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(Time requested: 20 minutes)

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Appellate Division, Fourth Department Docket No. CA 19-01672
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Court of Appeals

of the

State of New York

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION, and BATAVIA INVESTORS, LTD.

Plaintiffs-Respondents,

– against –

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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RULE 500.1(f): CORPORATE DISCLOSURE

Defendant/Appellant Council of Churches Housing Development Fund Company, Inc. (the "*Churches*"), is the sole General Partner of Plaintiff/Respondent Batavia Townhouses, Ltd. (the ***"****Partnership****"***). The Partnership owns and operates a low and moderate income housing project in Batavia, New York. Plaintiffs/Respondents Arlington Housing Corporation and Batavia Investors, Ltd. are the only limited partners of the Partnership (the ***"****Limited Partners****"***). Churches has no other parents, subsidiaries or affiliates.

RULE 500.13(a): STATUS OF RELATED LITIGATION

On December 17, 2018, the Churches initiated an action against the Limited Partners in the United States District Court for the Western District of New York. *Council of Churches Housing Development Fund Company, Inc. v. Arlington Housing Corporation and Batavia Investors, Ltd.*, Case No. 6:18-cv-06920-CJS-MAP (W.D.N.Y.). By the complaint in that action, the Churches seek a declaration that the Limited Partners have no basis to remove the Churches as the general partner of the Partnership, and an injunction against further threats or conduct to that end. The Limited Partners counterclaimed, seeking a declaration of the parties' rights and appropriate injunctive relief.

By a Stipulated Order dated August 27, 2019, that action has been, and remains, stayed pending the outcome of this appeal.

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QUESTION PRESENTED FOR APPEAL

The Question presented on this appeal is as follows:

Annually from 2012 through 2019 (and earlier) the Partnership transmitted to the Churches - as its creditor - written audited financial statements and an auditors' report signed by its independent auditors that reflected a certain WrapAround Note and Mortgage, and interest accrued thereon, as a liability of the Partnership. The Partnership also annually transmitted copies of its tax returns to the Churches, in which it listed the amount of the debt due on the WrapAround Note and Mortgage as a "non-recourse debt."

The Partnership - as obligor and mortgagor on the WrapAround Note and Mortgage - did not make any payments with respect to the debt from March 2012 until February 2019, and the Churches, as creditor and mortgagee, took no action to enforce it.

Are the financial statements, auditors' reports, and tax returns sufficient, under Article 17 of the New York General Obligations Law, to acknowledge and reaffirm the debt memorialized by the WrapAround Note and Mortgage?

Relying solely on General Obligations Law § 17-105, the Appellate Division, Fourth Department, ruled that the financial statements, auditors' reports and tax returns did not reaffirm the debt, and that the debt was therefore unenforceable.

STATEMENT OF FACTS

In June 1970, a group of Batavia-area churches formed Council of Churches Housing Development Fund Company, Inc. ("*the Churches*") as a not-for-profit corporation incorporated under the New York Private Housing Finance Law and the Membership Corporations Law of New York. The mission of the Churches is to develop and operate, on a non-profit basis, a housing project for persons of low income where no adequate housing exists for such persons. A board of directors, all of whom serve in an uncompensated voluntary capacity, manages the Churches. (*R. 68, ¶5.*)

The Churches pursue their mission through involvement in the Birchwood Village Apartments ("*Birchwood Village*" or the "*Apartments*"), a 224-unit apartment complex located at 77-79 River Street in the City of Batavia, New York. Since its inception in 1971, Birchwood Village has operated as affordable housing for families of low and moderate income in the Batavia area. It has provided - and continues to provide - a vital resource to meet a critical need in the community. *(R. 68 ¶6.)*

Plaintiff Batavia Townhouses, Ltd. (the "*Partnership*"), is the limited partnership through which the Churches currently pursues that mission: the Partnership owns and operates Birchwood Village. The Churches is the sole managing general partner of the Partnership. Plaintiffs Arlington Housing

Corporation ("*Arlington*") and Batavia Investors, Ltd. ("*Investors*") are both limited partners in the Partnership. (Collectively, Arlington and Investors are sometimes referred to hereafter as the "*Limited Partners*.") There are no other partners in the Partnership. (*R. 69, ¶7.)*

Beginning in March 1971, the Churches originally developed, owned and operated Birchwood Village independent of the Partnership, through a loan that was insured by the United States Department of Housing and Urban Development ("*HUD*"). That loan was evidenced by a promissory note with a maturity date of March 1, 2012 (the "*Original Note*"), which was insured by HUD, and was secured by a mortgage (the "*HUD Mortgage*"). In exchange for HUD's agreement to insure the Original Note, the Churches agreed to operate Birchwood Village in compliance with certain HUD regulatory agreements that ensure the project would provide ongoing benefits to low- or moderate-income families. (*R. 69, ¶8.)*

In the early years of its existence, Birchwood Village was poorly managed and poorly maintained. The complex experienced financial difficulties through 1977, and at that time, the Board and management of the Churches recognized a need to take action to improve physical and financial conditions at the Apartments. (*R. 69, ¶9.)*

After considering a number of available options, the Churches elected to take advantage of the benefits to be obtained by structuring the project as a limited

partnership tax shelter. Through that structure, an infusion of capital would be brought to the project by a group of investors who would recognize the tax advantages of the tax shelter (through the limited partnership status of their investment fund), and another general partner – with expertise in construction and facility rehabilitation - would be introduced to the project. (*R. 70 ¶10.)*

On or about December 1, 1979, by operation of an agreement titled "Amended and Restated Certificate and Agreement of Limited Partnership of Batavia Townhouses, Ltd." (the "*Partnership Agreement*"), the Churches became one of two general partners of the Partnership,[1] and was designated as the Partnership's managing general partner. (*R. 70 ¶11; R. 86.)*

The Churches became the Partnership's managing general partner in exchange for the Churches' conveyance of Birchwood Village into the Partnership. At the time of the conveyance, the Apartments were still encumbered by the HUD Mortgage. (*R. 70 ¶12.)*

The Churches conveyed Birchwood Village to the Partnership in exchange for the Partnership's execution of the WrapAround Note and Mortgage dated September 1, 1979. The Wraparound Note and Mortgage memorialized the Partnership's debt to the Churches for the value of the Chruches' contribution, in the amount of $5.5

[1] At that time, the Partnership's second general partner was an individual named David C. Green. His contribution to the project was his construction/rehabilitation expertise.

Million, together with interest at the annual rate of six percent (6%). Because the Churches' prior HUD Mortgage remained partially unpaid at the time of the conveyance, the Wraparound Note and Mortgage was subordinate to the HUD Mortgage. *(R. 70, ¶13).*

At that time, Investors was the Partnership's sole limited partner. Investors - itself a limited partnership, comprised of individuals seeking opportunities to realize federal tax benefits - contributed a total of $400,000 into the Partnership: this infusion of capital afforded the opportunity to rehabilitate the Apartments' physical and financial condition. The Apartments' status as a HUD regulated property afforded opportunities to realize significant tax advantages with respect to the Limited Partners' federal income tax liabilities.

In May 1981, the Partnership's second general partner withdrew, and was replaced by Plaintiff Arlington. Arlington's president is Lawrence F. Penn. Mr. Penn is also the president of Investors' general partner.[2] *(R. 71 ¶15.)* After Arlington joined the Partnership, the Churches remained the managing general partner, and Investors remained a limited partner. (*R. 72, ¶17 - 18.)*

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2 During the two years of Mr. Green's status as co-general partner, the Partnership completed the contemplated improvements to the physical condition of the Apartments, and he fulfilled his role in the project. At the time, Mr. Penn was involved in numerous HUD properties across the nation, and he was viewed – at that time - as a person who could assist the Churches to optimize the operation of Birchwood Village.

Section 2.4 of the Partnership Agreement sets forth the following Purpose of Business for the Partnership:

> The sole purpose and business of the Partnership shall be to acquire real property, together with the improvements thereon, as described in the Project Documents, and to own, hold, manage, maintain, and operate thereon the Project together with such other activities related directly or indirectly to the foregoing as may be necessary, advisable, or convenient to the promotion or conduct of the business of the Partnership, including without limitation the incurring of indebtedness and the granting of liens and security interests in the real and personal property of the Partnership to secure the payment of such indebtedness; all in such manner as will conform to all rules and regulations of Agency, and insofar as is consistent therewith, <u>will maximize the Federal, state and local income tax benefits available to the Partnership. The specifications of such business shall be deemed a limitation upon the powers of the General Partner</u>.

(R. 88) (emphasis added).

To ensure that the operating losses that supported the tax savings would flow primarily to the investors, the Partnership Agreement allocated 99% of the Partnership's property, profits and losses to the limited partners. *(R. 71 ¶16 and n.2).*

At some time in or after 2001, the Churches received a copy of a memorandum dated April 3, 2001, advising all HUD Multifamily Field Offices that HUD had entered into a settlement agreement with "Lawrence Penn and all his affiliates," pursuant to which Penn and all his associated entities were to divest all interests in any HUD properties. The memo further explained that the settlement agreement was

intended to resolve all outstanding criminal, civil and administrative matters involving HUD, the United States Department of Justice, Penn, and Penn's entities. (*R. 72, ¶19.)*

The divestitures were required by a Consent Judgment relating to multiple criminal and civil claims – including an indictment against Penn, personally – presented in U.S. v. Lawrence F. Penn, identified as Case No. CR-00-0084-SC in the United States District Court for the Northern District of California. *(R. 110 – 126).*

As a consequence, and given that Birchwood Village was a HUD property, Arlington was not permitted to continue in its capacity as a general partner of the Partnership. Arlington was permitted, however, to participate as a limited partner. By an amendment to the Partnership Agreement dated March 10, 2004, Arlington's status in the Partnership changed from general partner to limited partner. *(R. 73, ¶21.)*

In summary, as of and since 2004, the Partnership has been comprised of the Churches, as its sole managing general partner, and two limited partners, Plaintiffs/Respondents Arlington and Investors. The Churches elected to operate the Apartments in the structure of the Partnership at a time early in the history of the Churches' effort to fulfill their mission, when the Churches recognized a need for capital and expertise in the operation of the Apartments: the Churches contributed

the $5.5 Million facility into the Partnership (subject to the WrapAround Note and Mortgage that ensured the Apartments would be returned to the Churches when the tax shelter had run its course); and, in comparison, the limited partners contributed a one-time infusion of $400,000; and the involvement of a man who was forced to remove himself from the project's management to resolve a criminal investigation by the project's regulating agency. *(R. 73, ¶22).*

