To be argued by:
William E. Brueckner, Esq.
(Time requested: 20 minutes)

APL No. APL-2021-00021
Appellate Division, Fourth Department Docket No. CA 19-01672
Genesee County Clerk's Index No. E67594

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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

WOODS OVIATT GILMAN LLP
William E. Brueckner, Esq.
1900 Bausch & Lomb Place
Rochester, New York 14604
(585) 987-2800
wbrueckner@woodsoviatt.com

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C.
Kevin S. Cooman, Esq.
25 East Main Street, Suite 500
Rochester, New York 14614
(585) 546-2500
kcooman@mccmlaw.com

Attorneys for Defendant-Appellant

June 17, 2021

RULE 5001(f): CORPORATE DISCLOSURE

Defendant/Appellant Council of Churches Housing Development Fund Compnay, 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 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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STATUTES AND LEGISLATIVE MATERIALS:

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JUDICIAL PRECEDENT: (continued)

JUDICIAL PRECEDENT: (continued)

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 of 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.

PRELIMINARY STATEMENT

As explained in the parties' principal briefs, this appeal arises from the parties' cross-motions for summary judgment in a bilateral dispute regarding the enforceability of a WrapAround Note and Mortgage executed by Respondent Batavia Townhouses, Ltd. (the "Partnership") in favor of Appellant Council of Churches Housing Development Fund Company, Inc. (the "Churches").

In this derivative action, the Partnership's two limited partners (the "Limited Partners") contend on the Partnership's behalf that the obligations in the WrapAround Note and Mortgage should not be enforceable because the Churches failed to bring action to enforce the obligations within six years of the date that the Partnership first failed to make payment of the debt. The Partnership's obligations under the WrapAround Note and Mortgage are enforceable, despite the Churches' failure to insist on payments, because those obligations were annually acknowledged and reaffirmed in writings delivered by the Partnership to its creditor, the Churches.

This Court should reverse the Opinion and Order of the Appellate Division, Fourth Department, which determined that the provisions of General Obligations Law §17-105 make the WrapAround Note and Mortgage unenforceable.

LEGAL ARGUMENT:

I.

THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE AN EXPRESS PROMISE

Section 17-105(1) of the General Obligations Law provides as follows:

> A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property … or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise.

General Obligations Law §17-105 (West 2021) (emphasis added).

The Fourth Department's Opinion and Order is mistaken because it misapprehends the command of Section 17-105. The statute does not require a "writing" that includes an "express promise," as the Opinion and Order concludes, *R. 365*: rather, the statute requires the "express terms of a writing" to include a "promise." The distinction – driven by the plain terms of the statutory provision - is absolutely critical to the proper determination of the issue, and decades of this State's judicial precedent teach that an acknowledgement in the "express terms of a writing" creates an implied "promise", so long as the acknowledgment is unconditional and includes nothing inconsistent with the obligor's intention to pay.

For decades, New York courts have recognized that the "express terms" of a writing can constitute an acknowledgment of a debt, where those terms 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, 521 (1976); *Knoll v. Datek Securities Corp.,* 2 A.D.3d 594, 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 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, 59 – 60 (Bankr. S.D.N.Y. 2004) (collecting cases interpreting New York state law).

Importantly, even after the enactment of General Obligations Law §17-105, the prevailing judicial precedent holds that an acknowledgement does not need to be an express promise. Instead, the writing need 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) (purported 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, 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 …").

Contrary to the Appellate Division's holding, and to Respondents' argument to this Court, Section 17-105's plain language does not alter this interplay. The plain language of the statute requires only that a "promise" can be determined from the "express terms" of a writing: there is nothing in the statute that requires the promise, itself, to be written expressly.

The other subparagraphs of Section 17-105 support the conclusion that an obligor can express an intent to pay a debt through an "acknowledgment," in contrast to an "express 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) (West 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.

II.

MORE THAN FIFTY YEARS OF JURISPRUDENCE DOES NOT REQUIRE AN EXPRESS PROMISE

After the enactment of General Obligations Law §17-105 in 1963, the courts in New York have regularly and often analyzed a mortgage debtor's reaffirmation of an obligation under the four part test for an acknowledgement.

