SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

SEATTLE PACIFIC INDUSTRIES,

Plaintiff,

-against-

GOLDEN VALLEY REALTY ASSOCIATES and LEO ZELKIN,

Defendants.

Motion Sequence #006, #007
Submitted March 8, 2007

INDEX NO: 8188/04

The following papers were read on these motions:

Defendants' Notice of Motion.....1
Continuation to Affirmation Exhibits.....2
Defendants' Memorandum of Law in Support.....3
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Defendants, GOLDEN VALLEY REALTY ASSOCIATES (hereinafter referred to as "GOLDEN VALLEY") and LEO ZELKIN (hereinafter referred to as "ZELKIN"), move for an order, pursuant to CPLR §3212, granting them partial summary judgment

dismissing the complaint of plaintiff, SEATTLE PACIFIC INDUSTRIES, INC. (hereinafter referred to as "SPI"), as time barred, except for $37,877.70. SPI opposes the motion and cross-moves, pursuant to CPLR §3212, for an order granting it summary judgment as to defendants' liability for the indebtedness owed to SPI. The motion and cross-motion are determined as follows:

In September 1975, SPI's predecessor in interest, Englishtown Sportswear Ltd. (hereinafter referred to as "ENGLISHTOWN"), was formed by Martin Heinfling, Brian Leung, Tony Lau, Eli Kaplan and defendant herein, ZELKIN. Isadore Heinfling, the brother of Martin Heinfling, was a senior employee of ENGLISHTOWN. Eli Kaplan was bought out of ENGLISHTOWN at some point in the early or mid-1980s. The offices of ENGLISHTOWN were located in New York City and the company was engaged in the business of purchasing and reselling garments at the wholesale distribution level. In 1983, ENGLISHTOWN decided to acquire certain real property in Lyndhurst, New Jersey. The plan was to locate an additional corporate facility for ENGLISHTOWN on the acquired property in New Jersey.

In September 1983, when the real property in Lyndhurst, New Jersey was acquired, the acquisition was structured by having a partnership of ENGLISHTOWN principals take title to the Lyndhurst property. To that end, in September 1983, the GOLDEN VALLEY partnership was formed as a New York general partnership with five persons as partners: Martin Heinfling, Brian Leung, Tony Lau, defendant, Leo ZELKIN, and Isadore Heinfling. Each of the GOLDEN VALLEY partners had a 20% interest in the partnership.

In 1984, SPI's predecessor in interest, ENGLISHTOWN, advanced funds to GOLDEN VALLEY, for the purpose of purchasing the real property in New Jersey that was to be developed as a corporate facility for ENGLISHTOWN. ZELKIN, the managing partner of GOLDEN VALLEY and the former president of ENGLISHTOWN, states that there was no due date for the repayment of the advance, no document reflecting the advances and no provision for interest on the advances, until 1997, fifteen years later. SPI alleges that the parties had an "understanding" that the advances would be repaid not later than the sale of the property, together with 6% interest (*Complaint*, ¶7). GOLDEN VALLEY and ZELKIN maintain that ENGLISHTOWN not only made all the advances, but also kept all the financial records of the GOLDEN VALLEY partnership and supervised the preparation of tax returns for GOLDEN VALLEY.

At some point, however, the plan changed. Instead of the intended development, the property was sold in two parcels. The first parcel was sold in 1984 to a third party and, according to SPI, the net proceeds of the sale were remitted to ENGLISHTOWN in partial satisfaction of their advances previously made to GOLDEN VALLEY.

Thereafter, several of the partners terminated their relationship with ENGLISHTOWN and executed notes in favor of ENGLISHTOWN representing their share of the outstanding advances made by the corporation to GOLDEN VALLEY that were not covered by the partial sale of the New Jersey property. Specifically, some time prior to September 1992, Martin and Isadore Heinfling, terminated their relationship

with ENGLISHTOWN, receiving a release and executing a note in favor of ENGLISHTOWN representing 20% of the outstanding advances as of that time.

On September 30, 1992, ZELKIN also sold his equity interest in ENGLISHTOWN back to the company for $1,310,000 and resigned as an officer and director of the corporation. Simultaneously, ZELKIN entered into two agreements with ENGLISHTOWN --- a non-competition agreement and a consulting agreement--- together with a Note. Following Leo ZELKIN'S sale of his equity interest in ENGLISHTOWN, the remaining principals were Brian Leung and Tony Lau.

In 1992, ENGLISHTOWN merged into SPI with the two remaining shareholders, Brian Leung and Tony Lau, as principals. After the merger, SPI made advances to defendant, GOLDEN VALLEY, for the maintenance of the New Jersey property. Apparently, these advances were also made without note or other contemporaneous documentation containing terms such as a due date.

In January 1999, the sale of the remaining portion of the Lyndhurst, New Jersey, property was completed. Thereafter, SPI, made demands for repayment of the advances made by its predecessor in interest, ENGLISHTOWN, with interest. Defendant, ZELKIN, rejected the demands.