In 2012, the Partnership paid the final installment due on the Original Note, and discharged the HUD Mortgage. The Wraparound Note and Mortgage became the only encumbrance on the Apartments, entitled to first priority. *(R. 73, ¶23).*

This declaratory action is the Limited Partners' effort to invalidate the WrapAround Note and Mortgage, and to secure the Partnership's ownership of Birchwood Village free and clear. *(R. 73, ¶23).*

Every year since at least April 2000, the Partnership has distributed to its partners (both general and limited), written annual financial statements that have been prepared under the oversight of the Partnership's independent certified public accountants, EFPR Group, CPAs, PLLC. *(R. 74, ¶¶25 – 27).*

Those financial statements include balance sheets that reflect the WrapAround Note and Mortgage as a liability of the Partnership, state the then-present amount of the liability (including both principal and accrued interest), and report the Partnership's obligation to repay the amount due. Every one of the financial

statements specifically refers to the obligation as a "Note and mortgage payable." The financial statements were distributed to the Churches annually, under a signed auditors' report, most recently in April 2019. *(R. 74 - 75 ¶¶28 – 31; R. 129 – 212).*

The Partnership also prepared, filed, and shared with the Churches its annual tax returns. (*R. 233 – 234 ¶¶13 – 14; R. 270 – 296*). Every one of those returns acknowledged the mortgage obligation in writing *(R. 274; R. 288 [acknowledging outstanding "non-recourse loan" in exact balance of mortgage at beginning of year and year-end])* and was signed by the Executive Director who oversaw the daily operation of the apartment complex that is the subject of this litigation. *(R. 271; R. 272; R. 281; R. 285; R. 296 [signature of Partnership's Executive Director, Barbara Greenbaum]).*

On May 28, 2019, Plaintiffs Arlington and Investors brought this declaratory judgment action in the form of a derivative action, seeking a declaration that the WrapAround Note and Mortgage are unenforceable because the Partnership did not make any payment in connection with the WrapAround Note and Mortgage from 2012 until February 2019. (*R. 68, ¶3; R. 52 – 56).*[3] The Limited Partners contend

[3] The Partnership Agreement provides that the partnership is to be governed by the laws of the District of Columbia. *(R.104, §16.10)*. Under those laws:

> A partner may maintain a derivative action in the Superior Court to enforce a right of a limited partnership if: (1) The partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or (2) A demand would be futile.

that, during that interim, the limitation period for enforcement of the agreements has expired.

The potential result of a successful challenge by the Limited Partners is obvious, but deserves to be expressly stated. If the WrapAround Note and Mortgage is found to be unenforceable, the Apartments will be free and clear of any encumbrance, and, at the sale of the Apartments or dissolution of the Partnership, the gain from the sale of the Partnerships assets will be allocated overwhelmingly to the Limited Partners, and the original intent of the respective partners will be put on its head.

The Churches acknowledged service of the Summons and Complaint on May 29, 2019. The Churches timely filed an Answer on June 18, 2019, *(R. 57 – 64),* and this Motion for Summary Judgment was filed the same day. *(R. 65 - 66)*. The Limited Partners cross-moved for summary judgment on July 17, 2019. (*R. 216*).

On August 16, 2019, Supreme Court issued its Decision and Order awarding summary judgment to the Limited Partners. *(R. 3 – 16)*. That Order was entered August 21, 2019 *(R. 17)*, and the Churches' Notice of Appeal to the Appellate Division, Fourth Department, was filed August 28, 2019. *(R. 1)*.

D.C. Code 29-709.02 (West 2021). As the Partnership's only general partner, the Churches acknowledge that it would be futile for the limited partners to formally demand that the Partnership repudiate its obligation to the Churches, as the Churches will not accede to the limited partners' effort to misappropriate Birchwood Village.

The Opinion and Order of the Appellate Division, Fourth Department is dated October 2, 2020. *(R. 360)*. It was served on the Churches on October 6, 2020, together with Notice of Entry, by notice generated through the New York State Courts Electronic Filing System. *(Id.)*.

THIS COURT'S JURISDICTION:

The Fourth Department's Opinion and Order is a final determination as provided by Civil Practice Law and Rules 5611. Defendant/Appellant did NOT move for leave to appeal to this Court at the Appellate Division, but instead filed a Motion for Leave to Appeal directly with this Court.

This Court granted permission to appeal on February 18, 2021. *(R. 359).*

This Court has jurisdiction of this appeal under Civil Practice Law and Rules 5602(a)(1)(i).

LEGAL ARGUMENT:

IN THIS BILATERAL DISPUTE, THE WRAPAROUND NOTE AND MORTGAGE IS ENFORCEABLE BECAUSE THE PARTNERSHIP REPEATEDLY AND REGULARLY REAFFIRMED ITS OBLIGATIONS

This case is essentially a bilateral dispute between a creditor and a debtor: the case does not present any material question regarding the ownership of real property. The parties and the courts below all agreed that this action presents an actual and justiciable controversy for which this Court may appropriately award declaratory

judgment. The parties and the courts below also agreed that the matter is appropriate for resolution by summary judgment.

Because the Partnership has repeatedly reaffirmed the debt and other obligations memorialized in the WrapAround Note and Mortgage – as recently as July 2019 – there is absolutely no merit to the Limited Partners' contention that the governing limitations period has expired. Because the matter is simply a dispute between a debtor and creditor, General Obligations Law §17-101 governs. Recalling the litigants' respective roles in the Partnership, and applying ordinary business understanding and rules of common sense, the Partnership's financial reporting to the Churches was sufficient to acknowledge the WrapAround Note and Mortgage and extend the applicable limitations period. General Obligations Law §17-105, which addresses questions involving the ownership of real property, is not applicable.

This Court should reverse the Fourth Department's Opinion and Order, and award summary judgment to the Churches declaring that the WrapAround Note and Mortgage are valid, binding and enforceable obligations owed by the Partnership to the Churches. To rule otherwise would result in a happy accident for the Limited Partners, producing an unexpected windfall to the Limited Partners and an undeserved benefit no party ever anticipated they might obtain.

I.

THE EVOLUTION OF NEW YORK LAW REGARDING THE REAFFIRMATION OF DEBT

New York law has long recognized there are instances when a promisor, like the Partnership, will wish to honor a contractual promise, even when the promisee has elected not to involve the machinery of the judiciary to enforce that promise, and even when the time to involve the machinery of the judiciary might have otherwise expired. *See, e.g., CPLR* §213 (providing six-year limitation period for contract claims).

In those circumstances, New York law provides that an otherwise time-barred claim to recover a debt can proceed when there is a later acknowledgement or partial payment of the debt by the debtor. *See, e.g., Scheurer v. Scheuer,* 308 N.Y. 447, at 450 - 451 (1955) ("At common law, an acknowledgment or promise to perform a previously defaulted contract obligation was effectual, whether oral or in writing, at least in certain types of cases, to start the statute of limitations running anew.") The common law rule has been qualified by a statute that provides that, to take an action outside the operation of the statute of limitations, there must be "an acknowledgment [of the debt] or promise [to pay it] contained in a writing signed by the party to be charged." *General Obligations Law* §17-101 (McKinney's 2021). A second statutory provision, General Obligations Law §17-105, applies in actions to

foreclose a mortgage, or where the dispute involves competing claims to real property.

At first blush, the case law developing the jurisprudence of an "acknowledgement" appears to be rather inconsistent. However, two themes predominate the jurisprudence: first, the question whether a purported acknowledgement is sufficient to restart the running of a period of limitations depends on the circumstances of the individual case. *Estate of Vengroski v. Garden Inn,* 114 A.D.2d 927, at 928 (2d Dept. 1985). Second, whether an acknowledgement has occurred is a decision to be made without resort to "subtle or refined distinctions contrary to ordinary business understanding or rules of common sense." *Vengroski, supra,* 114 A.D.3d at 928; *Curtiss Wright Corp. v. Intercontinent Corp.,* 277 App. Div. 13, at 17 (1st Dept. 1950).

Under the circumstances of this case, this Court should rule in favor of the Churches because that result is the only one that is consistent with ordinary business understanding and rules of common sense. The parties' relationship as defined in the Partnership Agreement is manifest: the Apartments were a project to be undertaken and operated primarily by the Churches. Structuring the project as a limited partnership afforded the Churches to benefit from the comparatively modest investment made by Limited Partners, who realized the tax benefits arising from the project until the end of the parties' relationship. However, the WrapAround Note

and Mortgage always was intended to serve as the mechanism that ensured the Limited Partners would receive no more than the tax benefits for which they bargained. It is the WrapAround Note and Mortgage that permits the Churches to insist that the Apartments be returned to their ownership upon the dissolution of the Partnership.

The rulings of the lower courts in this case must be reversed because they ignored those common sense business understandings, and misapprehended the interplay between General Obligations Law §17-101 and General Obligations Law §17-105. That interplay can be best understood through a recounting of the role each statutory section served in the evolution of New York's law regarding the reaffirmation of debt.

A.

New York's Common Law Recognized
both Oral and Written Acknowledgements

Prior to any of the statutory enactments, New York common law extended and renewed the applicable statute of limitations where a creditor could show that the debtor had acknowledged a debt either orally or in writing. At common law, it was only necessary for the plaintiff to show an unconditional acknowledgment of the existence of the debt; and this could have been shown by proof of a direct acknowledgment, or by proof of facts from which it could be properly inferred. *Shapely v. Abbott,* 42 N.Y. 443 (1870), *citing, Dean v. Hewitt,* 5 Wendell 257 (1830); *M'Crea v. Purmort,* 16 Wendell 460 (1836); *Henry v. Root,* 33 N.Y. 526 (1865); *Cocks v. Weeks,* 7 Hill 45 (1844). In M'Crea v. Purmort, it was held: "The admission of a debt is available to take it out of the statute of limitations, whether that admission be express or tacit; whether made to the party or a stranger: and it may be implied from the conduct of the party." *M'Crea, supra*, 16 Wendell at 477 (emphasis added).

