SHORT FORM ORDER

INDEX No. 24220-08

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 2/28/12 (#005)
MOTION DATE: 4/27/12 (#006)
MOTION DATE: 7/27/12 (#008)
ADJ. DATES 7/27/12
Mot. Seq. # 005 - MD
Mot. Seq. # 006 - MD
Mot. Seq. # 008 - XMD
Compliance Conf: 9/18/12
CDISP Y____ N X

THOMAS ROMANSKI, individually and d/b/a ROMANSKI IRRIGATION, Plaintiff, -against- WILLIAM ACKERMANN and THERESA ACKERMANN, Defendants.	JONATHAN BROWN, ESQ. Atty. For Plaintiff 737 Roanoke Ave. Riverhead, NY 11901 REYNOLDS, CARONIA, GIANELLI Attys. For Defendant Wm. Ackermann 35 Arkay Dr. Hauppauge, NY 11788 BLANGIARDO & BLANGIARDO Atty. For Defendant Theresa Ackermann PO Box 1169 Cutchogue, NY 11935

Upon the following papers numbered 1 to 21 read on these motions for summary judgment; Notices of Motion/Order to Show Cause and supporting papers 1-4; 5-7; Notice of Cross Motion and supporting papers 8-10; Answering Affidavits and supporting papers 11-13; 14-15; 16-17; Replying Affidavits and supporting papers ____; Other 18-19 (affirmation in support); 20-21 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#005) by defendant, Theresa Boyle Ackerman, and the separate motion (#006) by defendant, William Ackerman, for summary judgment dismissing the plaintiff's complaint in this action to recover monies due under the terms of an oral contract by which the plaintiff allegedly provided irrigation services, are considered under CPLR 3212 and are denied; and it is further

plaintiff allegedly provided irrigation services, are considered under CPLR 3212 and are denied; and it is further

ORDERED that the cross motion (#008) by the plaintiff, Thomas Romanski, for summary judgment on his complaint to recovery monies due for work, labor and services to the defendants, is considered under CPLR 3212 and is denied and it is further

ORDERED that upon receipt of a copy of this order, the calendar clerk shall schedule a compliance conference in this action for **September 18, 2012**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

By ordered dated May 1, 2012, the motions by the defendants (#005 and #006) for summary judgment were granted by order of this court dated May 1, 2012, without opposition from the plaintiff. However, the plaintiff successfully moved (motion #007) to vacate his default in opposing said motions by order dated June 21, 2012. Pursuant thereto, the defendants' motions for summary judgment (#005 and #006) were restored to the motion calendar of the this court for the date of July 27, 2012, together with the cross motion (#008) by plaintiff.

The instant breach of contract action, commenced on July 1, 2008, arises out of irrigation services performed by the plaintiff, Thomas Romanski, on a vineyard owned and/or operated by the defendants. The services were performed in accordance with an oral contract which was, according to the plaintiff, entered into by the plaintiff and defendant, William Ackerman, in January of 2003. A payment of $5,000 was made by said defendant on November 28, 2003 and/or a like payment was made by defendant Theresa Ackerman. The plaintiff further alleges that the defendants, who have long enjoyed the benefits of his work, have failed to pay the $39,945.71 balance owing for this service.

The defendants, who were married at the time the plaintiff's work was performed, dispute these factual assertions of the plaintiffs. The defendants claims that the irrigation work performed by the plaintiff was completed in either 2001 or 2002.

In an order issued by this Court on November 10, 2010, defendant William Ackermann was granted summary judgment on the issue of the liability of his co-defendant, Theresa Ackermann, n/k/a Theresa Boyle. Such liability arose from a promise by defendant, Theresa Ackerman, n/k/a Theresa Boyle, to indemnify and hold harmless defendant, William Ackerman, against the plaintiff's claim under the terms of a written stipulation of settlement entered into on April 28, 2008, in a divorce action then pending between the defendants.