In the 58 years since Section 17-105 was adopted, the reporters are replete with cases that analyze the effect of an acknowledgment's implied promise as a reaffirmation of a mortgage obligation. See*, Comerica Bank, N.A. v. Benedict*, 39 A.D.3d 456 (2d Dept. 2007) (in mortgage foreclosure case analyzing GOL §17-105, court examined whether writing qualified as an "acknowledgment" of the debt so as to extend the Statute of Limitations); *McQueen v. Bank of New York*, 57 Misc.3d 481, 483 - 84 (Sup. Court Kings County, 2017) (in a mortgage foreclosure context, court searches the record for an "unconditional acknowledgement" of a debt); *Petito v. Piffath,* 85 N.Y.2d 1, 7 - 8 (1994) (in mortgagor's action to declare mortgage unenforceable as untimely, purported "acknowledgement" evaluated under both 17-

101 and 17-105); *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 unenforceable as untimely); *Maidman Family Parking, L.P., v. Wallace Industries, Inc.,* 145 A.D.3d 1165, 1166 (3d Dept. 2016) *(*in an action on note and mortgage, court extends limitation period based on "a writing … signed, recogniz[ing] an existing debt and contain[ing] nothing inconsistent with an intention on the debtor's part to pay it"); *U.S. Bank N.A. v. Martin,* 144 A.D.3d 891 (2d Dept. 2016) (same); *Yadegar v. Deutsche Bank National Trust Company,* 164 A.D.3d 945 (2d Dept. 2018) (same); *Sharova v. Wells Fargo Bank,* 62 Misc.3d 925, 937 (Sup. Court Kings County, 2019) (same); *Lynford v. Williams*, 34 A.D.3d 761 (2d Dept. 2006); *Sichol v. Crocker*, 177 A.D.2d 842 (3d Dept. 1991) (analyzing acknowledgement of mortgage obligation, but finding that inferred promise to pay was not "unconditional").

Inexplicably, Respondents conclude that the legislature "deliberately abandoned" acknowledgements as a basis to toll or revive mortgage debts, and urge this Court to disregard a half-century body of law, suggesting that all those cases are a result of only a "cursory look" that reached an "erroneous conclusion." *Respondents' Brief,* 18, 22. This, of course, mischaracterizes the impact of GOL § 17-105, and evades the jurisprudence because they cannot overcome it.

III.

IN THIS BILATERAL DISPUTE, THE LEGISLATIVE HISTORY DOES NOT REQUIRE AN EXPRESS PROMISE

Respondents attempt to distort Section 17-105's legislative history by focusing on the Legislative Commission's recitation of the most obvious instance where a waiver of the statute of limitation can occur: where an express agreement says so. 1961 Legislative Document Number 65(F) (hereafter the "Legislative Document"), reprinted in *McKinney's 1961 Session Laws of New York* 1873, at 1876. But in doing so, Respondents ignore that the Legislative Commission did not stop there. It cited an "express agreement" as a non-exclusive example of a transaction where the intent to waive the limitation period is "sufficiently evidenced." *Id*. However, the Legislative Document does not rule out the possibility that other transactions might "sufficiently evidence" an intent to waive the limitation period, and goes on to recognize that the intent can be "implied" and "inferred." *Id*.

The possibility of "implied" and "inferred" waivers remains because the Legislature's intent in requiring an express promise was to address those situations where the dispute would have "adverse effect on titles" or "impair the security of titles." *Legislative Document,* 1875. Of course, not every dispute involving a mortgage debt carries that risk. It is evident that the Legislative Document's concern with the clarity of an express promise is tied to real property recording statutes, and their need to "put the world on notice" of interests in real property. The intention of

the Legislature to limit the scope of Section 17-105 is obvious from the heading of the section: "Promises and waivers affecting the time limited for action to foreclose a mortgage." See, *General Obligations Law* §17-105; *Broderick v. Weinsier*, 253 A.D. 213, 219 (1st Dept. 1938), *aff'd.*, 278 N.Y. 419 (1938) (heading of statute may be considered in construing its intent).

Because this bilateral dispute between a creditor and a debtor is *not* an "action to foreclose a mortgage," its presents one of the possibilities where an implied or inferred promise will acknowledge and reaffirm the debt. The outcome of this dispute – a determination as to whether the Partnership's debt to the Churches is enforceable – does not implicate "the security of titles."

A resolution of this dispute does not implicate the concerns for multilateral notice associated with the recording statutes. It is a simple dispute between a debtor and creditor who are already familiar with the transaction. Accordingly, the concerns of the Legislative Document are of no moment, and under these circumstances, the cases interpreting General Obligations Law §17-105 look only for an implied promise that meets the elements of an "acknowledgment."

IV.

THE FINANCIAL STATEMENTS, AUDITORS' REPORTS AND TAX RETURNS SATISFY THE REQUIREMENTS FOR ACKNOWLEDGEMENT AND IMPLIED PROMISE TO REPAY THE DEBT.