This action was commenced by SPI in June 2004. SPI alleges that when it merged with ENGLISHTOWN in 1992 GOLDEN VALLEY became indebted to SPI for its indebtedness to ENGLISHTOWN. As such, SPI seeks to recover funds advanced by ENGLISHTOWN, its predecessor in interest, to GOLDEN VALLEY and ZELKIN. SPI alleges that there was an understanding that the advances would be repaid not later

than the sale of the property. SPI further alleges that, in 1999, upon the sale of the second parcel, the net proceeds of sale were not remitted to SPI, as successor in interest to ENGLISHTOWN. In this action, SPI states that the present sum due and owing is $2,218,632.68, together with 6% interest from May 1, 2004.

By Short Form Order, dated March 28, 2005, this Court denied defendants' pre-discovery cross-motion to dismiss the complaint on the grounds that, *inter alia*, the case was barred by the statute of limitations. Thus, the case proceeded to discovery. Upon the instant post-discovery motion for partial summary judgment dismissing plaintiff's complaint on the same grounds, GOLDEN VALLEY and ZELKIN argue that the record confirms that the advances made by both ENGLISHTOWN and SPI were note-less, thus making them demand obligations in which the statute of limitations begins to run when the advance loans are made. Consequently, defendants claim that plaintiff's complaint should be dismissed, as a matter of law, because the advances made between 1983 and 1998 are barred by the six-year statute of limitations pursuant to CPLR §213, except for $37,877.70 of advances that were made within six years of the commencement of suit.

SPI opposes the motion and cross-moves for partial summary judgment as to defendants' liability to pay the principal of the debt owed to plaintiff at the end of 1998 in the sum of $1,346,193.76, plus interest. SPI argues that the statute of limitations for the debt that it seeks to collect did not start to run until the sale of the last parcel of real estate owned by GOLDEN VALLEY, on January 14, 1999, and thus this action is timely. Moreover, SPI argues that this action is timely because of defendants' acknowledgment

of the debt owed to SPI within six years of the commencement of this action which had the effect of tolling the statute of limitations, citing General Obligations Law §17-101. SPI further maintains that the admission of the debt owed to SPI in the 1998 income tax return and 1999 financial statements of GOLDEN VALLEY, together with the admission of the debt by ZELKIN and SPI's documentary proof of its advances to GOLDEN VALLEY, warrant the granting of SPI's cross motion for partial summary judgment as to GOLDEN VALLEY's and ZELKIN's liability for the sum of $1,346,193.76, representing the principal amount owed to SPI for advances made through the end of 1998, plus interest.

Summary judgment is the procedural equivalent of a trial (*Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [1986]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (*Alvarez v Prospect Hosp.*, supra; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (*Zuckerman v. City of New York*, *supra*).

While the parties fail to address the statute of frauds issue in this case, this Court recognizes that the analysis of this case must start with whether plaintiff's unwritten promise to advance money to the defendants needs to be in writing.

"The statute of frauds, as incorporated in section 5-701(a)(1) of the General Obligations Law, provides that an agreement is void if it is not in writing and 'subscribed by the party to be charged therewith' when the agreement '[b]y its terms is not to be performed within one year from the making thereof'" (*Sheehy v Clifford Chance Rogers & Wells LLP,* 3 NY3d 554, 789 NYS2d 456, 822 NE2d 763 [2004]). This provision of the statute of frauds encompasses only those contracts which, by their terms, "have absolutely no possibility in fact and law of full performance within one year" (*see Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 670 NYS2d 973, 694 NE2d 56 [1998], *quoting D & N Boening v Kirsch Beverages,* 63 NY2d 449, 483 NYS2d 164, 472 NE2d 992 [1984]). Thus, the statute of frauds does not apply to an agreement, the performance of which depends on a contingency which may or may not happen within one year (*D&N Boening v Kirsch Beverages*, *supra*). "Oral agreements must be analyzed closely and the statute of frauds does not apply if there is 'any possible means of performance within one year'" (*D&N Boening v. Kirsch Beverages*, *supra*).

In this case, SPI's predecessor in interest, ENGLISHTOWN, first advanced funds to GOLDEN VALLEY in 1983 for the purpose of purchasing and developing the real property in New Jersey that was to be subsequently developed as a corporate facility for ENGLISHTOWN. Thus, the agreement here, as alleged, was not by its terms incapable of performance within a year. There was no guarantee that GOLDEN VALLEY would

purchase the property and develop it as a corporate facility within one year. It appears that the performance of the parties' agreement depended on a contingency which could or could not have happened within one year and thus, the statute of frauds does not apply herein. (See *Cron v Hargro Fabrics, Inc.*, *supra*; *see also North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 292 NYS2d 86, 239 NE2d 189 [1968]).

The central issue presented in this case is whether the advances, extended by ENGLISHTOWN and its successor SPI, to defendants constituted demand obligations or whether they were, in fact, loans that became due upon the sale of GOLDEN VALLEY's New Jersey property.

