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As of: Jul 22, 2014

Hon Fui Hui, Appellant, v. East Broadway Mall, Inc., Respondent.

No. 26

COURT OF APPEALS OF NEW YORK

4 N.Y.3d 790; 828 N.E.2d 73; 795 N.Y.S.2d 157; 2005 N.Y. LEXIS 237

January 12, 2005, Submitted;

February 22, 2005, Decided

PRIOR HISTORY: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 26, 2004. The Appellate Division affirmed a judgment of the Supreme Court, New York County (Ira Gammerman, J.), which had granted summary judgment to defendant dismissing the complaint.

Hon Fui Hui v East Broadway Mall, Inc., 4 A.D.3d 309, 773 N.Y.S.2d 344, 2004 N.Y. App. Div. LEXIS 1984 (N.Y. App. Div. 1st Dep't, 2004)reversed.

DISPOSITION: Order of the appellate division reversed; defendant's motion for summary judgment denied.

CASE SUMMARY:

PROCEDURAL POSTURE: A court in the New York Appellate Division granted summary judgment to appellee mall in appellant assignee's action on a contract between his predecessor in interest, a construction company (company), and the mall. The assignee appealed.

OVERVIEW: Although the statute of limitations had run for the commencement of an action based on the breach of the original contract between the company and the mall, the mall's 1994 acknowledgment reflecting the amount of debt outstanding to the company was sufficient to satisfy N.Y. Gen. Oblig. Law § 17-101 and take the instant action out of the statute of limitations. Second, while the instant court agreed that the cause of action properly belonged to the company, which had been dissolved by proclamation but had an outstanding claim pending against it, it disagreed that the assignment to the assignee did not cure the defect. When the assignee became aware of the outstanding judgment, his assignment as sole shareholder of the cause of action to himself in order to correct the error and prosecute the claim should not have resulted in dismissal of the action as untimely. If the company had intervened, its claim would have been deemed to relate back to the assignee's original claim. The assignment was simply a less cumbersome way of achieving the same result, avoiding dismissal of what appeared to be an otherwise meritorious claim.

OUTCOME: Summary judgment was reversed, and the

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motion was denied.

concur in memorandum.

HEADNOTES

Limitation of Actions -- Six-Year Statute of Limitations -- Acknowledgment of Debt

1. Plaintiff's breach of contract action was timely commenced in February 2000, even though the work had been completed by 1989 and the statute of limitations had run for commencement of an action based on breach of the original contract. Defendant's February 1994 acknowledgment reflecting the amount of debt outstanding satisfied General Obligations Law § 17-101 and took this "action out of the operation of the provisions of limitations of time for commencing actions." The writing recognized an existing debt and contained nothing inconsistent with the debtor's intention to pay it.

Corporations -- Capacity to Sue -- Shareholder of Dissolved Corporation

2. Plaintiff sole shareholder of a dissolved corporation, which had an outstanding judgment against it, properly brought this breach of contract action in his own name as the corporation's successor-in-interest. Plaintiff was the sole shareholder and had a good faith belief that all corporate business had been completed. When plaintiff became aware of the judgment, his assignment of the action to himself to correct the error and prosecute the claim should not have resulted in dismissal of the action as untimely. The corporation would have been permitted to intervene, despite the expiration of the statute of limitations because it was closely related to plaintiff and its claim was based on the same transaction. If the corporation had intervened, its claim would relate back to the original claim. The assignment was a less cumbersome way of achieving the same result, avoiding dismissal of an apparently meritorious claim.

COUNSEL: *Morton S. Minsley*, New York City, for appellant.

Gartner, Bloom & Greiper, P.C., New York City (*Arthur P. Xanthos* of counsel), for respondent.

JUDGES: Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith

OPINION

[***157] [**73] [*791] MEMORANDUM.

The order of the Appellate Division should be reversed, with costs, and East Broadway's motion for summary judgment denied.

[1] Although the statute of limitations had run for the commencement of an action based on the breach of the original contract--as work had been completed by 1989--East Broadway's February 22, 1994 acknowledgment reflecting the amount of [***158] [**74] debt "outstanding to Ka Hon" was sufficient to satisfy General Obligations Law § 17-101 and take this "action out of the operation of the provisions of limitations of time for commencing actions" (General Obligations Law § 17-101). The writing "recognize[s] an existing debt and . . . contain[s] nothing inconsistent with an intention on the part of the debtor to pay it" (*Lew Morris Demolition Co., Inc. v Bd. of Educ.*, 40 N.Y.2d 516, 521, 355 N.E.2d 369, 387 N.Y.S.2d 409 [1976] [citations omitted]). Plaintiff's breach of contract action, commenced February 18, 2000, was thus timely within the six-year statute of limitations (*see* CPLR 213 [2]).

[2] We agree with the Appellate Division that the cause of action properly belonged to Ka Hon Construction, which had been dissolved by proclamation but had an outstanding claim pending [*792] against it. * We disagree that the assignment to plaintiff dated September 28, 2001 did not cure the defect. Plaintiff was the sole shareholder of Ka Hon and had a good faith belief that all corporate business had been completed when he commenced the action as Ka Hon's successor-in-interest. When plaintiff became aware of the outstanding judgment, his assignment as sole shareholder of the cause of action to himself in order to correct the error and prosecute the claim should not have resulted in dismissal of the action as untimely. If the corporation instead had moved to intervene, it would have been permitted to do so, despite the expiration of the statute of limitations, because it was closely related to plaintiff and its claim was based on the same transaction. If the corporation had intervened, its claim would be deemed to relate back to plaintiff's original claim. The assignment of the corporation's claim was simply a less cumbersome way of achieving the same result, avoiding dismissal of what appears to be an otherwise meritorious claim.

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* The corporation was dissolved September 28, 1994 and the outstanding judgment was filed January 29, 1996.

Rosenblatt, Graffeo, Read and R.S. Smith concur in memorandum.

Order reversed, etc.

Chief Judge Kaye and Judges G.B. Smith, Ciparick,