B.

Statutory Elimination of Oral Acknowledgements
General Obligation Law §17-101

Beginning with the adoption of the Field Codes in 1850, and again in 1865, the legislature adopted rules that eliminated the effectiveness of an oral acknowledgment to reaffirm debt. Originating in Section 395 of the New York Code of Civil Procedure, and now codified in General Obligations Law §17-101, New York's statutory law accommodates the promisee's forbearance, and extends the promisor's obligation, when a contractual debt is acknowledged in writing.

> An acknowledgement or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

General Obligations Law §17-101 (McKinney's 2021) (emphasis added).

With the exception of actions for the recovery of real property, General Obligations Law 17-101 effectively revives, or tolls, a time-barred contract claim when the debtor has signed a writing which validly acknowledges the debt. *Lynford v. Williams,* 34 A.D.3d 761, at 762 (2d Dept. 2006). To constitute an acknowledgment of a debt, the writing must recognize an existing debt and contain nothing inconsistent with an unconditional intention on behalf of the debtor to pay it. *Lew Morris Demolition Co. v. Board of Education,* 40 N.Y.2d 516, at 521 (1976);

Knoll v. Datek Securities Corp., 2 A.D.3d 594, at 595 (2d Dept. 2003). The writing must also be communicated to the promisee, such that the promisee can be presumed to have relied upon the reaffirmation. *See, e.g., Essex Road Real Estate Corp. v. Piluso,* 68 A.D. 2d 923 (2d Dept. 1979) (acknowledgement must be shown to have influenced the creditor); *In re Brill,* 318 B.R. 49, at 59 – 60 (Bankr. S.D.N.Y. 2004) (collecting cases interpreting New York state law).

Importantly, even after the statutory enactment, an acknowledgement need not be an express promise. Instead, the writing must only contain nothing inconsistent with an unconditional intention to pay. *Knoll v. Datek Securities Corp.,* 2 A.D.3d 594, at 595 (2d Dept. 2003). The applicable precedent makes clear that an appropriate acknowledgement serves as a "promise" because the law infers a "promise" to repay when there is nothing inconsistent with such an intent. *Henry v. Root,* 33 N.Y. 447 (1955); *George Tsunis Real Estate, Inc., v. Benedict,* 116 A.D.3d 1002 (2d Dept 2014) (acknowledgment is sufficient to restart the running of a period of limitations when it demonstrated defendant's intent to pay); *see also, Calltrol Corp. v. DialConnection, LLC,* 51 Misc.3d 1221(A), 2016 WL 2860753 (Sup. Court Westchester County 2016) ("The critical question is whether the acknowledgment imports an intention to pay"); *Celia v. Shah,* 94 Misc 2d. 932, at 935 (Dist. Ct. Nassau County, 1978) (absence of anything inconsistent with intent to pay infers promise to pay); *Connecticut Trust & Safe Deposit Co. v. Wead,* 172 N.Y. 497

(1902) (under Section 395 of the Code of Civil Procedure, reviewing document to determine whether it is "an acknowledgment of a subsisting debt that a promise to pay may fairly be implied from that acknowledgment …").

The rationale behind all these decisions is that the acknowledgment is made in terms and under circumstances consistent with a new promise to pay the debt, whether or not that promise is made expressly. However, "actions to recover real property" are expressly excluded from Section 17-101's scope, in apparent recognition of the reality that a mortgage is not just a promise, but is also the conveyance of an interest in real property. *See, e.g.* 1961 Legislative Document Number 65(F) (hereafter the "Legislative Document"), reprinted in *McKinney's 1961 Session Laws of New York* 1873, at 1873 - 74 (rationale is "clearly inapplicable to an acknowledgment of a mortgage lien: a mortgage is not a promise, but an executed transaction; the mortgage lien is an interest in real property requiring for its creation a written instrument which is a conveyance within the real property recording statutes").

C.

Statutory Acknowledgments Clarified for Mortgages General Obligations Laws §17-105

General Obligations Law §17-105 was enacted in 1961. At the time, decisional law throughout the state wrestled with acknowledgments in the context of real property conveyances, with confusing outcomes. *See, e.g., Shohfi v. Shohfi,* 303 N.Y. 370 (1952) (leaving undecided the question whether written acknowledgement of mortgage is effective under 17-101); *Tortora v. Malve Realty & Construction Co.,* 96 N.Y.S.2d 388 (Sup. Court, New York County, 1950), *aff'd.*, 283 App. Div. 769 (1st Dept. 1954) (refusing to decide whether deed to grantee "subject to a first mortgage" was an acknowledgement that revived statute of limitation); *Mintz v. Greenberg*, 5 A.D.2d 744 (2d Dept. 1958), *aff'd*., 5 N.Y.2d 909 (1959) (deed "subject to all tax liens, unpaid assessments and incumbrances of record" was acknowledgement sufficient to extend limitations period).

The Legislative Revision Commission explained that the varying judicial treatment of the rule led to "serious impairment of titles to land and hindrance of real property financing" and required legislative action. *Legislative Document,* at 1875. The result was General Obligations Law §17-105.

In its explanation regarding the intent behind the adoption of General Obligations Law §17-105, the Legislative Revision Commission wrote:

> In determining whether a transaction should be given effect by statute either to toll the statute applicable to a mortgage foreclosure or to revive a mortgage where the time limited for foreclosure has run, two factors should be controlling: first, whether the transaction manifested an intention to waive the statute or not plead it, and second whether the transaction expressing such intent is sufficiently evidenced.

Legislative Document, at 1876.

The Legislative Revision Commission continued:

> An express waiver of the bar of the statute, or of the time that has expired, and a promise not to plead the statute or not to plead the time that has expired, clearly meet the first requirement. An intention to waive the bar of the statute … is also reasonably to be inferred by an express promise to pay the mortgage debt. Such an intention may be similarly inferred from a formal assumption of the mortgage debt by a grantee of the mortgaged premises, unless such intention is expressly disclaimed.

Legislative Document, at 1876 (emphasis added).

As can be seen, therefore, at the time General Obligations Law §17-105 was enacted, the Legislative Revision Commission made clear that the intent was not to eliminate the possibility that an intention to pay a mortgage debt could be inferred by something other than an express promise. Rather, as under case law existing at the time it was adopted, the intent of Section 17-105 was to permit a writing to acknowledge a mortgage debt so long as the intent to pay could be fairly inferred, and the writing contained nothing that expressly disclaimed the intent to pay.

Indeed, by its express terms, General Obligation Law §17-105 contemplates that an obligor can express an intent to pay a debt through an "acknowledgment," in contrast to a "promise." General Obligation Law §17-105(4) reads:

> Except as provided in subdivision five, no acknowledgment, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose or *(sic)* mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

General Obligations Law §17-105(4) (McKinney's 2021) (emphasis added). If an acknowledgement were legally insufficient to extend the foreclosure limitations period, there would be no reason for subsection (4) to express the limitations on its effectiveness. *A fortiori*, an acknowledgement must have some effectiveness to extend timeliness under Section 17-105.

The leading secondary authority agrees. Professor Bergman observes that the provisions of Section 17-105 "are controlling" in mortgage foreclosure actions, but even the punctilious Professor Bergman recognizes that makes little difference, due to the reality that the case law he recites with respect to acknowledgements "is and remains" "vital" after the enactment of Section 17-105. *BERGMAN ON NEW YORK MORTGAGE FORECLOSURES,* §5.11[7] (Bender 2021). Indeed, earlier in his study of the relevant jurisprudence, Professor Bergman states that Section 17-105 is merely a codification of "the authority under which an effective written acknowledgement

of a mortgage obligation serves as a revival of the statute of limitations time period." *BERGMAN, supra*, at §5.11[6][a] (emphasis added).

D.

Section 17-105's Express Written Promise is Required in Only Actions Involving a Dispute Over the Ownership of Real Property

By its very title, General Obligations Law §17-105 only applies in an action to recover real property. This action involves the Limited Partners' effort to invalidate the debt embodied in the WrapAround Note and Mortgage, and the Churches' request that the obligation be declared valid and enforceable. The action does not involve a request to determine the ownership of the real property.

Many cases that have addressed the issue have inherently recognized that the express written promise requirement in Section §17-105 was intended to address "serious impairment of titles to land and hindrance of real property financing." *Legislative Document,* at 1875 (emphasis added). These cases properly limit the application of Section §17-105 to cases that affect the ownership of land – where recording statutes make documents publicly available, and precise clarity is necessary to put the world on notice, including strangers to the transaction, with respect to the scope of obligation undertaken. In those actions, Section 17-105 requires an express written promise to repay the debt in order to provide that precise clarity to the world.

Where the dispute does not affect title to real property, however, and involves only a bilateral question regarding the validity of debt, between a debtor and creditor already familiar with the transaction, the Courts have not required the precision of an express written promise - and Section 17-105 continues to contemplate the effectiveness of a "acknowledgement" in those circumstances. Confronted with a property owner's request to invalidate a mortgage debt due to the alleged expiration of the Statute of Limitation, the New York courts analyze the timeliness issue under General Obligations Law §17-101. *See, e.g., Petito v. Piffath,* 85 N.Y.2d 1, at 7 - 8 (1994) (in mortgagor's action to declare mortgage debt unenforceable as untimely, purported "acknowledgement" evaluated under both 17-101 and 17-105), *reargument den.*, 85 N.Y.2d 858, *cert. den.*, 516 U.S. 864 (1995); *Karpa Realty Group, LLC, v. Deutsche Bank National Trust Company,* 164 A.D.3d 886 (2d Dept. 2018) (court applies GOL §17-101 in mortgagor's action to declare mortgage debt unenforceable as untimely); *U.S. Bank NA v. Martin,* 144 A.D.3d 891 (2d Dept. 2016) (same); *Yadegar v. Duetsche Bank National Trust Company,* 164 A.D.3d 945 (2d Dept. 2018) (same); *Sharova v. Wells Fargo Bank,* 62 Misc.3d 925, at 937 (Sup. Court Kings County, 2019) (same). *See also, Hakim v. Peckel Family Ltd. Partnership,* 280 A.D.2d 645 (2d Dept. 2001) (reaffirmation of mortgage obligation reviewed for unconditional and unqualified reaffirmation of the debt under GOL 17-101 and 17-105).

