IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NORMAN CHAN **Plaintiff,** **vs.** **SUNNY KING MAN CHAN** **MATSUMOTO PROPERTIES, LTD.** **JADE GARDEN, INC.** **Defendants,** **JUAN E. AQUINO,** **Intervenor/Plaintiff**	**Civil Action No. 97-1039B** **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON INTERVENOR'S COMPLAINT IN INTERVENTION**

This matter came before the court on March 22, 2000, on Defendants' motion for summary judgment on Juan E. Aquino's complaint in intervention (the "Motion"). Stephen J. Nutting, Esq. appeared on behalf of Defendants Sunny King Man Chan ("Man Chan"), Matsumoto Properties, Ltd. ("Matsumoto"), and Jade Garden, Inc. ("Jade Garden"), and Yoon H. Chang, Esq. appeared on behalf of the Intervenor/Plaintiff, Juan A. Aquino ("Aquino"). The court, having heard the arguments and reviewed all the evidence presented, now renders its written decision.

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FOR PUBLICATION

[p. 2] **I. BACKGROUND**

1. Jade Garden is a corporation organized and existing under the laws of the Commonwealth of the Northern Mariana Islands (Mot. Ex.2). In its Annual report for the year 1990, filed with the Office of the Attorney General on March 4, 1991, Plaintiff Norman Chan was listed as an officer and director and the company's sole shareholder (*Id.*).[1]

2. On September 8, 1992, Man Chan, on behalf of Defendant Matsumoto, and Plaintiff executed a joint venture agreement providing, in material part, for Plaintiff to issue not less than fifty one percent (51%) of the company's shares to Matsumoto (Mot., Ex.4 at art. 2(d)). In a stock purchase agreement dated the same day, Matsumoto, by Man Chan, agreed to purchase fifty one percent of Jade Garden's outstanding stock (Mot., Ex.3). In the stock purchase agreement, Plaintiff represented and warranted: (1) that he was the owner, free and clear of liens, encumbrances, and charges, of fifty one percent of the stock listed in the company's 1992 annual report and (2) that no other person owned any share of stock in the corporation (*Id.* at § 2, ¶¶ (3),(4)).

3. By resolution dated September 8, 1992, the Company's Board of Directors approved the sale of fifty one percent of Plaintiff's shares to Matsumoto under the terms set forth in the stock purchase agreement (Mot, Ex.5). The Board resolution, the stock purchase agreement, and the joint venture agreement were filed with the Office of the Attorney General on September 9, 1992.

4. Notwithstanding the sale of 51% of his stock, Plaintiff continued to operate and manage Jade Garden and oversee substantial renovations to the premises in 1992 and 1993 (Man Chan Decl. at ¶ 9). At some point in 1994, Defendants contend they discovered that the Company had accumulated significant debt (*Id.* at ¶11). As a result, in January of 1995, Man Chan became actively involved in the management of the Company (*Id.* at ¶¶ 12-13). It was at this point that he met Plaintiff/Intervenor Aquino (*Id.* at ¶ 13). **[p. 3]**

5. Aquino told Man Chan that Plaintiff had promised to convey one-third of the Company's stock to him in return for his agreement to cosign for bank loans and offer certain real property as collateral

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[1] Jade Garden's Amended Articles filed on May 23, 1996 indicate that the company was authorized to issue a total of 10,000 shares (Mot. Ex.1).

(Man Chan Decl. at ¶ 13). Aquino informed Man Chan that the proceeds from the loans were used to help finance the start-up costs of Jade Garden (*Id.*).

6. Prior to his discussion with Aquino in 1995, Man Chan claims that he was entirely unaware of Aquino's professed interest in Jade Garden (*Id.* at ¶ 14). Plaintiff had, however, executed an assignment of dividend to Aquino dated July 14, 1997 (Aquino Opp. at Ex. A).

7. On or about October 15, 1997, Plaintiff filed his complaint against Man Chan and Matsumoto for breach of fiduciary duty, wrongful and fraudulent use of corporate assets, wrongful and inequitable distribution of dividends, and negligence. Plaintiff also sought to enjoin Man Chan from employing illegal workers, paying unauthorized consultants, purchasing non-corporate assets, and advancing loans and dividends to himself.

8. On August 5, 1998, Aquino filed his complaint in intervention to enforce a 1984 oral agreement pursuant to which he claimed a fifty percent interest in Jade Garden (Complaint in Intervention at ¶ 16). Aquino asserted that pursuant to this agreement, he loaned Plaintiff $10,000 and put up his property as collateral for a number of additional loans from the Bank of Saipan.[2] Aquino contends that in exchange for these acts, he is entitled to fifty percent of the shares of Jade Garden, an accounting, and a distribution of profits. Aquino further maintains that he never knew that Plaintiff had incorporated Jade Garden or that Plaintiff had sold 51% of Jade Garden to Man Chan and Matsumoto (*Id.* at ¶¶ 17-18).**[p. 4]**

9. On August 7, 1998, Defendants filed an answer to the complaint in intervention in which they asserted a number of affirmative defenses. Omitted from the Answer were the affirmative defenses of laches and the statute of limitations.