An acknowledgement of a debt that revives or tolls an otherwise time-barred claim on a debt must satisfy four elements. The acknowledgment must: (i) be in a writing that recognizes the existing debt; (ii) it must contain nothing inconsistent with an unconditional intention on behalf of the debtor to pay it; (iii) it must be signed; and (iv) it must be communicated to the creditor. *Lew Morris Demolition Co. v. Board of Education,* 40 N.Y.2d 516, 521 (1976); *Essex Real Estate Corp. v. Piluso,* 68 A.D. 2d 923 (2d Dept. 1979).

Respondents do not challenge the financial statements or tax returns under either the first or last elements. Instead, Respondents suggest that the writings do not manifest an unconditional intent to repay the debt, *Respondents' Brief*, 23 – 26, and that they are not signed by Partnership. *Id*. Both of these contentions are easily dismissed.

A. The Partnership Did More than Merely Carry the Debt on its Books.

Respondents devote too much of their argument to those cases suggesting that a debtor does not manifest an unconditional intent to repay a debt simply by carrying the debt on its books. See, e.g. *Respondents' Brief*, 26 - 27. That argument is not wrong, for as far as it goes, but it ignores the reality that, in this case, the Partnership

did more than simply carry the liability to the Churches on its books (and include the debt in its tax returns).

Annually, the Partnership sent its audited financial statements and its tax returns to its creditor, the Churches. *R. 74, - 75; R. 129 – 212; R. 270 – 296*.

It is the formal transmission of the statements and returns – as opposed to the statements and returns, themselves – that constitutes an acknowledgement. *Chase Manhattan Bank v. Polimeni*, 258 A.D.2d 361 (1st Dept. 1999), *lv. dismissed*, 93 N.Y.2d 952 (1999). Indeed, Respondents' own cases recognize that the inclusion of an obligation in a debtor's corporate books is adequate to acknowledge the debt, where it is accompanied by other circumstances evidencing an intent to repay. *Estate of Vengroski v. Garden Inn*, 114 A.D.2d 927, 928 (2d Dept. 1985); *Moore v. Candlewood Holding, Inc.*, 714 F.Supp.2d 406, 410 (E.D.N.Y. 2010) (acknowledgement occurs "if there is other evidence that the debtor listed a debt on its books or in its tax return with the intention of acknowledging its obligation to repay the lender"). Like the debtor in Polimeni, the Partnership unmistakably acknowledged its obligation to the Churches by its formal and annual transmission of the audited financial statements reflecting that debt, and by sharing its tax returns with the Churches.

B. The Signatures on the Writings are Sufficient to Acknowledge the Debt.

Respondents contend that in this case, the relevant financial documents were not suitably "signed" on behalf of the Partnership. Respondents rely on Shelley v. Dixon Equities, a case patently distinguishable from this dispute. *Shelley v. Dixon Equities*, 300 A.D.2d 566 (2d Dept. 2002). In Shelley, the document containing the purported acknowledgment was a reconstruction of the debtor's financial records signed by an accountant representing the creditor, not the debtor. *Id*. Here, the auditors who signed the transmittal of the Partnership's financial statement each year were acting on the Partnership's behalf, as the debtor, not on behalf of the Churches, as creditor. See, e.g. *R. 100* (auditors' reports and financial statements required under Section 14.2 of the partnership agreement); *R. 131, 145, 159, 173, 187, 201* (auditors' report addressed to its client, the Partnership).

Shelley has been expressly limited to its unique factual situation (*i.e.,* where the creditor reconstructed the financial statements at issue) and in so doing, the courts have acknowledged that financial statements signed and transmitted by an agent of the debtor may serve as a sufficient acknowledgement and reaffirmation of the obligation. See, *Daewoo International (America) Corporation Creditor Trust v. SSTS America Corp*., 2004 U.S. Dist. LEXIS 12298, *13 (S.D.N.Y., July 1, 2004) (financial statements prepared by an accountant of the debtor acknowledge and reaffirm debt); *Chase Manhattan Bank v. Polimeni*, 258 A.D.2d 361 (1st Dept. 1999)

(authority to sign documents acknowledging and reaffirming debt can be delegated by debtor). See also, *Nelux Holdings International v. Dweck*, 160 A.D.3d 520, 520 (1st Dept. 2018) (a written acknowledgement of a debt signed by the agent of the party to be charged may be sufficient); *Sullivan v Troser Management, Inc.*, 15 A.D.3d 1011 (4th Dept. 2005) (acknowledgement sufficient when signed by debtor's attorney).

Because they "have reference to the same subject matter and are so connected with each other that they may fairly be said to constitute one paper," the audited financial statements and the signed accountants' letter that transmitted them must be read as a single document. *Talarico v. Thomas Timmins Contracting Co, Inc.*, 1995 W.L. 422034 (S.D.N.Y. July 18, 1995).

Further, there can be no question that the Partnership's Executive Director signed the Partnership's tax returns. *R. 271 – 72, R. 285*.

