial.

In *Sears, Roebuck & Co v Enco Assoc.,* 43 NY2d 389 (1977), the plaintiff brought three causes of action. The first was negligence. The second was breach of warranty. The third was breach of contract. The Court recognized that different policy considerations were involved and often different results reached in actions for damages to property or pecuniary interest only. The Court stated:

> As we observed in *Paver*, the choice of applicable Statute of Limitations is properly related to the remedy rather than to the theory of liability. "[T]he general principle [is] that time limitations depend upon, and are confined to, the form of the remedy" (38 N.Y.2d 669, 672). We took note, however, of the cases in our courts in which the choice of Statute of Limitations had turned on what was termed the "reality" or the "essence" of the particular theory of liability on which the plaintiff relied. We observed that "many of these cases were decided in the context of causes of action to recover damages for direct or underlying personal injury", and recognized that different policy considerations were involved and often different results reached in actions for damages to property or pecuniary interest only (38 N.Y.2d 669, 675).

The Court held that that "claims by owners against architects arising out of the performance or nonperformance of obligations under contracts between them are governed by

the six-year contract Statute of Limitations (CPLR 213, subd 2)."

Unlike *Sears*, in the case at bar, there was no breach of contract claim.

In *Steiner v Wenning* 43 NY2d 831 (1977), it was alleged that the architect had negligently and carelessly performed his obligations under the contract. The defendant moved to dismiss on statute of limitations grounds, claiming that the three year statute of limitations applied. The Court of Appeals denied the motion to dismiss. The Court found that the complaint stated a good cause of action in contract and held that the complaint should not have been dismissed. The Court stated:

> The complaint, however, without amendment stated a good cause of action in contract and sought no greater recovery than would be allowed under the law of damages with respect to contract liability. It was accordingly error to apply the three-year Statute of Limitations and the complaint should not have been dismissed (*Sears, Roebuck & Co. v Enco Assoc.*, 43 N.Y.2d 389 [decided herewith]).

Unlike *Steiner*, in the case at bar, there was no breach of contract claim.

In *Video Corp. of Am. v Flatto Assoc.*, 85 AD2d 448 (1st Dept. 1982), the plaintiff sued an insurance broker

for negligence and breach of contract for failing to procure insurance coverage. In the Appellate Division, the complaint was dismissed on statute of limitations grounds, reasoning that it was essentially an action for malpractice (three year statute of limitations). In dissent, Juice Sandler held that the contract statute of limitations applied (six year statute of limitations).

On appeal, ***Video Corp. of Am. v Frederick Flatto Assoc.,*** 58 NY2d 1026 (1983), the Court of Appeals affirmed based on the reasoning in the Appellate Division dissent. The Court held as follows:

> Justice SANDLER'S analysis (85 AD2d 448, 457) of our holding in ***Sears, Roebuck & Co. v Enco Assoc.*** (43 N.Y.2d 389; see, also, ***Steiner v Wenning***, 43 N.Y.2d 831; ***Matter of Paver & Wildfoerster [Catholic High School Assn.]***, 38 N.Y.2d 669) is correct: an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to property or pecuniary interests recoverable in a contract action is governed by the six-year contract Statute of Limitations (CPLR 213, subd 2).

Unlike ***Video,*** in the case at bar, there was no breach of contract claim.

In ***Vigilant Ins. Co. of Am. v Housing Auth. of the City of El Paso, Tex.,*** 87 NY2d 36 (1995), ***supra,*** there were three causes of action for declaratory judgment, conversion and breach of bond obligation. The issue was

the statute of limitations on the declaratory judgment cause of action. With respect to the causes of action for conversion and breach of contract, the Court held that "these two causes of action are barred by pertinent Statutes of Limitations." The Court then went on to find that the three year limitation period applied for conversion. The Court stated:

> For Statute of Limitations purposes, an action for conversion as well as an action for damages for the taking of a chattel are subject to a three-year limitation period (*see*, CPLR 214 [3]).

In *Vigilant,* the Court of Appeal applied the three year statute of limitations to a conversion cause of action although the gravamen of claim was the allegation that the defendants confiscated bond coupons and refused to redeem the coupons and bonds. The genesis of the claim was based on a contract yet the Court of Appeals used the conversion statute of limitations.

The lower Court relied upon *Vigilant* in holding that the three year limitation period applied in the case at bar.

These cases cited by Graca hold that when there are tort and contract causes of action arising together, the longer contract statute of limitation applies. This is

inapplicable to the case at bar where there is no contract claim. Nor could there be a contract claim involving Augusto and the partnership. They are not parties to the contract. There are three tort claims which each have their own statute of limitations. The lower Court properly held that the statute of limitations bars all but the claims accruing during the three years immediately preceding the commencement of the action.