10. In his answer to the complaint in intervention filed on August 7, 1998, however, Plaintiff claimed that enforcement of the 1984 oral agreement was barred by the statute of limitations (Answer at 2). On August 21, 1998, Plaintiff also served and filed with the court certain discovery requests in which he sought admissions from Aquino that: (1) more than six years had passed since he "had

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[2] Aquino asserts that he put up his Tuturan property to secure an initial loan of $15,000 in May of 1984 and a second loan of $20,563.31 in August of 1984 (Complaint in Intervention at ¶¶ 10-11). At Plaintiff's request, moreover, Aquino further contends that he borrowed an additional $10,000 from the Bank of Guam for Jade Garden's operating expenses. *Id.* at ¶ 13.

a claim for half an interest in the Jade Garden, Inc.," (2) more than six years had passed since Aquino "first had a claim for an accounting and distribution of profits from Jade Garden," and (3) Aquino was not impaired by a disability from 1984 through 1997. *See* Plaintiff's Request for Admissions directed to Intervenor at ¶¶ 7-10.

11. On March 1, 2000, Defendants filed their motion for summary judgment, claiming that Aquino's complaint for specific performance of the oral agreement was barred by the Commonwealth's statute of limitations and laches.

12. Although Plaintiff took no position on the merits in his response to the motion, Aquino filed an Opposition arguing that Defendants' failure to plead the statute and laches as affirmative defenses in the answer waived those defenses and mandated their exclusion from the case. Aquino further claimed that he has been prejudiced by the delay, in that he has had to incur litigation expenses during the nearly two years that his complaint in intervention has been pending, and that Plaintiff's assignment of his monthly stock dividends required the statute of limitations to be tolled (Opp. at 2).

II. QUESTIONS PRESENTED

1. Whether Defendants' failure to plead the statute of limitations and laches as affirmative defenses under Com. R. Civ. P. 8(c) waives these defenses and requires their exclusion at trial. **[p. 5]**

2. Whether Aquino's claim to a fifty percent interest in Jade Garden is barred by the statute of limitations and/or laches.

III. ANALYSIS

1. Statutes of limitation for all actions pending in the Commonwealth appear in Title 7 of the Code. For actions upon a judgment and actions to recover land or any interest therein, the Code provides for a limitation period of twenty years. 7 CMC § 2502. With the exception of certain causes of action that must be commenced within two years after the cause of action accrues,[3] all other actions must be initiated within six years after the cause of action accrues. 7 CMC § 2505. Aquino's

[3] Actions for assault and battery, false imprisonment, or slander; actions against the Department of Public Safety or a police officer or process server; certain malpractice actions; actions for wrongful death or against a bank for the payment of a forged check, and finally actions against the estate of a deceased person must all be commenced within two years pursuant to 7 CMC §§ 2503 and 2504.

action to enforce an oral contract falls within this six year period of limitation.

2. Laches and the statute of limitations are affirmative defenses that are waived if not timely asserted. Com. R. Civ. P. 8(c); *In re Estate of Delon* Castro, 4 N.M.I. 102, 106 (Sup. Ct. 1994) (laches is affirmative defense that is waived if not pled in trial court proceeding). *See also Michael-Regan Co., Inc. v. Lindell,* 527 F.2d 653 (9th Cir. 1975) (failure to raise statute of limitations defense at trial on counterclaim seeking to recover on oral contract constituted waiver of defense); *Hambrecht & Quist Venture Partners v. American Medical Intern., Inc.*, 46 Cal.Rptr.2d 33, 38 Cal.App. 4th 1532 (1995) (once sued, if defendant does not timely raise limitations defense, it is waived regardless of how long plaintiff has delayed).

3. The purpose of Rule 8(c), however, is to guarantee that the opposing party has notice of any issue that may be raised at trial, so that he or she is prepared to litigate it. *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988). Thus, if a plaintiff receives notice of an affirmative defense by some means other than the pleadings, the defendant's failure to comply with Rule 8(c) generally causes the plaintiff no prejudice. *Id.* **[p. 6]** Accordingly, although Com. R. Civ. P. 8(c), as the Federal Rule, requires a party to raise the statute of limitations and laches "in pleading to a preceding pleading,"[4] courts addressing this issue hold that these defenses may also be raised for the first time by motion for summary judgment when there is no significant prejudice or unfair surprise to the plaintiff. *E.g. Cedars-Sinai Medical Center v. Shalala*, 177 F.3d 1126 (9th Cir. 1999); *Rivera v. Anaya*, 726 F.2d 564 (9th Cir. 1984).