Thus, in simple bilateral disputes between a debtor and creditor regarding the validity of a debt, the enactment of General Obligation Law §17-105 did not alter the general themes of the existing jurisprudence regarding the reaffirmation of debt. Except in actions involving "serious impairment of titles to land," reaffirmation of mortgage debt will occur when an intent to pay can be reasonably inferred, as measured under "ordinary business understandings" and everyday "rules of common sense."

In this case, a simple bilateral dispute regarding the validity of debt, the application of ordinary business understanding and rules of common sense make clear that the Partnership's financial reporting to the Churches unquestionably expresses an intent to repay the WrapAround Note and Mortgage.

II.

THE PARTNERSHIP'S ANNUAL FINANCIAL REPORTING REAFFIRMED THE OBLIGATIONS OF THE WRAPAROUND NOTE AND MORTGAGE

In the ordinary course of its business, on an annual basis, the Partnership rendered to all its partners – the Churches and the Limited Partners – a variety of financial reports. Included within these financial reports were audited financial statements and copies of the Partnership's income tax returns. The reports both unambiguously disclosed the WrapAround Note and Mortgage as a current liability of the Partnership, and contained nothing inconsistent with an intent to pay. As such,

both types of annual financial reports were adequate to reaffirm the Partnership's obligations under the WrapAround Note and Mortgage, and to extend the limitations period in which the Churches could enforce it.

A.

The Partnership's Annual Audited Financial Statements

Here, the Partnership has reaffirmed the obligation of the WrapAround Note and Mortgage every year since 2000. In financial statements audited by the Partnership's certified public accountants, the debt memorialized by the WrapAround Note and Mortgage has been reflected as a liability of the Partnership, changing only as the accrued interest on the principal obligation has grown. The statements expressly refer to the WrapAround Note and Mortgage as a "Note and mortgage payable." (*See, R. 74 – 75, 129 – 212).* Naturally, these financial statements - signed by the accountants who were directed by the Partnership to prepare them - were delivered each year, promptly upon their completion, to the Churches and to the Limited Partners. *(R. 74 at ¶27).*

Where doing so is consistent with ordinary business understanding and rules of common sense, the courts routinely accept that a debtor's financial statements, prepared and signed by a person authorized to do so by the debtor, will serve as an acknowledgement that revives a debt under the statute. *See, e.g., Chase Manhattan Bank v. Polimeni,* 258 A.D.2d 361 (1st Dept. 1999) (personal financial statement);

In re Meyrowitz' Estate, 114 N.Y.S.2d 541 (Surrogate's Court, New York County, 1952) (corporate balance sheet); *Clarkson Company, Ltd., v. Shaheen,* 533 F.Supp. 905, at 931 – 32 (S.D.N.Y. 1982) (interpreting state law, and determining that audited financials revived debt under NYGOL §17-101).

B.

The Partnership's Annual Tax Returns

The Partnership's tax returns were also adequate under controlling precedent to reaffirm the obligations memorialized in the WrapAround Note and Mortgage. Each year, the returns reflected the exact amount of the WrapAround Note and Mortgage as an "outstanding non-recourse loan," a reference that, under all the circumstances of this case, is sufficient the reaffirm the WrapAround Note and Mortgage. *See, Estate of Vengroski v. Garden Inn,* 114 A.D.2d 927, at 928 (2d Dept. 1985).

C.

Both Types of the Partnership's Annual Financial Reports Were Independently Adequate to Acknowledge and Reaffirm the WrapAround Note and Mortgage

In this case, the Partnership's annual delivery of the audited financial statements to the Churches, and its delivery of its tax returns, tolled the applicable statute of limitations for any action on the WrapAround Note and Mortgage. (The audited financial statements and annual tax returns are hereafter referred to collectively as the "*Financial Reports*.") The Financial Reports reaffirmed the

obligation of the WrapAround Note and Mortgage, they expressly characterized the amounts due as "payable," and they were delivered to the Churches annually. Thus, without regard to the date that a claim may have accrued for the Partnership's non-payment of the WrapAround Note and Mortgage, the annual delivery of the Financial Reports tolled the limitations period each year. As the limitations period has been tolled each year, year after year, it has never expired, and need not be revived.

1. The Financial Reports are Writings Signed by an Authorized Representative of the Partnership

"[A] written acknowledgement of a debt signed by the agent of the party to be charged may be sufficient to invoke (GOL §17-101)." *Nelux Holdings International v. Dweck,* 160 A.D.3d 520, at 520 (1st Dept. 2018), *citing Hakim v. Hakim,* 99 A.D.3d 498 (1st Dept. 2012); *Chase Manhattan Bank v. Polimeni,* 258 A.D.2d 361 (1st Dept. 1999) (signature of obligor's secretary on transmittal of financial information), *lv. dismissed,* 93 N.Y.2d 952 (1999), *Sullivan v. Troser Management, Inc.,* 15 A.D.3d 1011 (4th Dept 2005) (signature of obligor's attorney); *Park Associates v. Crescent Park Associates,* 159 A.D.2d 460 (2d Dept. 1990) (signature of corporate officer). *Cf., Leising v. Multiple R. Development,* 249 A.D.2d 920 (4th Dept. 1998) (corporation's printed name on letterhead is adequate to constitute "signature" under GOL §17-101).

The audited financial statements that set forth the mortgage liability were not separately signed by the Partnership's accountants, but every one of those reports was accompanied by a standard accountant's trasmittal letter, and the auditing accountants signed each of those letters. *(R. 131 – 32, 145 – 46, 159 – 160,173 – 74, 187 – 88, 201 – 02*).

"Ordinary business understanding" and "rules of common sense" dictate that the financial statements and the signed accountants' letters should be read together. Indeed, it has been suggested that an acknowledgement can consist of two separate writings that "have reference the same subject matter and are so connected with each other that they may fairly be said to constitute one paper." *See, Talarico v. Thomas Timmins Contracting Co., Inc.,* 1995 WL 422034 (S.D.N.Y. 1995), *citing, Victory Investment Corp. v. Muskogee Electric Traction Co.,* 150 F.2d 889, 891 (10th Cir.), *cert. den.* 326 U.S. 774 (1945).

Each year, the Partnership's tax returns also reflected the mortgage obligation, *(see, e.g., R. 274 [line 18], R. 288 [line 18])*, and were signed by the Partnership's executive director, Barbara Greenbaum. (*R. 271- 72, R. 285)*.

For all the foregoing reasons, the signatures on the documents acknowledging the Partnership's obligation to the Churches satisfy the requirements of applicable law.

2. **The Financial Reports Show Nothing Inconsistent <u>with an Intent to Honor the Obligation</u>**

The mortgage obligation has been reflected consistently as an obligation of the Partnership, changing only as the accrued interest relating to the principal obligation has grown. The Financial Statements expressly refer to the mortgage obligation as a "Note and mortgage payable," *(see, R. 134; R. 148; R. 162; R. 176; R. 190; R. 204)* and the tax returns refer to the obligation as a "nonrecourse loan." (*R. 274 [line 18]; R. 288 [line 18]).*

Nothing in any of the Financial Reports is inconsistent with the Partnership's intent to honor the mortgage obligation. Nothing whatsoever in the audited financial statements can be interpreted as a condition precedent or other caveat regarding the obligation.

The Partnership's tax returns appropriately reflect that its mortgage obligation to the Churches is "nonrecourse," such that the Churches' remedy is limited thereby and its "only recourse in connection with the underlying loan was the mortgaged property." *See, e.g. Wells Fargo Bank. N.A. v. Alessi,* 133 A.D.3d 1216 (4th Dept. 2015). This does not affect the validity of the acknowledgement, but only recognizes the limitations upon the available remedy. *See generally, General Obligation Law* §17-105(1) (acknowledgement "by the express terms of a writing signed by the party to be charged is effective subject to conditions expressed in the writing").

3. **The Financial Reports Were Delivered Annually <u>to the Churches and to the Limited Partners</u>**

There is no serious question in this case that the Partnership annually transmitted its audited financial statements and tax returns to the Churches (and to the Limited Partners). *(R. 74 - 75, ¶¶ 26 – 30; R. 233 - 34, ¶¶ 12 – 14).*

After they were transmitted to the Churches, the financial reports from the Partnership were considered, reviewed and approved by the Churches' Board of Directors. *(R. 233, ¶11; R 262 – 63).*

For all the foregoing reasons, the writings that the Partnership sent to the Churches and to the Limited Partners were sufficient to constitute an acknowledgement of the Partnership's obligation to the Churches, and that acknowledgement extended the limitations period for the Churches to enforce that obligation according to its terms.

CONCLUSION:

This Brief explains that, for decades, the Courts of this state have considered evidence of reaffirmation under two different provisions of the General Obligations Law: Sections 17-101 and 17-105. Those cases permit reaffirmations in cases regarding the validity of debt, but require express written promises in cases that involve questions of ownership of real property.

The Opinion and Order of the Appellate Division, Fourth Department in this case diverges from those decades of jurisprudence, and mistakenly holds that Section 17-105 provides that an express written promise is the exclusive mechanism by which a mortgage debt can be reaffirmed. Because the Opinion and Order is inconsistent with those decades of jurisprudence, and with authoritative precedent from this Court, that Opinion and Order should be reversed, and this Court should grant declaratory judgment determining that the WrapAround Note and Mortgage are valid, enforceable and binding obligations of the Partnership.

Respectfully submitted,

Dated: April 16, 2021
Rochester, New York

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ADDENDUM

Unreported Disposition
51 Misc.3d 1221(A), 37 N.Y.S.3d 206 (Table), 2016 WL 2860753 (N.Y.Sup.), 2016 N.Y. Slip Op. 50765(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 Calltrol Corporation, Plaintiff,
v.
DialConnection, LLC a/k/a VESPER TECHNOLOGIES, L.L.C., Defendant.

Supreme Court, Westchester County
65994/2015
Decided on May 10, 2016

CITE TITLE AS: Calltrol Corp. v DialConnection, LLC

ABSTRACT

Limitation of Actions
Four-Year Statute of Limitations
Sale of Goods

Calltrol Corp. v DialConnection, LLC, 2016 NY Slip Op 50765(U). Limitation of Actions—Four-Year Statute of Limitations—Sale of Goods. (Sup Ct, Westchester County, May 10, 2016, Scheinkman, J.)