POINT III

REPLY ON APPEAL BY HORSEBLOCK HOLDING ASSOC. FOR SUMMARY JUDGMENT FOR UNPAID RENT AGAINST MANUEL AND CLASSIC.

The partnership has appealed the denial of its motion for summary judgment against Manuel and Classic Concrete for unpaid rent. That appeal has been fully briefed in the brief of the defendant-appellant-respondent, Horseblock Holding Assoc. The partnership raised two points in its brief.

The first point was that the partnership established its prima facie entitlement to unpaid rent as a matter of law on summary judgment by tendering admissible evidence and admissions. The partnership relied upon the undisputed statement of material facts, the factual affidavit of the managing agent, an admission in a letter from Manuel, bank statements, an admission in Manuel's deposition testimony, and a compilation from the accountant.

The second point was that the counterclaim defendants failed in their burden in opposing summary judgment by failing to submit an affidavit in opposition, failing to object to the statement of material facts, relying upon a non-probative attorney's affirmation, and relying upon

unsubstantiated and unpled claims raised in deposition testimony.

The counterclaim defendants, Manuel and Classic Concrete, have submitted their respondents brief in response to the partnership's appeal. This point is the partnership's reply to the respondents brief.

Manuel and Classic Concrete argue that because the compilation shows higher monthly rent, this is contradictory to the monthly rent of $700 sought by the partnership on the motion for summary judgment and that this contradiction creates an issue of fact. Mrs. Warmuth explained that for the purpose of the motion only, the unpaid rent was being computed at $700/month from May 2013 to the date the receiver took over in May 2019 and that this was 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 (A26). Augusto stated in his affidavit that for the purpose of the motion and without prejudice, the partnership was only seeking unpaid rent for the one storage yard and reserved its claim for the unpaid rent for additional rent and space to trial (A31-A32).

The partnership did not rely on the compilation to determine the amount of rent sought on summary judgment. Instead, the unpaid rent was computed at $700 a month because 1) Manuel admitted to that amount in his deposition (A194); 2) when Classic Concrete was asked in interrogatory 6 about leasing all or part of the storage yards, the response was: "Yes, Classic Concrete leased part of the yard for $700 per month" (A110); and 3) in Manuel's letter dated April 9, 2013, Manuel stated he had a "check written for $8400" [$8,400 ÷ 12 = $700] but "will not be sending in the check for 2013" (A108). There was ample uncontested evidence that Manuel and Classic Concrete admitted to at least $700 per month rent.

The compilation was used to show that the last rent payment was the $6,900 paid in 2012. This was corroborated by the sworn statement of Augusto, the managing agent: "The last payment by Classic Concrete and Manuel Fernandes was the $6,900 paid in January 2012 for the May 2012-April 2013 rent" (A32) and the letter for Manuel that he "will not be sending in the check for 2013" (A108). This was not disputed. Manuel did not submit an affidavit in opposition.

Manuel and Classic Concrete argue that blind reliance in the undisputed statement of material facts in not mandatory if the proof does not support granting summary judgment. The two paragraphs objected to are 1) that the last rent payment was the $6,900 paid in January 2012 and 2) neither Classic Concrete nor Manuel ever make any subsequent rent payments. As show above, there was proof which supported these two statements. Among other things, Augusto, the managing agent, submitted his sworn testimony on these facts in his affidavit. His affidavit was not rebutted. There was also Manuel's letter stating he was not sending the 2013 rent (A108). The proof supported the statement of material facts.

Manuel and Classic Concrete argue that the Court can properly consider their "offset defense" because Manuel and Augusto are de-facto partners. There is no offset defense. While Manuel and Classic Concrete raised many defenses in his answer (A50-A62), offset was not one of them. This offset defense was raised by his attorney for the first time in opposition to summary judgment. Manuel did not even submit an affidavit in support of his new offset defense.

Even if there were such a defense, the defense has no merit. Manuel testified at his deposition that the alleged one million dollar debt he claimed was owed to him by Augusto was actually based on $320,000 owed from 27-28 years ago by F&G Concrete to Europa Concrete, a corporation owned by Manuel and Augusto's wife Maria (A121, A147-A152). In any event, the rent is owed to the partnership, not Augusto. Manuel's alleged claim against Augusto is not a claim versus the partnership's rent claim.

Summary judgment should have been granted in favor of the partnership for the rent due from Manuel and Classic Concrete in the amount of $58,500.

CONCLUSION

The order appealed from which dismissed the action against Maria and which limited the claims against Augusto and Horseblock Holding Assoc. to the three years immediately preceding the commencement of the action should be affirmed with costs and disbursements.

The order which denied summary judgment to Horseblock Holding Assoc. against Manuel and Classic Concrete for the unpaid rent in the amount $58,800 with interest should be reversed and summary judgment granted with costs and disbursements.

Dated: September 11, 2023

Respectfully submitted,

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