4. Prejudice means "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided," had the original pleading contained the affirmative defense. *See A.J. Pegno Construction Corp. v. City of New York*, 463 N.Y.S.2d 214, 215 (1983). Common examples of prejudice include the incurring of substantial litigation

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[4] Com. R. civ. P. 8(c) provides, in pertinent part, that "In pleading to a preceding pleading, a party shall set forth affirmatively ... laches, ... statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Rule 12(h)(1) requires that certain defenses are waived if not raised by motion under Rule 12 or "included in a responsive pleading or amendment thereof permitted by Rule 15(a) to be made as a matter of course." The statute of limitations is not included in those defenses required to be preserved or else waived under Rule 12(h)(1).

expenses before the defense is raised,[5] or a plaintiff's action or forbearance in reliance upon the defendant's failure to raise the defense. *Estes v. Kentucky Utilities Co.*, 646 F.2d 1131, 1134 (6th Cir. 1980).

5. In the case before the court, Intervenor does not point to any change or position, significant trouble, or substantial expense that can be traced to Defendants' failure to plead the statute of limitations or laches in their answer. Nor could he, since the record reflects that Intervenor has been on notice that the statute of limitations would be raised, at least since Plaintiff filed an answer to his complaint in August of 1998. Nearly eighteen months prior to filing the instant motion, moreover, Plaintiff also served Intervenor with Discovery regarding this issue. Thus, Aquino has had ample notice that some party was planning to raise the issue at trial. When, as here, a party can adequately confront and defend against an affirmative defense, there is no unfair surprise or significant prejudice. *See Grant v. Preferred* **[p. 7]** *Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) (where defendant raised the statute of limitations defense in a motion for summary judgment filed approximately one month before trial, the plaintiff was not prejudiced and the district court correctly addressed the issue on the merits). Accordingly, the court rules that under the circumstances presented, Defendants' failure to plead the statute of limitations and laches as affirmative defenses in their Answer does not waive these defenses nor require their exclusion at trial.

6. Determining whether Aquino's claims are barred by the statute of limitations or laches presents a different question. Com. R. Civ. P. 56 permits a party to seek summary judgment on any claim that is not sufficiently controverted by evidence in the record. *Lee v. TAC International Constructor, Inc.*, Civ. No. 96-0349 (N.M.I. Super. Ct. Jan 6, 1997). When a party seeking summary judgment meets the initial burden of showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law, the opposing party must either establish a genuine issue for trial under Com. R. Civ. P. 56(e) or explain why he cannot do so under Com. R. Civ. P. 56(f). *See Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548,

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[5] *See Pierce v. County of Oakland*, 652 F.2d 971, 973 (6th Cir. 1988).

L.Ed.2d 265 (1986). When the moving party demonstrates an absence of evidence to support the non-moving party's case, the non-moving party must present specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Castro v. Hotel Nikko, Inc.*, 4 N.M.I. 268, 272 (1995).

7. In deciding whether there is a disputed material fact precluding summary judgment, the court views the evidence and all reasonable inferences to be drawn from the underlying facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 25505, 91 L.Ed.2d 202 (1986). To defend against a proper summary judgment motion, however, the non-movant may not rely on mere denial of material facts nor unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set **[p. 8]** forth specific facts showing that there is a genuine issue for trial. Com. R. Civ. P. 56(e); *see Cabrera v. Heirs of DeCastro*, 1 N.M.I. 172, 176 (1990).

8. In their Motion, Defendants assert that there are no genuine issues of material fact preventing the court from ruling that the statute of limitations and/or laches bars Aquino's claim for specific performance of a sixteen year old oral agreement. The burden, therefore, is initially on the Defendants to demonstrate that no genuine issue of material fact exists to establish when Aquino's cause of action arose and to demonstrate that the statute of limitation has expired.

9. Defendants argue that the statute of limitations on Aquino's claim began to run long ago, at approximately the same time the contract was formed (Mot. at 5).[6] On the basis of deposition testimony that was not appended to their motion,[7] moreover, Defendants assert that as early as

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[6] In making this ruling, the court must assume, but does not decide, that an oral contract between the parties did, in fact, exist. Such a contract is alleged in the amended motion for judgment and, at this stage of the proceedings, must be taken as true.

[7] On the basis of deposition testimony not attached to their motion, Defendants assert that Aquino knew he needed to have something in 'black and white' to evidence his ownership in the company. Since Defendants fail to attach the depositions, there is no evidence concerning Aquino's knowledge in the record. Unsworn statements and suggestions of counsel that are not part of the record cannot properly be considered by the trial court. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-158 n.17, 90 S.Ct. 1590, 1608, n.17, 26 L.Ed.2d 142 (1970).