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OPINION OF THE COURT

Alan D. Scheinkman, J.

Defendant DialConnection, LLC, a/k/a Vesper Technologies, L.L.C. ("Defendant" or "DialConnection"), moves pursuant to CPLR 3211(a)(5) for an order dismissing the Verified Complaint of Plaintiff Calltrol Corporation ("Plaintiff" or "Calltrol") on the basis of ***2** the statute of limitations. Plaintiff opposes the motion.

THE ALLEGATIONS OF THE COMPLAINT

This action for breach of contract was initiated by Plaintiff's filing of its Summons and Complaint[1] on September 28, 2015. Defendant moved to dismiss the Complaint on December 11, 2015.

The following are the pertinent allegations of the Complaint, which the Court must accept as true for the purposes of this motion. All allegations in the Complaint are set forth under the heading "First Cause of Action." Although Plaintiff does not explicitly identify the claim asserted by its sole cause of action, the allegations collectively reflect that Plaintiff is raising a claim for breach of contract.

Plaintiff alleges that it is an authorized distributor of software products and other third party products for C.T. Ventures, Inc. (Complaint at ¶ 9). It further alleges that Plaintiff entered into a "Reseller Agreement" with Defendant in January 2001, by which Defendant became a licensee of Plaintiff to market and resell certain products for which Plaintiff was a licensed distributor (the "January 2001 Contract") (*id.* at ¶¶ 10-12). A copy of the January 2001 Contract is attached to the Complaint (*id.* at Ex. B).

Pursuant to the January 2001 Contract, Plaintiff granted Defendant a non-exclusive license to market and resell certain products, which the January 2001 Contract states are identified in Schedule A thereto (*id.* at Art. 1.1). However, Schedule A is not included with the copy of the January 2001 Contract that is attached to the Complaint and annexed to Defendant's moving papers. The submitted version of the January 2001 Contract only includes Schedules B and C. Further, the pagination shows that page 6 of 11, which presumably included Schedule A, has been omitted from the copies filed with the Court.

Plaintiff further alleges in the Complaint that both parties performed their obligations under the January 2001 Contract, “except that defendant failed to make certain payments due” (Complaint at ¶ 14). It claims that the parties subsequently entered into another contract “renewing their relationship” (*id*. at ¶¶ 15-16). Certain portions of a “Reseller Agreement” executed in May 2010 (the “May 2010 Contract”) are attached to the Complaint (*id*. at Ex. C). Pursuant to the May 2010 Contract, Defendant was again granted a non-exclusive license to market and resell certain products for which Plaintiff was a licensed distributor, which products are identified in Schedule A thereto (*id*.). Schedule A to the May 2010 Contract sets forth the products as follows:

OTS (Object Telephony Server) -- Schedule C license

Various other programs and documentation for Computer Telephone Integration -- Schedule C license

PS240 Developer's Kit for CAPDE/OTS -- Schedule D license

Reseller Support -- Schedule E

Third Party Products

Plaintiff in the Complaint cites to Article 7.1(a) of the May 2010 Contract, which reads, in its entirety, as follows:

7.1a Balance Due Reseller [*i.e*., Defendant] acknowledges current indebtedness to [Plaintiff] in the sum of Four Hundred Nineteen thousand and 00/100 ($419,000.00), the Balance Due.' *Annexed hereto is a breakdown of the Balance Due*.“ (Complaint at ¶¶ 18-19 and Ex. C) (emphasis in original).

Exhibit C to the May 2010 Contract consists of a spreadsheet captioned “Account Statement” dated April 28, 2010 and appears to have been issued by Plaintiff and addressed to Defendant. It includes a series of transactions and reflects a “Balance Due” of $419,000.00 (*id*. at ¶ 20 and Ex. C). Plaintiff alleges that Defendant is liable to Plaintiff for $419,000 less subsequent payments made by Defendant of $42,794.41, for a total of $376,206.59 (*id*. at ¶¶ 21-23).

As relief, Plaintiff seeks a judgment against Defendant in the amount of $376,206.59, with interest from May 10, 2010 and costs.

DEFENDANT'S CONTENTIONS IN SUPPORT OF ITS MOTION

In support of its motion, Defendant submits an affirmation from its counsel, John W. Fried, Esq. (Flaster/Greenberg P.C.), and a memorandum of law.

The purpose of counsel's affirmation is to attach a copy of the Summons and Complaint (Affirmation of John W. Fried, Esq. dated December 10, 2015 [“Fried Aff.”] at ¶¶ 1-3 and Ex. A).

As its legal argument set forth in its memorandum of law, Defendant argues that the Complaint should be dismissed pursuant to CPLR 3211(a)(5) because the sole cause of action for breach of contract is governed by the applicable four year statute of limitations set forth in Article 2-725(1) of New York's Uniform Commercial Code (“UCC”).

Defendant contends that the UCC applies to the January 2001 Contract because that agreement is for the market and resale of software products and other third party products. Defendant asserts that the UCC's broad application to all transactions in goods covers this contract, as computer software is considered to be a “good” for UCC purposes. Defendant further argues that the UCC also applies to the January 2001 Contract regardless of whether there was a direct sale of goods or licensure for the sale of goods, because the UCC governs all “transactions” and not only the sale of goods. Defendant also cites to case law that it asserts stands for the proposition that the UCC applies to software licensing contracts of the type at issue in this action.

Defendant contends that even if Plaintiff's cause of action is deemed to be a claim for account stated as opposed to breach of contract, the UCC's statute of limitations nonetheless applies. It argues that the “Balance Due” of $419,000.00 set forth in the May 2010 Contract did not reinstate Defendant's debt to Plaintiff, as the May 2010 Contract did not require Defendant to make payments to Plaintiff for the past due balance. Even if the “Balance Due” reinstated the debt, Defendant asserts that this account stated claim arises out of the same allegation as a breach of contract claim, and is accordingly governed by the UCC's four year limitations period. It further asserts that a party may not circumvent the UCC by entering into a new contract for an account stated. Defendant contends that because both the ***3** January 2001 Contract and the May 2010 Contract and the balance due thereunder arise out of the same allegations, *i.e.*, Defendant's alleged failure to make payments due under the January 2001

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Contract, the UCC governs both agreements and the four year statute of limitations warrants the dismissal of Plaintiff's Complaint.

Defendant argues that pursuant to UCC § 2-725(1), an action for breach of contract must be commenced within four years of the breach regardless of whether the aggrieved party has knowledge of the breach, and the common law's six year statute of limitations is inapplicable. It asserts that the underlying transactions all occurred before the May 10, 2010 execution of the May 2010 Contract. Because Plaintiff filed the Complaint more than five years later, *i.e.*, on September 28, 2015, Defendant asserts that the sole cause of action is time barred pursuant to the UCC's four year statute of limitations.

PLAINTIFF'S CONTENTIONS IN OPPOSITION

For its opposition, Plaintiff submits the affidavit of its president, David M. Friedman, and a memorandum of law.

In the Affidavit of David M. Friedman sworn to December 11, 2015 ("Friedman Aff."), Friedman avers that he is the president of Plaintiff and handled the relevant transactions between Plaintiff and Defendant (Friedman Aff. at ¶ 1). He states that the "Balance Due" of $419,000 set forth in the May 2010 Contract was not for Plaintiff's prior sale of goods or software to Defendant, as alleged by Defendant (*id*. at ¶ 3). Rather, Friedman avers that each of the prior charges comprising the $419,000 was a license fee (*id*. at ¶ 4). He explains that each charge only involved Defendant selling a software license to one of Defendant's customers, and did not involve Plaintiff selling any software or license to Defendant's customers (*id*.). Friedman further avers that at the inception of the parties' relationship, Plaintiff furnished its software to Defendant, which Defendant copied onto its system. As such, Defendant was able to subsequently sell the software to Defendant's customers, and it would copy the software from Defendant's system to that of the customer, which process did not involve Plaintiff (*id*.). Each time Defendant sold the software to a customer, it was contractually required to pay a license fee to Plaintiff, which license fees comprise the $419,000 "Balance Due" noted in the May 2010 Contract (*id*.). He states that none of the charges included in that $419,000 involved Plaintiff's furnishing of software or a software development kit to Defendant. Rather, these were merely license fees which are "akin to a royalty" (*id*.).

In its memorandum of law, Plaintiff argues that the four year statute of limitations set forth in UCC § 2-725(1) does not apply to this action. It asserts that Article 7.1(a) of the May 2010 Contract regarding the "Balance Due" of $419,000 embodies a promissory note. Plaintiff further asserts that a promissory note need not be a stand alone document, and may be included in an agreement as a contractual provision, as was the case here. It contends that as a promissory note, relevant claims are subject to a six year statute of limitations pursuant to CPLR 213(2). Plaintiff argues that the promissory note is "divorced from the underlying transaction" and the UCC's four year statute of limitations therefore does not apply. It further asserts that Article 2 of the UCC does not apply, either expressly or by implication, to a promissory note. Plaintiff also contends that where the parties' contract is not primarily for goods sold and delivered, but is related to financing issues, the UCC's four year limitation period is ***4** inapplicable. Because the May 2010 Contract related to the acknowledgment of an indebtedness and was not primarily for goods sold and delivered, Plaintiff argues that the four year statute of limitations for the sale of goods does not govern.

Plaintiff also argues that Defendant's motion should be denied because Defendant has failed to furnish an affidavit from someone with personal knowledge of the facts. Specifically, it asserts that Defendant's description of the parties' agreement in its memorandum of law as a contract to "purchase for resale certain products for which Calltrol was the licensed distributor" is factually inaccurate and unsupported by the relevant contractual provisions. By contrast, Plaintiff notes that it has furnished the Friedman Affidavit, wherein Plaintiff's president avers that the past due acknowledgment of debt was for license fees and not for the sale of goods or software. Plaintiff argues that the issue here is not whether Defendant's sales of software development kits to its customers fall under the UCC; rather, the issue is that Defendant owes Plaintiff payment for license fees, which fees do not constitute the sale of goods and accordingly do not invoke the UCC's four year limitations period. Plaintiff also contends that if Defendant were to furnish sworn testimony on reply attempting to demonstrate that the license was a sale of goods, such belated showing cannot remedy the basic deficiencies in Defendant's *prima facie* showing.