CONCLUSION:

This Court should reverse the Appellate Divisions's Opinion and Order, and rule that the Partnership's obligation to the Churches under the WrapAround Note and Mortgage is valid and enforceable. By its plain language, General Obligations Law §17-105 does not require that a reaffirmation of debt include an express promise in bilateral disputes between a debtor and creditor. The courts of this state have consistently interpreted the statute in that manner since its enactment, and the

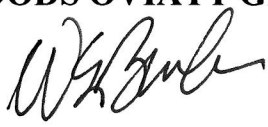
legislative history makes clear that the requirement for an express promise is not implicated in such bilateral disputes.

The financial statements, auditors' reports, and tax returns delivered annually to the Churches by the Partnership satisfy all of the requirements to acknowledge and reaffirm the Partnership's obligations to the Churches, and accordingly, the statute of limitations to enforce those obligations was tolled, and the Churches may still enforce them.

The Fourth Department's Opinion and Order should be reversed.

DATED: June 17, 2021
Rochester, New York

Respectfully submitted,
WOODS OVIATT GILMAN LLP



William E. Brueckner, Esq.
1900 Bausch & Lomb Place
Rochester, New York 14604
585.987.2800
wbrueckner @woodsoviatt.com

McCONVILLE, CONSIDINE, COOMAN & MORIN, P.C.
Kevin S. Cooman, Esq.
25 East Main Street
Rochester, New York 14614
585.546.2500
kcooman@mccmlaw.com

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Pursuant to 22 NYCRR 500.13(c)

The foregoing brief was prepared on a word processing system. A proportionally spaced typeface was used, as follows:

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ATTACHMENT

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As of: June 17, 2021 3:11 PM Z

Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp.

United States District Court for the Southern District of New York

July 1, 2004, Decided ; July 2, 2004, Filed

02 Civ. 9629 (NRB)

Reporter
2004 U.S. Dist. LEXIS 12298 *; 2004 WL 1488511

DAEWOO INTERNATIONAL (AMERICA) CORP. CREDITOR TRUST, Plaintiff, - against - SSTS AMERICA CORP., and SHINGSUNG TONGSANG CO., LTD., Defendant.

Subsequent History: Application denied by *Daewoo Intl. (Am.) Corp. Creditor Trust v. SSTS Am. Corp., 2004 U.S. Dist. LEXIS 17007 (S.D.N.Y., Aug. 24, 2004)*

Prior History: *Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp., 2004 U.S. Dist. LEXIS 6599 (S.D.N.Y., Apr. 12, 2004)*

Disposition: [*1] Defendants' motion for reconsideration denied.

Core Terms

defendants', reconsideration motion, recoupment, translation, summary judgment, overlooked, invoices, toll, statute of limitations, cross-motion, summary judgment motion, personal jurisdiction, financial statement

Case Summary

Procedural Posture
Defendants, borrower and guarantor, moved, pursuant to *Fed. R. Civ. P. 59(e)*, for reconsideration of an order of the district court granting summary judgment in favor of plaintiff lender and denying the defendants' cross-motion for summary judgment.

Overview
The complaint alleged that the lender would provide a line of credit to borrower for up to $ 2,500,000 per year, the borrower would purchase goods through the lender, and, when invoiced, pay the invoiced amount plus interest and a commission. When the borrower failed to make its payments, the lender asserted causes of action for breach of contract, account stated, goods sold and delivered, breach of guaranty, unjust enrichment and quantum meruit. The district court eventually granted the lender's motion for summary judgment. In moving for reconsideration, defendants asserted several issues: (1) credit for recoupment of some of the goods; (2) interpretation of the agreement from Korean; (3) the statute of limitations defense; (4) the burden of proof for asserting personal jurisdiction, and (5) alleged factual discrepancies concerning invoices. The court rejected each argument, noting that the exact amount of damages would be worked out by the parties; that minor differences in translation of the agreement were de minimis; the borrower continued to acknowledge the debt; and based on when the guarantor's liability ripened, the suit was filed well within the limitations period.