By the complaint served herein with the summons, the plaintiff sets forth three causes of action for recovery from the defendants. The first sounds in breach of oral contract for the performance of the irrigation services performed by the plaintiff to the vineyard land. The second cause of action sounds in an account stated and the third sounds in goods sold and delivered. A copy of an amended complaint containing the same claims is attached to the cross moving papers of the plaintiff, without proof that said amended complaint was served in accordance with leave therefor granted by order of the court upon motion or stipulation of counsel (*see* CPLR 3025(b)..

The defendants' separate motions for summary judgment rest principally upon claims that the plaintiff's prosecution of his breach of contract claim is barred by the expiration of the applicable statute of limitations. In this regard, both defendants note that pursuant to CPLR 213, the six-year limitation applies to causes of actions based on a breach of contract. Neither of the defendants address the plaintiff's claims for recovery under the alternate theories of liability advanced by the plaintiff in his complaint which sound in an account stated and goods sold and delivered. An award of summary judgment in favor of the defendants dismissing the second and third causes of action is precluded due a lack of proof of the type required by CPLR 3212(b).

With respect to the plaintiff's claim for recovery under the breach of contract claim, the defendants are correct in their assertions that a six year statute of limitations applies to claims for recovery of monies due under a contract (*see* CPLR 213). However, they failed to establish that the statute has run on the plaintiff's claims for recovery of monies due under the alleged oral contract upon which the plaintiff's first cause of action rests.

Under CPLR 213(2), a claim for breach of contract is governed by a six-year statute of limitations. As a general principle, the statute of limitations begins to run when a cause of action accrues (*see* CPLR 203[a]), that is, "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (***Aetna Life & Cas. Co. v Nelson***, 67 NY2d 169, 501 NYS2d 313 [1986]). In contract actions, a claim generally accrues at the time of the breach (*see* ***Ely–Cruikshank Co. v Bank of Montreal***, 81 NY2d 399, 599 NYS2d 501 [1993]). Appellate case authorities have more recently held, however, that where the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the [party making the claim] possesses a legal right to demand payment (*see* ***Hahn Auto. Warehouse, Inc. v American Zurich Ins. Co.***, 18 NY3d 765, 944 NYS2d 742 [2012]; ***Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.***, 71 AD3d 843, 897 NYS2d 485 [2d Dept 2010]; ***771 Kuo v Wall St. Mtge. Bankers, Ltd.***, 65 AD3d 1089, 885 NYS2d 520 [2d Dept 2009]).

The burden of establishing an entitlement to a dismissal of a complaint based upon a statute of limitations defense rests upon the movant and the satisfaction of such burden, requires a prima facie showing that the time within which to commence the action has expired (*see* ***Baptiste v Harding-Marin***, 88 AD3d 752, 930 NYS2d 670 [2d Dept 2011]). Where such a showing is made, the burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see* ***Rakusin v Miano***, 84 AD3d 1051, 923 NYS2d 334 [2d Dept 2011]; ***Texeria v BAB Nuclear Radiology, PC***, 43 AD3d 403, 405, 840 NYS2d 417 [2d Dept 2007]).

Here, the record is replete with questions of fact regarding the alleged date on which the breach of contract and the plaintiff's entitlement to monies due arose. Defendant, William Ackermann, argues in his moving papers that the work called for under the contract was completed in the spring of 2001. However, plaintiff, Thomas Romanski, alleges that work continued on the project as late as autumn of 2003 and that the last payment received by plaintiff for the services provided by such defendant was on November 28, 2003. Neither of the defendants adduced proof in admissible form sufficient to eliminate these questions of fact.

In any event, the plaintiff, whose opposition to the defendants' motions is set forth in his cross moving papers, has raised questions of fact regarding the inapplicability of the statute of limitations defenses asserted by the defendants. Appellate case authorities have long instructed trial courts that an applicable statute of limitations may be inapplicable due to a tolling of the statutory limitations period. In ***Erdheim v Gelfman***, 303 AD2d 714, 757 NYS2d 320 (2d Dept 2003), the Appellate Division, Second Department stated the rule as follows:

> There are two ways in which the statute of limitations may be tolled. One involves part payment of the debt and the other a signed acknowledgment. As to part payment, 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, 387 NYS2d 409, 355 NE2d 369). 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 (*id*).