DEFENDANT'S REPLY

In further support of its motion, Defendant submits a reply memorandum of law. In it, Defendant reiterates its argument that Plaintiff's sole cause of action should be dismissed as time

barred pursuant to the UCC's four year statute of limitations, as the underlying transactions occurred prior to May 10, 2010 and the Complaint was filed on September 28, 2015, more than five years after the date of the alleged breach. Defendant again asserts that the May 2010 Agreement, as a contract for the marketing, resale and licensure of software products and other third party products, concerns the sale of goods and is governed by the broad reach of the UCC. As such, Defendant contends that it met its *prima facie* burden of establishing in its moving papers that the time in which Plaintiff could sue had expired before Plaintiff filed its Complaint. Defendant argues that Plaintiff's assertion in its opposition that the May 2010 Agreement is a contract for accumulated license fees and contains a promissory note is both inaccurate and belied by the contract's terms. Accordingly, Defendant asserts that Plaintiff's opposition failed to rebut Defendant's *prima facie* showing and failed to establish that Plaintiff's claim was timely filed.

Defendant also contends that in opposing Defendant's motion, Plaintiff has proffered a "new theory" that the "Balance Due" is a promissory note, which theory is not alleged in the Complaint and is not supported by applicable law, and should not be countenanced by this Court. Specifically, Defendant argues that the "Balance Due" provision in the May 2010 Contract is not a promissory note because (a) Plaintiff in the Complaint did not assert a claim for breach of a promissory note and did not allege any facts supporting such a claim; (b) Defendant never expressed a promise to pay the amount allegedly due as required by UCC § 9-102(a)(65); and (c) Defendant never expressed that the amount due was payable on demand or at a definite time in the future as is required by UCC § 3-104.

***5** *LEGAL ANALYSIS*

STANDARD OF REVIEW ON A MOTION TO DISMISS

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired ...The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable statute of limitations period" (*Coleman v Wells Fargo & Co.*, 125 AD3d 716, 716 [2d Dept 2015]). On such a motion, affidavits may properly be considered, provided that the affidavits come from persons with personal knowledge of the facts (*Zhinin v Vicari*, 50 AD3d 786, 787 [2d Dept 2009]).

THE ACTION SHOULD NOT NOW BE DISMISSED AS TIME BARRED

The general rule applicable to actions to recover damages for breach of contract is that a six-year statute of limitations begins to run when a contract is breached or when one party fails to perform a contractual obligation (*see Beller v William Penn Life Ins. Co. of NY*, 8 AD3d 310, 314 [2004]; *Squeri v Moriches Assocs.*, 307 AD2d 260, 261 [2003]; *see also* CPLR 213[2]). "[A] breach of contract cause of action accrues at the time of the breach" even where "the injured party may be ignorant of the existence of the wrong or the injury" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

However, UCC § 2-725(1) provides that "[a]n action for breach of any contract for sale [of goods] must be commenced within four years after the cause of action has accrued" (*see* CPLR 203 [a]). Accordingly, actions involving the sale of goods that are not commenced within the UCC's four year statute of limitations are properly dismissed as time barred pursuant to CPLR 3211(a)(5). *See*, *e.g.*, *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 69-70 (2d Dept 2013); *Chernick v RCA*, 207 AD2d 373, 373 (2d Dept 1994).

The Court notes that Plaintiff's Complaint does not specify when the alleged breaches of the January 2001 Contract (*i.e.,* the nonpayment) occurred and Defendant does not offer any evidence as to the date of these breaches. Friedman does not directly address this in his affidavit, though he does allude to Exhibit C to the May 2010 Contract, which shows that there were payment shortfalls, but it does not specify the date payments were made, though it does set forth the due date. It seems fair to conclude that all breaches had occurred prior to the May 2, 2010 execution of the May 2010 Contract.

The premise of Defendant's motion is that the very allegations of the Complaint show that the action is untimely in that the action was not brought within four years of May 2, 2010, as required by UCC § 2-725(1). However, even if it may be said that Defendant has shown *prima facie* that the action is untimely, Plaintiff has raised questions of fact as to whether the statute of limitations has been tolled.

The Court notes that Friedman avers in his affidavit, as does the Complaint, that Defendant made payments to Defendant

after May 3, 2010, with the payments totaling $42,794.41. Partial payment of a debt before or after the statute of limitations has ***6** expired may toll the statute or start it running a new, provided that the payment was of a portion of an admitted debt under circumstances amounting to a clear demonstrated intention to pay the balance (*see Education Resources Institute, Inc. v Piazza,* 17 AD3d 513 [2d Dept 2005]; *Bernstein v Kaplan*, 67 AD2d 897 [2d Dept 1979]). The statute will be tolled if the creditor demonstrates that it was "payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (*Lew Morris Demolition Co. v Board of Educ. of City of NY*, 40 NY2d 516, 521 [1976]; *Erdheim v Gelfman*, 303 AD2d 714 [2d Dept 2003]).

Here, there is no question but that Defendant admitted in the May 2010 Contract that it owed Plaintiff $419,000.00 at the time of the Contract. While Friedman's affidavit is sparse, he does manage to connect the payments after May 3, 2010 to a reduction of the admitted debt by his statement that Defendant is liable for the $419,000 "less subsequent payments" and that "additional payments" of $42,794.41 were made after May 3, 2010.

The Complaint states that one payment of $2,500 was made on May 12, 2010 and another payment in the same amount was made on June 8, 2010. The Complaint then lists fourteen other payments, of at least $2,000 each, but the dates of such payments are not specified. Nevertheless, given the ambiguity of the record, it cannot be said that, even if it is assumed that the four year statute of limitations applies, that there are no questions of fact as to whether the action was timely commenced.

Putting the issue of part payment aside, there is another ground for holding that Plaintiff has shown the existence of questions of fact as to the timeliness of the action.

As to a written acknowledgment, pursuant to General Obligations Law § 17--101, the statute of limitations will be tolled by a signed written acknowledgment of an existing debt which contains nothing inconsistent with an intention on the part of the debtor to pay it (*id.*;*Lew Morris Demolition Co. v Board of Educ. of City of NY*, 40 NY2d 516, 521 [1976]; *Erdheim v Gelfman*, 303 AD2d 714 [2d Dept 2003]). The critical question is whether the acknowledgment imports an intention to pay (*Knoll v Datek Securities Corp.*, 2 AD3d 594 [2d Dept 2003]; *see Jeffrey L. Rosenberg & Assoc., LLC v Lajaunie*, 54 AD3d 813 [2d Dept 2008]).

In this case, Defendant acknowledged in writing in the May 2010 Contract that it currently was indebted to Plaintiff in the amount of $419,000, and referred to this amount as the "Balance Due". Furthermore, the written acknowledgment also referred to the accompanying spreadsheet (the "breakdown of the Balance Due"), which in turn showed that there was a larger sub total of claims by Plaintiff ($558,616.50) and that the sum of $419,000 constituted the "Balance Due This Statement" after deduction of $139,616.50 for a negotiated discount. Thus, the writing reflects an admission of a debt to Plaintiff and certainly does not contain anything inconsistent with an intention to pay the debt. The reference to "Balance Due" reflects an intention to pay, since "balance" is referable to the amount in question and "due" reflects that the amount is owing or payable. Moreover, Friedman's affidavit and the allegations of the Complaint reflect that a payment of $2,500 was made on May 12, 2010, which was the day *before* the ***7** date (May 13, 2010) that Friedman dated his signature on the May 2010 Contract, Defendant having signed the Contract earlier. Thus, there is evidence that Defendant tendered a partial payment, either contemporaneously with or shortly after, its signature of the May 2010 Contract, thus evidencing that Defendant intended to pay the Balance Due. Thus, there are questions of fact as to whether Defendant re-set the statute of limitations by its written acknowledgment of the debt.

But the question remains what statute of limitations was re-set: four years or six.

The Court concludes that it is not possible, on this record, to determine whether the January 2001 Contract is for the sale of goods and thus subject to the UCC.

UCC § 2-102 provides that Article 2 of the UCC "applies to transactions in goods." "Goods" is defined broadly in UCC § 2-105(a) to mean "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." *See also Holbrook v Nat'l Fuel Gas Distrib. Corp.*, 11 AD3d 1040, 1041 (4th Dept 2004); *In re Estate of McManus*, 83 AD2d 553, 555 (2d Dept 1981).

Fatal to Defendant's motion is the fact that Schedule A to the January 2001 Contract has not been furnished to the Court.

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Pursuant to the January 2001 Contract, Plaintiff granted Defendant a non-exclusive license to market and resell certain products, which products the agreement states are identified in Schedule A thereto (*see* Complaint, Ex. B at Art. 1.1). However, the copy of the January 2001 Contract that is annexed to Defendant's motion, and the copy annexed to the Complaint, both omit Schedule A and are missing this critical page. Defendant also failed to furnish an affidavit from someone with personal knowledge of the facts in support of its motion. Its description of the January 2001 Contract in its memorandum of law as involving the sale of goods is insufficient for purposes of meeting Defendant's *prima facie* burden. Absent documentation or sworn testimony from someone with personal knowledge identifying the specific "products" at issue under the January 2001 Contract, it is impossible for the Court to determine on this motion whether the January 2001 Contract was a transaction in "goods" under UCC § 2-102 and UCC § 2-105(a). As such, Defendant has not met its *prima facie* burden of establishing that the four year limitation period set forth in UCC § 2-725(1) applies to Plaintiff's breach of contract cause of action, and Defendant therefore cannot make an initial showing that this claim is time barred (*see QK Healthcare*, 108 AD3d at 69; *Paris Suites Hotel, Inc. v Seneca Ins. Co., Inc.*, 2011 NY Misc. LEXIS 5656 [Sup Ct, Queens County Dec. 2, 2011]).