Outcome
The motion for reconsideration was denied.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN1[] **Relief From Judgments, Altering & Amending Judgments**

Pursuant to U.S. Dist. Ct., S.D. N.Y. & E.D.N.Y., Civ. R. 6.3 and *Fed. R. Civ. P. 59 (e)*, a motion for reconsideration is appropriate when a court overlooks

controlling decisions or factual matters that were put before it on the underlying motion and which, if examined, might reasonably have led to a different result. A motion for reconsideration may also be granted to correct a clear error, or prevent manifest injustice, or in light of the availability of new evidence.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN2[] Standards of Review, Abuse of Discretion

A motion for reconsideration is not a second bite at the apple for a party dissatisfied with a court's ruling. A *Fed. R. Civ. P. 59* motion should not be a vehicle for advancing new theories that a party failed to articulate in arguing the underlying motion, nor should it be an attempt to secure a rehearing on the merits. Whether to grant or deny a motion for reconsideration or reargument is in the sound discretion of a district court judge and will not be overturned absent an abuse of discretion. Absent compelling circumstances, a *Rule 59* motion is generally denied.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > ... > Documentary Evidence > Transcripts & Translations > Translations

Evidence > ... > Documentary Evidence > Transcripts & Translations > General Overview

HN3[] Summary Judgment, Entitlement as Matter of Law

Where a comparison of two different translations of a document prepared in a foreign language does not reveal any substantive differences, minor variations in words or phrases will not function to raise a genuine issue of material fact.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN4[] Statute of Limitations, Extensions & Revivals

Where a debtor acknowledges an obligation to a creditor in its annual report and carries the debt on its books that constitutes a recognition of the continuing validity of the obligation, and is sufficient to revive the creditor's otherwise time-barred claims on the debt.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Guaranty Contracts

Contracts Law > ... > Secured Transactions > Default > General Overview

HN5[] Types of Contracts, Guaranty Contracts

A contract of guaranty is a promise to answer for the payment of some debt or the performance of some obligation owed by another. It is a secondary obligation in that it is collateral, and only meaningful in relation to, the independent obligation to pay a debt of the primary obligor, and is contingent upon the primary obligor's default.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] Summary Judgment, Burdens of Proof

Even in the face of a motion for summary judgment challenging personal jurisdiction, the plaintiff's burden for a showing of jurisdiction remains prima facie.

Counsel: For Plaintiff: Steven Har, Esq., Duane Morris LLP, New York, NY.

For Defendant: Eric S. Weinstein, Esq., Feldman, Weinstein, LLP, New York, NY.

Judges: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

Opinion by: NAOMI REICE BUCHWALD

Opinion

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Defendants SSTS America Corp. ("SSTS America") and Shinsung Tongsang Co., Ltd. ("SSTS Korea") (collectively, "defendants") have moved this Court to reconsider its Memorandum and Order dated April 12, ***2004***, ("Order"), granting summary judgment in favor of plaintiff, Daewoo International (America) Corp. Creditor Trust ("Daewoo" or "plaintiff") and denying defendants' cross-motion. for the reasons stated below, defendants' motion for reconsideration is denied.

BACKGROUND [1]

[*2] A. Plaintiff's Allegations Against SSTS

Plaintiff alleges that in or about July 1995, SSTS entered into an agreement (the "Agreement") with Daewoo wherein Daewoo would provide loans and financing to SSTS America in order to help it set up and operate its business in the state of New York. Under the Agreement, Daewoo would provide SSTS America with loans to be paid back on a monthly basis plus interest. According to the plaintiff, the Agreement also called for Daewoo to provide a line of credit to SSTS America in the amount of up to $ 2,500,000 per year, which was to be adjusted from time to time. Under this provision, SSTS America was to purchase all goods through Daewoo. Daewoo would then invoice SSTS America for the goods and SSTS America would pay Daewoo the invoiced amount plus interest and a commission. While the defendant made certain payments in accordance with the Agreement, plaintiff alleges that it failed to pay all monies owed.

B. The Present Action

Plaintiff filed the instant action against defendants in New York State Supreme Court asserting causes of action for breach of contract, account stated, goods sold and delivered, breach of guaranty, unjust **[*3]** enrichment and quantum meruit. On December 4, 2002, the case was removed to this Court, and on January 24, 2003 SSTS America filed its answer including as affirmative defenses the rights of recoupment and setoff. On April 4, 2003 plaintiff filed a motion for partial summary judgment seeking to dismiss these affirmative defenses. This Court granted plaintiff's motion on June 9, 2003.

On September 29, 2003, plaintiff filed another motion for summary judgment, seeking summary judgment on all claims in its Complaint. Defendants responded with a cross-motion for summary judgment asserting defenses based on the statute of limitations, personal jurisdiction and plaintiff's alleged failure to state a prima facie case with respect to any of its claims. On April 12, ***2004***, we granted plaintiff's motion for summary judgment on all claims and denied defendants' cross-motion. Thereafter, defendants filed the instant motion for reconsideration, focusing on the issues of: (1) recoupment; (2) interpretation of the relevant Agreement; (3) the statute of limitations; (4) personal jurisdiction; and (5) alleged factual discrepancies concerning invoices.