To be effective under General Obligations Law § 17–101, a written acknowledgment of the debt must not only admit liability for a debt presently due, but it must be directed to the creditor and/or shown to have been made with the intent to benefit the debtor or influence the creditor (*see* ***Lynford v Williams***, 34 AD3d 761, 826 NYS2d 335 [2d Dept 2006]; ***Essex Real Estate Corp. v Piluso***, 68 AD2d 923, 414 NYS2d 377 [1st Dept 1979]). "In determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports an intention to pay" (***Knoll v Datek Sec. Corp.***, 2 AD3d 594, 769 NYS2d 581 [2d Dept 2003]).

Here, the record contains some evidence of payments made by the defendants on account of work performed by the plaintiff in late 2003. Such payments may have tolled an otherwise earlier start to the limitations period imposed by CPLR 213 on the plaintiff's breach of contract claims thus rendering such claims timely. Morever, the written acknowledgment of the debt by both defendants set forth in their stipulation of settlement entered into April of 2008, may have effectively renewed the debt so as to restart any prior accrual of the six years limitations period by virtue of the application of GOL §17–101.

The court rejects as unmeritorious the contentions of defendant, William Ackerman, as to the inapplicability of GOL §17–101 due to a failure to apprise the plaintiff of the acknowledgment set forth in the defendants' divorce stipulation of settlement. For the record here contains evidence that Mr. Ackerman advised the plaintiff in 2005 that arrangements for the payment of amounts owing to him were the subject of ongoing divorce settlement negotiations between the defendants and that they were attempting "to determine who was responsible for what" (*see* pp. 28, 30 of the Transcript of the Deposition testimony of W. Ackerman attached as Exhibit F to his moving papers). The

record also contains evidence that such negotiations culminated in the April 28, 2008 written stipulation of settlement in which the debt owing to the plaintiff was expressly acknowledged by the defendants and sole liability therefor assumed by defendant, Theresa Ackerman n/k/a/ Theresa Boyle (*see* pp. 31- 32 of the Transcript of the Deposition testimony of W. Ackerman attached as Exhibit F to his moving papers). The inclusion of the debt owing to the plaintiff in the defendant's long negotiated stipulation of settlement, coupled with the express acknowledgment of its existence, clearly evinces that the acknowledgment was made with the intent of benefitting the defendant debtors and/or to influence the plaintiff as their creditor (*see* ***Lynford v Williams***, 34 AD3d 761, *supra*). Under these circumstances, the motions by the defendants for dismissal of the plaintiff's complaint on the grounds that the statute of limitations precludes the plaintiff's continued prosecution of his claims in this action are denied.

Also rejected as unmeritorious are defendant, William Ackermann's alternative grounds for his motion. In his moving papers, defendant, William Ackermann, alleges that any services provided by plaintiff were provided to the parities' limited liability corporation, Manorhill Vineyard, LLC, which had some interest in either the land or the vineyard business operated therefrom and not to this moving defendant, individually. However, the moving papers failed to provide admissible proof in support of these claims. Mr. Ackerman's further claims that the amounts sued upon improperly include finance charges give rise only to questions on damages, not to liability. Those portions of the motion by defendant, William Ackermann, for summary judgment dismissing the plaintiff's complaint on the grounds that he is without liability to the plaintiff are thus denied.

Also denied is the plaintiff's cross motion for summary judgment. The plaintiff's submission were devoid of proof in admissible form sufficient to establish a prima facie entitlement to summary judgment on any of the causes of action set forth in his complaint (*see* CPLR 3212(b); ***Raytone Plumbing Specialities, Inc. v Sano Const.***, 92 AD3d 855, 939 NYS2d 116 [2d Dept 2012]; ***Brualdi v. IBERIA***, 79 AD3d 959, 913 NYS2d 753 [2d Dept 2010]). Plaintiff's cross motion is thus denied.

Counsel for all parties are directed to appear in the courtroom of the undersigned at 9:30 a.m. on September 18, 2012, for the compliance conference scheduled above by the terms of this order.

DATED: 8/16/12

THOMAS F. WHELAN, J.S.C.