The Court finds Defendant's authority, *Architectronics v Control Sys., Inc.*, 935 F Supp. 425, 432 (SDNY 1996), to be inapposite. Defendant cites *Architectronics* for the propositions that computer software is considered to be a "good" under Article 2 of the UCC, and that the UCC applies to the January 2001 Contract regardless of whether there was a direct sale of goods from Plaintiff to Defendant because the UCC governs transactions and not merely sales. However, the Court in *Architectronics* found that the "predominant feature" of the relevant license agreement was a transfer of intellectual property rights. As such, it held that "the agreement is not subject to Article Two of the UCC" and that plaintiff's breach of contract was timely under the six year statute of ***8** limitations for breach of contract actions not governed by the UCC (*see Architectronics*, 935 F Supp. at 432). In the Friedman Affidavit, Friedman avers that at the inception of the parties' relationship, Plaintiff furnished its software to Defendant, which Defendant copied onto its system (Friedman Aff. at ¶ 4). Defendant was thereafter permitted to sell the software to Defendant's customers, and it would copy the software from Defendant's system to that of the customer (*id.*). Whenever Defendant sold the software to a customer, it was required to pay a license fee to Plaintiff (*id.*). As per *Architectronics*, there is at least an issue of fact as to whether the "predominant feature" of the agreements between Plaintiff and Defendant in this action involved a transfer of intellectual property rights, *i.e.*, Plaintiff's furnishing of its software to Defendant for copying onto Defendant's system and Plaintiff's granting Defendant permission to sell copies thereof to customers. This authority does not support Defendant's argument that Article 2 of the UCC applies to this transaction, and can instead be read to suggest that the six year limitations period of CPLR 213(2) should govern.

Moreover, even if it is considered that Defendant met its *prima facie* burden, the Court would find that Plaintiff in its opposition has raised a question of fact as to whether the four year statute of limitations is applicable(*see Coleman*, 125 AD3d at 716). Friedman avers that he is the president of Plaintiff and handled the relevant transactions between Plaintiff and Defendant (Friedman Aff. at ¶ 1). As such, he has personal knowledge of the facts at issue herein. Friedman avers that the "Balance Due" of $419,000 set forth in the May 2010 Contract was not for Plaintiff's prior sale of goods or software to Defendant, as alleged by Defendant in its moving papers (*id.* at ¶ 3). Rather, he avers that each of the prior charges comprising the $419,000 was a license fee (*id.* at ¶ 4). Insomuch as Plaintiff has furnished sworn testimony from someone with personal knowledge of the facts stating that the requested monetary damages are not for Plaintiff's prior sale of goods or software to Defendant, there is an issue of fact as to whether the four year limitation period set forth in UCC § 2-725(1) or the six year statute of limitations of CPLR 213(2) applies to Plaintiff's breach of contract cause of action.

Based on the foregoing, Defendant's motion to dismiss Plaintiff's cause of action for breach of contract shall be denied.

CONCLUSION

The Court has considered the following papers in connection with this motion:

1) Notice of Motion to Dismiss dated December 10, 2015; Affirmation of John W. Fried, Esq. dated December 10, 2015, together with the exhibit annexed thereto;

2) Defendant's Memorandum of Law in Support of its Motion to Dismiss dated December 10, 2015;

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3) Affidavit of David M. Friedman in Opposition, sworn to December 11, 2015;

4) Plaintiff's Memorandum of Law in Opposition dated February 19, 2016; and

5) Defendant's Reply Memorandum in Support of its Motion to Dismiss dated March 8, 2016.

Based on the foregoing papers and for the reasons stated, it is hereby

ORDERED that the motion by Defendant DialConnection, LLC, a/k/a Vesper Technologies, L.L.C., pursuant to CPLR 3211(a)(5) for an order dismissing the ***9** Verified Complaint of Plaintiff Calltrol Corporation is hereby denied; and it is further

ORDERED that counsel for the parties shall appear for a Preliminary Conference, one of the purposes of which shall be to establish a schedule for the completion of discovery, to be held on May 27, 2016 at 9:30 a.m., which conference may not be adjourned except upon the prior order of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

May 10, 2016

E N T E R :

Alan D. Scheinkman

Justice of the Supreme Court

FOOTNOTES

Copr. (C) 2021, Secretary of State, State of New York

Footnotes

1 While the Complaint is labeled “Verified Complaint”, no verification appears on the efiled copy or on the copy tendered to the Court. Hence, the Court cannot consider the Complaint to have been verified.

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1995 WL 422034
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Tony TALARICO, Plaintiff,
v.
THOMAS CRIMMINS CONTRACTING COMPANY, INC., Kevin Crimmins, and John Does 1–10, Defendants.

No. 94 Civ. 0420(RPP).
|
July 18, 1995.

Attorneys and Law Firms

William L. Barish, Mt. Kisco, NY, for plaintiff.

McLaughlin & Stern, Alkalay Handler Robbins and Herman by Craig S. Brown, New York City, for defendants.

OPINION AND ORDER

ROBERT P. PATTERSON, Jr., District Judge.

***1** Plaintiff Tony Talarico brings this four count complaint against Thomas Crimmins Contracting Company, Inc. ("TCCC") and its president, Kevin Crimmins ("Crimmins") based upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1). Venue is based upon 28 U.S.C. § 1391(a)(1) & (2).

Defendants TCCC and Crimmins move for summary judgment, pursuant to Fed.R.Civ.P. 56, on the complaint in its entirety. Plaintiff makes a cross-motion for summary judgment on his first cause of action for a contract balance of $136,230.

BACKGROUND

TCCC, a foundation and excavation subcontractor, hired Plaintiff to remove dirt from worksites of various construction projects between June 1985 and December 1986. Plaintiff alleges that upon completion of his work in late 1986 or early 1987,[1] Defendants' Vice President, Alan Gale, told him that TCCC was experiencing difficulties in securing payment on various projects from the general contractor, Madison Lexington Venture ("Madison"), and was unable to pay him immediately. Since there was no express agreement as to payment date, Plaintiff contends that payment was due within a reasonable time after completion.[2] Pl.'s Rule 3g Statement at 1.

Plaintiff alleges that Gale also asked him not to sue, that Gale told him the outstanding balance was undisputed, and that he called Gale thereafter every four to five weeks about the debt, each time receiving reassurances that he would be paid as soon as TCCC settled its claims against Madison. Pl.'s Decl. at 1–2.

In connection with Plaintiff's bankruptcy proceedings on December 14, 1989, Plaintiff asked Gale to confirm the amount owed to him. Plaintiff alleges that in response Gale mailed him charts (the "Charts") in late 1989 or early 1990.[3] Pl.'s Decl. at 2. The Charts appear to be a handwritten record of all the work Plaintiff had performed for TCCC: the number of loads transported per day per project multiplied by the undisputed fee of $95 per load less payments resulting in a balance due of $147,060. They are undated, unsigned and lack any markings identifying TCCC as the preparer. Plaintiff does not recall whether the Charts were accompanied by a transmittal letter, but asserts that the envelope in which the Charts were sent included Defendants' name and return address. Pl.'s Decl. at 2–3.

Plaintiff alleges that he continued to call Gale every five weeks until Gale left TCCC's employment in 1992, after which Plaintiff alleges that no one at TCCC answered his approximately dozen phone calls. Pl.'s Decl. at 3. Plaintiff's attorney sent a written demand for payment dated June 16, 1992. Receiving no response, Plaintiff filed suit in New Jersey (the "New Jersey Action") on July 18, 1992. By Order dated October 1, 1993, the New Jersey Action was dismissed for lack of personal jurisdiction over Defendants. On January 25, 1994, approximately one year after the six year statute of limitations for breach of contracts claims had expired, Plaintiff commenced the present action, containing a charge of breach of contract against TCCC for nonpayment of trucking services at an agreed rate of $95 per load totalling $136,230; a charge of breach of contract against TCCC for nonpayment of $10,070 for trucking services performed; a charge of diversion of trust funds created by Article 3A of the New York Lien Law against TCCC and Crimmins; and a

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charge against John Does 1–10 for distribution of funds of a trust created by Article 3A of the New York Lien Law.

DISCUSSION

***2** Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970), and the court must view the facts in the light most favorable to the non-moving party, *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

I. Timebar under the law of New York

Plaintiff contends that since he filed this action within six months of the dismissal of the New Jersey action, this action was timely filed under section 205 of the Civil Practice Law Rules (CPLR 205). Defendants counter that the New Jersey Action cannot toll the statute of limitations, having been dismissed for lack of personal jurisdiction because TCCC had insufficient contacts with New Jersey to be subject to jurisdiction under its long-arm statute. Pl.'s Notice of Cross–Mot. at 2.

CPLR § 205 reads in relevant part:

> If an action is timely commenced and is terminated in any other manner than by ... a failure to obtain personal jurisdiction over the defendant ... the plaintiff ... may commence a new action upon the same transaction ... within six months....

Plaintiff equates the statutes use of “a failure to obtain personal jurisdiction” with a failure to effect service of process. Pl.'s Cross–Mot. at 2. However, Plaintiff cites no cases in support of this narrow reading. Obtaining personal jurisdiction requires that the defendant be one upon whom process may be served. *See, Int'l Shoe Co. v. State of Washington,* 326 U.S. 310, 316 (1945) (“in order to subject a defendant to a judgment in personam ... he [must] have certain minimum contacts ... such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ”) Accordingly, the language of CPLR § 205 precludes Plaintiff from relying on the New Jersey Action to toll the statute of limitations. Furthermore, *Baker v. Commercial Travelers Mutual Accident Association,* 161 N.Y.S.2d 332 (4th Dept.1957), held that CPLR § 205 is not available when the predicate action is commenced in a sister state.

Plaintiff next argues that the Charts received from TCCC, sent in response to his request for information needed for his bankruptcy proceedings, constitute an acknowledgment of debt sufficient to stay the statute of limitations under section 17–101 of the General Obligations Law (GOL § 17–101), which reads in relevant part:

> An acknowledgment ... in a writing signed by the party to be charged ... is the only ... evidence ... to take an action out of the ... limitations of time for commencing actions ...

Defendants argue that the Charts are not an acknowledgment because they are time-barred, having been obviously prepared more than six years prior to the commencement of this action.

***3** Defendants cite *Sitomer v. Kimbrofsky,* 254 N.Y.S. 205 (City Ct.1931), holding that an acknowledgment “must have been made within six years next preceding the commencement of the cause of action”, *Id.,* at 207. However, it is clear from the preceding sentence that “made” refers to “execution” and it is unclear from the facts whether “execution” signifies “creation” as opposed to “delivery”. Furthermore, since the statute requires only that an acknowledgment be “contained in a writing signed by the party to be charged”, Defendant's argument is unpersuasive.