DISCUSSION

I. Motion for Reconsideration [*4] Standard

HN1[↑] Pursuant to *Local Rule 6.3* and *Federal Rule of Civil Procedure 59 (e)*, a motion for reconsideration is appropriate when a court overlooks "controlling decisions or factual matters that were put before it on the underlying motion" and which, if examined, might reasonably have led to a different result. *Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000)*. Additionally, a motion for reconsideration may be granted to correct a clear error, or prevent "manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)*. Finally, a *Rule 59* motion may be granted in light of the availability of new evidence. Id.

[1] The following section contains a summary of the factual information recited more fully in our earlier opinion in this case, *Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp., **2004** U.S. Dist. **LEXIS** 6599, No. 02 Civ. 9629, **2004** WL 830079 at *1 (S.D.N.Y. Apr. 13, **2004**)*. Any new or additional facts are duly noted.

HN2[] A motion for reconsideration is not, however, a "second bite at the apple" for a party dissatisfied with a court's ruling. A *Rule 59* motion should not be a vehicle for advancing new theories that a party failed to articulate in arguing the underlying motion, nor should it be an attempt to secure a rehearing on the merits. See *Griffin Ins., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)*. "Whether to grant or deny **[*5]** a motion for reconsideration or reargument is in the 'sound discretion of a district court judge and will not be overturned absent an abuse of discretion.'" *U.S. Titan, Inc. v. Guangzhou Men Hua Shipping Co., Ltd., 182 F.R.D. 97, 100 (S.D.N.Y. 1998)* (quoting *McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983)*). Absent compelling circumstances, a *Rule 59* motion is "generally denied." *Wells Fargo Fin., Inc. v. Fernandez, 2001 U.S. Dist. LEXIS 4120, No. 98 Civ. 6635, 2001 WL 345226, at *1 (S.D.N.Y. Apr. 9, 2001)*

II. Recoupment

Defendants complain that this Court did not properly consider their recoupment claim in its April 12, ***2004*** Order. However, the recoupment claim was already considered and disposed of in our Memorandum and Order of June 9, 2003, wherein we granted plaintiff's motion for partial summary judgment to strike defendants' affirmative defenses of recoupment and setoff. See *Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS Am. Corp., 2003 U.S. Dist. LEXIS 9802, No. 02 Civ. 9629, 2003 WL 21355214 (S.D.N.Y. June 11, 2003)*. Defendants allege that there may be some accounting discrepancies in calculating damages, and they request, as they **[*6]** did in their briefing on the cross-motion, that the Court set an inquest to determine any credits in damages to which defendants might be entitled.

When we dismissed defendants' recoupment claim in June 2003, we stated:

> We need not reach the issue of whether as a technical matter, SSTS is barred from asserting recoupment of alleged overpayments to Daewoo America, as plaintiff's counsel specifically acknowledged at oral argument that he does not object to SSTS's legal argument that it should be "credited" for any payments already made to the debtor.

Id. at fn. 9. Thereafter, in our April ***2004*** Order, we decided all claims in favor of plaintiff and directed plaintiff to submit a proposed order of judgment. See Order at 22. Although liability was decided in favor of plaintiff in the April ***2004*** Order, no decision has yet been rendered with respect to the amount of damages owed by defendants. Accordingly, defendants' motion seeking reconsideration of the recoupment determination is unnecessary at this time, as no decision has yet been reached on the credit that defendants should receive for prior payment.

Rather, because this Court directed plaintiff to submit its **[*7]** proposed judgment on notice, see id., the proper course for defendants to follow would be to review plaintiff's proposal after it is submitted and if necessary, to submit a counter-proposed judgment supported by evidence of payment. Only after the Court reviews the judgments proposed by each party will it be able to determine whether a hearing is necessary on the recoupment issue. [2] Accordingly, defendants' motion for reconsideration is denied with respect to recoupment.

III. Interpretation of the Agreement

Defendants also allege that summary judgment was inappropriately granted because the Court overlooked defendants' translation of the governing Agreement, which was originally executed in Korean. Defendants argue that the translation they submitted **[*8]** as an exhibit to their briefing on the cross-motion for summary judgment showed the Agreement to be ambiguous, presenting an issue for trial as to whether SSTS America was the primary obligor under the Agreement. Specifically, they claim that because defendants' translation uses the phrase "unconditionally secure" where plaintiff's version reads "unconditional guarantee," there is a genuine issue of material fact regarding the nature of each defendants' payment obligations. However, a review of our April ***2004*** Order clearly shows that this Court already addressed the issue of any possible ambiguity and resolved that issue in plaintiff's favor.