A cause of action on a contractual obligation must be commenced within six years of the accrual of the cause of action (CPLR 213[2]; CPLR 203[a]). However, an obligation that is not due on a specific date is due on demand (*Nuri Faradi, Inc. v Anavian*, 58 AD2d 546, 396 NYS2d 26 [1st Dept. 1977]; *Riddle v Bank of Montreal*, 145 AD 207, 130 NYS 15 [1st Dept. 1911]). A promise or order is payable on demand if (1) it states that it is payable on demand or at sight, (2) it otherwise indicates that it is payable at the will of the holder, or (3) no time is stated for payment (UCC 3-108[a]). While it is presumed that a note that does not designate a time for payment or indicate that it is payable on demand is in fact a demand instrument (*Riddle v Bank of Montreal*, *supra*), the limitations period for which begins to run on the date the loan is made (*Shelley v Shelley*, 299 AD2d 405, 749 NY2d 431 [2nd Dept. 2002]; *Pomaro v Quality Sheet Metal, Inc.*, 295 AD2d 416, 743 NYS2d 556 [2nd Dept. 2002]), in this case, no notes were ever signed for the advances made by the plaintiff. Consequently, defendants' reliance on

case law, for the proposition that the limitations period for demand obligations runs from the date that the demand loans are made, is misplaced. All of the cases cited by the defendants involve fact patterns where the parties executed notes to memorialize the obligations.

The issue before the Court is when the statute of limitations period begins to run on a claim based on an oral agreement to pay money, allegedly as part of a loan, where the agreement contains no specified time for the repayment of the money. It is clear that if such a promise is viewed as a loan repayable on demand, since payment could be requested at any time, an action for repayment would accrue immediately, and the statute of limitations period would commence at the time the loan was made (*see Nuri Faradi, Inc. v Anavian*, *supra*; *Riddle v Bank of Montreal*, *supra*; *Shelley v Shelley*, *supra*; *Pomaro v Quality Sheet Metal, Inc.*, *supra*). On the other hand, it is possible to interpret such a promise as showing that the parties intended that the loan be repaid at the first opportunity the debtor would have to do so, which would occur when he became financially able to repay the loan (General Obligations Law §17-101; *see also Lorenzo v Bussin,* 7 AD2d 731, 180 NYS2d 625 [2nd Dept 1958] *affd* 7 NY2d 1039, 200 NYS2d 423, 167 NE2d 73 [1960]; *Mayer v Middlemiss*, 67 NYS2d 422, 187 Misc. 482 [App. Term 1946]). This second approach would be akin to treating the promise as if it contained a condition for repayment at the time when payment would be convenient for the debtor, in which case, the statute of limitations period would begin to run at the time the debtor was able to pay or it was convenient for him to do so (*see also Volpe v Volpe*, 16 AD3d 1176, 792 NYS2d 269 [4th Dept. 2005]; *Tebo v Robinson*, 100 NY 27,

2 NE 383 [1885]). The triggering event in this case was not defendants' ability to pay the advances back to SPI. Rather, the triggering event was the sale of the remaining parcel of the New Jersey property.

Based on a careful reading of the submissions herein, the Court herewith adopts the second approach and finds that the advances made by the plaintiff were nothing more than loans that became due upon the sale of GOLDEN VALLEY's New Jersey property. Under the facts herein, the repayment of the advances given by SPI to GOLDEN VALLEY and ZELKIN are not demand obligations requiring the statute of limitations to begin to run from the date of the advance (*Nuri Faradi, Inc. v Ananvian*, *supra*; *Riddle v Bank of Montreal*, *supra*). While it is certainly true and undisputed that no due date was specified for the repayment of plaintiff's advances, there is also no evidence that the loan was otherwise payable on demand. Accordingly, the Court finds that the statute of limitations did not begin to run until the condition was satisfied - i.e., the sale of the second parcel of property in January 1999.

In contract actions, the six year statute of limitation accrues at the time of the breach (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 599 NYS2d 469, 615 NE2d 953 [1993]; *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 415 NYS2d 785, 389 NE2d 99 [1979]). In the present case, the breach occurred when GOLDEN VALLEY sold the last parcel of the New Jersey property on January 14, 1999. Thus, the commencement of this action on June 16, 2004 was timely. It is therefore

ORDERED, that defendants' motion for summary judgment is denied and plaintiff's cross-motion for summary judgment as to defendants' liability for the indebtedness owed to the plaintiff is granted; and it is further

ORDERED, that this matter is specifically referred to the Calendar Control Part (CCP) for Inquest and Assessment of Damages against the defendants for the indebtedness owed to the plaintiff, and shall appear on the calendar of CCP on September 18, 2007 at 9:30 A.M. subject to the approval of the Justice there presiding; and it is further

ORDERED, that plaintiff shall serve a copy of this order and the Note of Issue upon the defendants' counsel and shall serve copies of same together with receipt of payment, upon the Calendar Clerk of this Court, no later than ten (10) days prior to the date of Inquest; and it is further

ORDERED, that the directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee as he or she deems appropriate; and it is further

ORDERED, that the failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the Inquest.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 8, 2007

WILLIAM R. LaMARCA, J.S.C.

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