Defendants' second argument is that the Charts are not signed. Although there are no marks on the charts indicating that TCCC is the preparer, Plaintiff alleges that Defendants printed name and return address on the envelope in which the Charts were sent is a sufficient signature to satisfy the GOL § 17–101. Pl.'s Cross–Mot. at 5.

The Court is aware of no New York cases discussing whether a signed document and the unsigned document indicating the balance due may be considered together to satisfy the signature requirement under GOL 17–101. Although the Tenth Circuit considered unsigned balance sheets and accompanying signed transmittal letters as a single writing to hold that the signature requirement for an acknowledgment was satisfied, the court stated that the “writings [must] have reference to the subject matter and [be] so connected with each other that they may fairly be said to constitute one paper relating the contract.” *Victory Investment Corporation v. Muskogee Electric Traction Co.,* 150 F.2d 889, 891 (10th Cir.), *cert. denied,* 326 U.S. 774 (1945). Plaintiff has not produced the envelope and has not shown that the envelope

is sufficiently connected with the Charts to be read as a single writing with the address on the envelope acting as a signature. Furthermore, since the statute requires a writing "signed by the party to be charged", Plaintiff's argument is unavailing and TCCC did not tender an acknowledgment of debt.

Plaintiff next argues that Defendants are estopped from invoking the statute of limitations. Although estoppel may not be invoked to give effect to parole representations or promises in the face of a statute requiring a writing, *see Scheur v. Scheur,* 308 N.Y. 447 (1955) (no basis for estoppel under Civ.Prac.Act § 59, precursor to GOL § 17–101), a court may exercise its discretion to invoke estoppel under GOL § 17–103(4)(b), which reads in relevant part:

> This section [Agreements waiving the statute of limitations] does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitation.

In *Travelers Insurance Co. v. State Farm Insurance,* 559 N.Y.S.2d 117, (Sup.Ct.1990), *aff'd,* 586 N.Y.S.2d 767 (4th Dept.1992), the court interpreted this section to mean:

> If conduct of the Defendant was such as to mislead a party, even without fraud or intent to deceive, and those actions cause a party to refrain from bringing an action in a timely manner, this is enough to warrant the application of equitable estoppel.

***4** *Id.* at 118.

In the instant case, Plaintiff states he received verbal requests to forbear from suit, verbal and written confirmation of the balance owed him, and verbal reassurances that payment was forthcoming from a Defendant from whom he had procured approximately $2 million of business via verbal agreement and from whom he had successfully received payment for approximately 92% of the balance due.[4] In light of Defendants' accounts payable ledger, which shows a balance owed to Plaintiff that equals the balance claimed in the current action, under principles of equity, Defendants may not now take advantage of Plaintiff's detrimental reliance on its conduct which appears to have conceded the issue of liability. Furthermore, although Plaintiff cannot use the New Jersey Action to save his claim under CPLR § 205, the fact that he filed a timely New Jersey Action just five weeks after Defendants' deceit became apparent (via the lack of response to Plaintiff's demand letter of June 16, 1992) may be used as evidence by the Court under principles of equity to determine that Plaintiff was not sufficiently dilatory to deny him his right to be heard. Defendants have not shown actions amounting to unclean hands by Plaintiff, accordingly the action will be allowed to proceed to trial.

II. Claims under the Lien Law of New York

Defendants argue that Plaintiff's third and fourth causes of action, asserting trust claims in connection with one of the construction projects on which Plaintiff worked, the 57th Street Building, are foreclosed by § 77(2) of the Lien Law, stating in relevant part:

> No such action shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later, except an action by the trustee for final settlement of his accounts and for his discharge.

Defendants argue that since the foundation services were completed in 1986, and the entire building was completed in 1990, regardless of whether "completion of such improvement" is construed as the completion date of the entire building or of its foundation only, Plaintiff's trust claims, asserted in January 1994, are time barred.

Defendants concede that in a subcontractor's action under the Lien Law brought against a general contractor, courts have held that "improvement" refers to the improvement of real property and that the date of "completion of such improvement" means the completion date of the entire construction project, *see, A.D. Walker & Co., Inc. v. Shelter Programs Co.,* 443 N.Y.S.2d 96, 97 (2d Dep't.1981). However, Defendants contend that where an action is brought against a subcontractor by a subsubcontractor, the date of completion should be the completion date of the particular improvement on which the subcontractor worked as opposed to the entire project. Defendants contend that applying a date corresponding to completion of the project would allow suit of a subcontractor years after the completion of its work and undermine the short statute of limitations set forth in the Lien Law.

***5** No New York cases have been presented interpreting the text at issue so strictly. In *Forest Electric Corp. v. Century National Bank and Trust Co.,* 333 N.Y.S.2d 644 (Sup.Ct.1970), the court noted

> Article 3A of the Lien Law was designed to create trust funds to assure payment of subcontractors.... [T]heir

> respective rights ... cannot be fully ascertained until completion of the entire improvement.... A statute of limitations should not be narrowly construed against beneficiaries of a trust.

Id., at 646. There is no reason to construe the text of the statute broadly in suits by subcontractors against general contractors and strictly in suits by sub-subcontractors against subcontractors when "the Legislature sought to assure that the funds received from an owner should reach their ultimate destination—material and labor". *Id.,* at 645 (quoting *Aquilino v. United States,* 219 N.Y.S.2d 254, 260 (1961)). Analogous to suits brought against general contractors by subcontractors, the date of "completion of such improvement" should correspond to the completion date of the entire construction project. To hold otherwise would cause unnecessary litigation in marginally profitable construction projects where the builder's 10% withholding is required to pay for all the work performed.

Defendants argue that the building was complete in 1990 and offer Madison's [general contractor on 57th Street Building] Debtor's Disclosure Statement prepared with respect to its bankruptcy proceedings, in which the date appears, as evidence. Plaintiff argues that Defendants' motion must be denied because Defendants' proof of the completion date is incompetent hearsay.

Approval in bankruptcy court of a disclosure statement pursuant to § 1125 is not an authentication of every detail contained therein. In *C.J. Kirk v. Texaco, Inc.,* 82 B.R. 678 (1988), the bankruptcy court found

> The legislative history could hardly be more clear in granting broad discretion to bankruptcy judges under § 1125(a): 'Precisely what constitutes adequate information.... Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation ... the need for relative speed in solicitation and confirmation'.... Mistakes or internal inconsistencies in a disclosure statement do not necessarily bar its approval.

Id., at 682. Even within a bankruptcy proceeding, the court will not allow information plucked from a disclosure statement to affect a litigant's rights. Comparing a disclosure statement with a reorganization plan, the court writes

> A disclosure statement ... is evaluated only in terms of whether it provides sufficient information to permit enlightened voting by holders of claims or interests. If the legislature had intended to afford [it] the same potential to control a party's rights that a [reorganization] plan has, approval of [it] would have ... required satisfaction of safeguards like those contained in § 1129 [standards for approving reorganization plans].

***6** *In re BSL Operating Corp. v. 125 East Taverns, Inc.,* 57 B.R. 945, 950 (1986). Likewise, there is no reason to allow unsubstantiated information contained in a debtor's disclosure statement to preclude Plaintiff's right to a trial on the merits in the federal district courts.[5] Defendants' motion for summary judgment on this cause of action is denied without prejudice to Defendants' renewal of the motion upon proper proof of the completion date prior to trial.

III. Plaintiff's Cross–Motion for Summary Judgment is Denied

Plaintiff argues that TCCC's obligation to him is undisputed, evidenced by TCCC's 1989 accounts payable journal produced in discovery showing $136,230 due Talarico, and that he is entitled to summary judgment on the first cause of action. An "account payable" is defined as "a liability representing an amount owed to a creditor ... not necessarily due or past due." *see Black's Law Dictionary* at 17 (5th ed. 1979). TCCC does not concede that the amount is due. Defs.' Mem. of Law at 16. Furthermore, Plaintiff's claim may be time barred if Plaintiff has unclean hands, an issue not presented to the Court. Since the burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970), and the court must view the facts in the light most favorable to the non-moving party, *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962), Plaintiff's cross-motion for summary judgment is denied.

CONCLUSION

Defendants' motion for summary judgment on the first two counts of the complaint is denied and on the last two counts is denied without prejudice to Defendants' renewal of the motion upon submission of proof of the completion date. Plaintiff's cross-motion for summary judgment on the first cause of action is denied. Counsel shall attend a conference on July 24, 1995 at 9 a.m.

IT IS SO ORDERED.

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All Citations

Not Reported in F.Supp., 1995 WL 422034

Footnotes

1 Defendants allege that Plaintiff completed all of his work by December 1986 (Defs.' Aff. at 2).

2 Defendants contend that final payment for Plaintiff's services was due upon completion, December 1986. Defs.' Rule 3g Statement at 1.

3 Crimmins alleges that he did not see the Charts until after the current action was commenced. Defs.' Aff. at 6. However, Defendants do not offer an affidavit from its former employee Mr. Gale alleging that he did not send the Charts to Plaintiff.

4 Defendants' argument that Plaintiff is precluded from reliance on GOL § 17–103 because he failed to allege that Defendants promised "to waive, to extend, or not to plead the statute of limitation" is unpersuasive. Plaintiff alleges that "Alan [Gale] asked me not to sue" and "assured me that I would be paid" (Talarico Decl. ¶ 4). The unmistakable implication, strengthened by Gale's continuing assurances over a period of years, was that TCCC would not assert a lack of timeliness, eg. the statute of limitations defense. Furthermore, "conduct" as used in GOL § 17–103 has not been restricted to cases in which debtors promise specifically not to plead the limitations defense. *See Travelers' Insurance Co. v. State Farm Insurance,* 559 N.Y.S.2d 117 (Sup.Ct.1990), *aff'd,* 586 N.Y.S.2d 767 (4th Dept.1992) (partial payment on a liability, without any mention of the limitations defense, was held as "conduct" sufficient to allow creditor to seek refuge under GOL § 17–103(4)).

5 Since the Court finds Plaintiff's trust claims are not barred, it does not consider Plaintiff's alternative arguments that § 77(2) does not govern actions for damages for diversion as opposed to actions to enforce a trust against a trustee or that the limitations provision does not apply to trust funds that come into existence after the one year period has expired.

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