Although defendants are correct that the parties' translations of the Agreement are not identical, the differences are *de minimis* and do not affect the parties' rights and obligations. HN3[] Where a comparison of two different translations does not reveal any

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[2] Because plaintiff's counsel has already stated that he is not opposed to allowing defendants to be "credited" for any amounts already paid, we are hopeful that the parties can agree on the remaining damages without the intervention of the Court.

substantive differences, minor variations in words or phrases will not function to raise a genuine issue of material fact. See *DiMauro v. Pavia, 492 F. Supp. 1051, 1067 (D.Conn. 1979)*; *In re Weiss-Wolf, Inc., 60 B.R. 969, 973 (Bkrtcy. S.D.N.Y. 1986)*.

Both **[*9]** versions of the Agreement clearly demonstrate that SSTS was the primary obligor under the parties' contract. Both translations state that Daewoo was to provide SSTS America with certain general and import-export loans and that SSTS Korea would assume responsibility for SSTS America's debt in the event that SSTS America defaulted on its loan repayment. See Har Decl. Ex. D. (plaintiff's translation) (stating that SSTS Korea shall "assume all responsibilities in the event that [SSTS America] defaults in its loan repayment"); Rhee Decl. Ex. B (defendants' translation) (stating that SSTS Korea "shall undertake all responsibilities in the event that [SSTS America's] repayment of the loan is delayed."). The contract next provides (pursuant to both translations) that Daewoo shall demand payment from SSTS America and that SSTS America will pay interest to Daewoo. [3] See Har Decl. Ex. D; Rhee Decl. Ex. B at 4(2). Thus, regardless of which translation is employed, SSTS America was primarily responsible under the contract and SSTS Korea's obligations arose only secondarily. Moreover, defendants conceded in their motion papers that SSTS Korea's obligations were to arise only "in the **[*10]** event that [SSTS America]'s repayment of the loan was delayed," Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in support of Defendants' Cross-Motion ("Def. Mem.") p. 5 (bracket in original). Its argument that SSTS Korea had primary responsibility for repaying the loan is thus somewhat bewildering.

[*11] In light of the above contractual language and defendants' own admission, their assertion that the word "secure" demonstrates that SSTS Korea was the primary obligor under the Agreement is simply not supported by the record. Accordingly, defendants have offered no persuasive basis on which to depart from our prior ruling and their motion for reconsideration with respect to interpretation of the Agreement is denied.

IV. Statute of Limitations

Defendants next seek reconsideration of this Court's ruling that plaintiff commenced the instant action within the applicable limitations period. Defendants assert that neither the letter acknowledging an existing debt, the financial statements showing the same, nor the partial payments to plaintiff were sufficient to toll the limitations period such that plaintiff's action was appropriately brought. Additionally, they argue that because each of the actions on which the Court relied as functioning to toll the statute of limitations was initiated by SSTS America, the statute should not have been tolled with respect to SSTS Korea.

As defendants have offered neither facts nor law that this Court overlooked, we will not entertain their **[*12]** attempt to belabor faulty arguments which we have already rejected. [4] Defendants complain that this Court overlooked on-point precedent, such as *Shelley v. Dixon Equities, 300 A.D.2d 566, 752 N.Y.S.2d 542 (2d Dep't 2002)* (holding that financial statements reconstructed by the creditor which were not signed by a principal of the debtor did not acknowledge an existing debt). However, that case is neither on-point, nor controlling precedent for this Court. Unlike the facts in Shelley, where the creditor created reconstructed financial statements, the financial statements at issue here were prepared by an accountant of the debtor itself. Similarly, defendants had to search the reporters until they found a case over a hundred years old, *DeFreest v. Warner, 98 N.Y. 217, 221 (1885)*, that the Court allegedly overlooked. Irrespective of its age, it is also inapplicable. That case addresses whether an acknowledgment of

[3] Defendants claim that the Court erroneously stated that Daewoo agreed under the contract to "send invoices to SSTS America," Order at 8, when the proper translation is that Daewoo "shall demand" payment "immediately upon incurrence" of the costs. See Def. Motion for Reconsideration at 4. Even if we substituted the words chosen by defendants for those used by the Court, our prior ruling would remain undisturbed. First, because an invoice generally serves as a demand for payment, defendants' assertion that the meaning of its translation is significantly different from the meaning conveyed by the phrase used by the Court is without merit. Second, with respect to the timing of the demand for payment, the invoices produced in this case unequivocally demonstrate that Daewoo America did demand payment of the purchase price immediately upon incurrence. See Har Decl. Ex. B.

