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.

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Respondent-Appellant, Graca Fernandes, and Counterclaim Defendants-Respondents, Manuel Fernandes and Classic Concrete Associates, Inc., respectfully submit this reply brief in support of their appeal from the Order of the Supreme Court, Suffolk County (Hon. Reilly, D.), entered on December 23, 2022, which granted Defendants' motion, in part, dismissing Maria Fernandes from the Complaint and limiting Plaintiff's potential recovery to three years, and in opposition to the brief of Defendants-Respondents' and Defendants-Appellants-Respondents'.

ARGUMENT

I. THIS CASE IS AN EXCEPTION TO THE GENERAL RULE REQUIRING AN ACCOUNTING - ALL CLAIMS SHOULD BE HEARD IN A SINGLE ACTION.

The interests of justice and judicial economy would best be served by reinstating the Complaint against Maria Fernandes and hearing the parties' claims together. While Defendants cite the general rule that a partner cannot sue another partner unless here has been an accounting, if this general rule were followed in this case it would merely prolong the appeal and accomplish little else. Defendants also contend that the partnership is not at an end and thus not all claims have accrued. However, considering the accounting issue at this time would finally conclude this protracted litigation and would not merely accommodate the litigants

but relieve the courts of an unnecessary burden and give impetus to the policy favoring speedy resolution of controversies. See generally *Crawford v Merrill, Lynch, Pierce,* 35 NY2d 291, 299 (1974).

Adoption of the general rule was occasioned by 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). However, there is an exception to this rule when its underlying purpose will not be served. *Id*. In this case, there would be no piecemeal adjustments because Plaintiff is merely seeking partnership funds from a specific, defined period and Defendant Augusto Fernandes, the managing agent during this period, is no longer the managing agent.

In fact, it would be inappropriate to hear this case piecemeal because the above interests will best be served by resolution of all the issues raised in this litigation as a single action. For example, if an accounting is sought, any amounts due Plaintiff can be offset by the damages, if any, awarded to Defendants. The issues that need to be resolved in Plaintiff's and Defendants' and Counterclaim Defendants' claims are so intertwined and related that one trial of all the causes of action is both desirable and necessary. Furthermore, all necessary parties to an action for an accounting are before the Court.

Finally, Defendants argue that had Plaintiff brought an action for an accounting she would not have been entitled to a jury. However, even if Plaintiff was not entitled to a jury on her equitable defenses, the claims are so intertwined with the legal claims as to make one trial of all the causes of action appropriate, providing that the jury serves exclusively in an advisory capacity as to those issues of fact which relate solely to the equitable claims. *See Hudson View Assocs. v Gooden*, 222 AD2d 163, 169 (1st Dept 1996). Therefore, all legal claims, including Plaintiff's claims against Defendant Maria Fernandes, should be tried together and this Court should reinstate the Complaint against her.

II. THIS COURT SHOULD APPLY THE SIX YEAR STATUTE OF LIMITATIONS TO PLAINTIFF'S CLAIMS BECAUSE THEY ARISE OUT OF THE PARTIES' CONTRACTUAL RELATIONSHIP.

A reading of Plaintiff's three causes of actions reveals that the essence of her claims is a violation of her contractual partnership rights. In other words, Defendants breached the parties' partnership agreement only in that they violated Plaintiff's rights guaranteed in the contract.

A breach of contract cause of action requires allegations of an agreement, performance by one party, failure to perform by the other party and resulting damages. *Ginellen Racing, Inc. v Szarmach*, 2019 NY Slip Op 50112 (affording the complaint a liberal construction and accepting the facts alleged therein as true, and finding plaintiff sufficiently pled a breach of the Partnership Agreement).

Defendants attempt to distinguish Plaintiff's case law on the basis that Plaintiff did not bring a breach of contract claim. However, to reiterate, in applying a statute of limitations, courts "look for the reality, and the essence of the action and not its name." *Morrison v Nat'l Broad. Co.*, 19 NY2d 453 (1967); *see also Western Elec. Co. v Brenner*, 41 NY2d 291, 293 (1977) (reciting that the rule in New York is that essence or gravamen of the cause of action determines the applicable Statute of Limitations); see *also Goldberg v Sitomer & Porges*, 97 AD2d 114, 116 (1st Dept 1983) (citing the previously mentioned Court of Appeals holding and noting that "it does not matter that plaintiff chose to call his claims "tort of injurious involvement," "fraud," "breach of warranty," and "fraudulent inducement"); *see also Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 (1937) (concluding that in applying a Statute of Limitations, this court declared some years ago, "We look for the reality, and the essence of the action and not its mere name").

In this case, the essence of Plaintiff's action is breach of contract and this Court should conclude as such. Defendants' argument that Plaintiff did not assert a breach of contract claim and therefore the six year limitations period should not apply is in error because courts look to the "essence" or "gravamen" of the claim—not the claim itself. Plaintiff alleges that, pursuant to the Partnership Agreement, plaintiff was due 50% of the profits of the Partnership and Defendants refused to

pay these monies due. Plaintiff further alleges that over an approximate ten year period, she has been damaged by Defendants' actions in the amount of $1,000,000. Providing Plaintiff's Complaint a liberal construction and accepting her allegations as true, the essence of the Complaint demonstrates a well pleaded breach of contract claim.

Further, it is no merit that Plaintiff did not bring a breach of contract claim; Plaintiff's allegations, which sound in breach of contract, are not merely incidental to her claims but arise strictly out of the parties' contractual relationship. Defendants converted partnership funds and breached their fiduciary duties arising out of the partnership contract. The applicable limitations period for Plaintiff's claims should be six years.

In an attempt to distinguish this case from *Rodriguez v Cent. Parking Sys*, Defendants state that Plaintiff did not seek to limit recovery to contractual damages in that she brought three tort claims. 10 Misc.3d 435 (2005). However Plaintiff did seek to limit her recovery to damages arising from the contract. On each claim, Plaintiff sought pecuniary damages due to Defendants' breach of the partnership agreement. Notwithstanding that Plaintiff brought an unjust enrichment claim, the claim sounds in contract. And while "under New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment"

the six year limitations period of CPLR 213(1) or (2) generally are applied . . . ." *The Krog Corp. v The Vanner Group, Inc.*, 2016 NY Slip Op 51288.

Finally, Defendants claim that Augusto and the Partnership were not parties to the contract, however, Plaintiff has already alleged that Augusto was a de facto partner on the basis that he controlled the partnership monies and formalities. Because the liability alleged in the complaint has its genesis in the contractual relationship between the parties, this Court should find that the six year Statute of Limitations is applicable.

CONCLUSION

For the foregoing reasons, the Order appealed from should be reversed, Defendants' Motion denied in full, and Plaintiff's Complaint against Defendant Maria Fernandes reinstated.

Dated: September 20, 2023
Bohemia, NY

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