[4] Most glaringly, defendants argue that the letter we relied on in our April ***2004*** Order as one of the factors tolling the statute of limitations did not provide evidence of a debt. Given that the letter, which is signed by an SSTS executive, states that the parties have "reached [] an agreement regarding the repayment of [an] existing loan" and that "SSTS will pay back $ 100,000.00 per month," see Har Decl. Ex. B, defendants' assertion is not only incorrect, but is also totally disingenuous.

debt made to a stranger, rather than the creditor, serves to toll the limitations period. The issue in this case, however, is whether an acknowledgment of debt on the debtor's books will toll the statute. As we stated in our April **[*13]** ***2004*** Order, such an acknowledgment on the company books is sufficient to toll the statute of limitations. See *Clarkson Co. v. Shaheen, 533 F. Supp. 905, 932 (S.D.N.Y. 1982)*(stating that ***HN4***[⬆] debtor's acknowledgment of its obligation to creditor in its annual report and fact that it carried debt on its books for at least two years was "clear recognition of the continuing validity of the obligation" and therefore action was not barred by the statute of limitations); *Chase Manhattan Bank v. Polimeni, 685 N.Y.S.2d 226, 258 A.D.2d 361 (1st Dep't 1999)* (stating that debtor's financial statement which carried its debt obligation to creditor constitutes an "acknowledgment or promise" and was sufficient to revive creditor's otherwise time-barred claims on those debts).

[*14] Additionally, defendants' argument that the statute of limitations was not tolled with respect to SSTS Korea is also without merit. As we stated in our April ***2004*** Order:

> ***HN5***[⬆] A contract of guaranty is a promise to answer for the payment of some debt or the performance of some obligation owed by another. See *In re Drexel Burnham Lambert Group, 151 B.R. 674, 682 (Bkrtcy. S.D.N.Y. 1993)*. "It is a secondary obligation in that it is collateral, and only meaningful in relation to, the independent obligation to pay (*i.e.,* the debt) of the primary obligor, and is contingent upon his default." *Michaels v. Chemical Bank, 441 N.Y.S.2d 638, 640, 110 Misc.2d 74, 75 (N.Y. Sup. Ct. 1993)*.

Order at 10. The guaranty obligation of SSTS Korea did not arise until May 2001, when SSTS America ceased complying with the agreed upon payment plan. The complaint in this action was filed on November 4, ***2004***, well within the applicable four year limitations period. See U.C.C. § 2-725; *Port Authority of New York and New Jersey v. Allied Corp., 914 F. Supp. 960, 962 (S.D.N.Y. 1995)*. Accordingly, defendants' motion for reconsideration **[*15]** is denied with respect to the statute of limitations.

VI. Personal Jurisdiction

With respect to this Court's prior ruling that SSTS Korea is subject to personal jurisdiction in New York, defendants assert that the Court either overlooked the facts or did not apply the proper evidentiary standard. However, the Court has already discussed at length each of the personal jurisdiction issues raised by defendants on the present motion, see Order at 17-22, and will not do so again here.

With respect to defendants' argument that the Court applied the wrong evidentiary standard in requiring plaintiff to make only a prima facie showing of jurisdiction at this stage in the case, defendants' position is squarely contradicted by the applicable law. See e.g. *Optimum Worldwide Ltd. v. Klebener, 1997 U.S. Dist. LEXIS 11097, No. 95 Civ. 1359, 1997 WL 433470 at *4 (S.D.N.Y. Aug. 1, 1997)* ***HN6***[⬆] ("Even in the face of a motion for summary judgment challenging jurisdiction, plaintiff's burden remains *prima facie.*") (citation omitted). Accordingly, defendants have provided the Court with no basis on which to reconsider its ruling that SSTS Korea is subject to jurisdiction in this Court and their motion **[*16]** with respect to this claim is denied.

VII. Invoices

Finally, defendants also attempt to reargue their prior summary judgment motion with respect to the invoices that Daewoo sent to SSTS America, reiterating their position that these invoices do not provide evidence of an agreement between Daewoo and SSTS America. We have already considered each of the arguments that defendants now raise, however, and we have found them to be without merit.

As stated above, a motion for reconsideration is not a "second bite at the apple" for a party dissatisfied with a court's ruling. A *Rule 59* motion should not be an attempt to secure a rehearing on the merits. See *Griffin Ins., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)*. To allow defendants to re-argue theories they have already raised in this forum would be improper and wasteful. Both fairness and efficiency values underlie the principle that reconsideration motions are granted only in the most unusual circumstances. Parties must make their best arguments in the first instance, so that through the clash of these positions, their relative strengths may become apparent. Were it permissible for a party **[*17]** to deploy additional evidence or arguments in successive and repetitive motions, a court decision would provide little meaningful repose to a litigant. As defendants have pointed to no facts nor legal precedent that this Court actually overlooked, their motion for reconsideration is denied

with respect to the invoices.

CONCLUSION

Based on the foregoing, defendants' motion for reconsideration is hereby denied.

IT IS SO ORDERED.

DATED: July 1, ***2004***

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

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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

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.

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.