1985, Aquino knew his interest in the company would have to be evidenced in writing, and that when Plaintiff failed to execute documents transferring an interest in the company to him, Aquino should have taken steps then and there to enforce his rights (Mot. at 5).

10. The court disagrees. The statute of limitations on a breach of contract claim runs from the date the contract is breached. *E.g., Cochran v. Cochran,* 56 Cal.App.4th 1115, 66 Cal.Rptr.337 (1997); *Whorton v. Dillingham*, 202 Cal.App.3d 447, 456, 248 Cal.Rptr.405 (1988). Where, as here, the oral agreement does not specify time for performance,[8] an action on the oral contract does not accrue until "the omission of **[p. 9]** performance is discovered." *Kotyk v. Rebovitch*, 87 Ohio App.3d 116, 121, 621 N.E.2d 897, 900-901 (1993); *see also Leonard v. Rose*, 65 Cal.2d 589, 592, 55 Cal.Rptr.916 (1967) (where no time for performance is specified, a person who has promised to do an act in the future and who has the ability to perform does not violate his agreement unless and until performance is demanded and refused). For purposes of the statute of limitations, therefore, Aquino had no cause of action against Plaintiff with respect to his failure to transfer a share of the ownership of the business, as long as he was treated as a co-owner and Plaintiff did not repudiate Aquino's claimed interest or refuse to respond to a demand by Aquino for a proper stock certificate. *Nashan v. Nashan,* 119 N.M. 625, 894 P.2d 402 (N.M.App., 1995). Not only have Defendants failed to prove any such facts, but Aquino points to some evidence that with the knowledge of the Board, he has been receiving stock dividend payments since 1997 (Opp., Ex. A). Since the issuance of a stock certificate is not a prerequisite to the formation of a shareholder relationship,[9] and since there is some evidence suggesting that Plaintiff, up until 1995, continued to provide Aquino with free meals and treat him as having an ownership interest (Man Chan Decl. at ¶ 13), Defendants have not conclusively established when Aquino's cause of action began to accrue. Since it is axiomatic that the statute of limitations does even not

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[8] In reaching its decision, the court must assume, but does not decide, that an oral contract between the parties did, in fact, exist. Such a contract is alleged in the motion for summary judgment and, at this stage of the proceedings, must be taken as true.

[9] At least as between the seller and purchaser of stock, "[i]ssuance of a stock certificate is not a prerequisite to the formation of a shareholder relationship." *Wilkinson v. Reitnauer,* 421 Pa.Super. 345, 617 A.2d 1326, 1330 (1992). See 12A W. M. Fletcher, FLETCHER CYCLOPEDIA OF CORPORATIONS §§5613, at 349 (rev. ed. 1993) ("The ... title passes, if such is the intention of the parties, even though the stock may remain in the name or in the possession of the seller."); *Copeland v. Swiss Cleaners*, 255 Ala. 519, 52 So.2d 223, 228 (1951).

begin to run until the cause of action accrues, Defendants have failed to demonstrate that they are entitled to judgment as a matter of law.

11. Alternatively, Defendants assert that even if Aquino's suit is not barred by the statute of limitations, it should be dismissed on grounds of laches. The Commonwealth recognizes laches as the "neglect or delay in bringing suit to remedy an alleged wrong, which, taken **[p. 10]** together with the lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 523-523 (1993). In *Rios*, the Commonwealth Supreme Court ruled that a defendant asserting laches as a defense must prove two elements: (1) that the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time plaintiff knew, or reasonably should have known, of his claim against the defendant, and (2) that the delay operated to prejudice or injure the defendant. 3 N.M.I. at 524. *Rios* recognized moreover, that "there is a presumption of laches where the statute of limitations has run." *Id.* (emphasis in the original). When the presumption of laches arises, a plaintiff must 'offer proof directed to rebutting the laches facts.... To rebut the presumption, a plaintiff must present evidence showing that its delay was reasonable or that the defendant did not suffer prejudice or both." *Id.* at 524-525. If the plaintiff's offer of proof raises a genuine issue of fact regarding either the reasonableness for its delay or the prejudice suffered by the defendant, then the presumption of laches is overcome. *Id.* at 525.

12. Defendants assert that Matsumoto purchased its controlling interest in the Company in September of 1992, without knowledge that Plaintiff did not have a controlling interest to sell (Mot. at 9, Man Chan Decl at ¶¶ 14-15). Defendants further contend that had Matsumoto known of any additional investors, it would not have made the investment (*Id.*). Thus, while Defendants have made a sufficient showing to demonstrate how Aquino's untimely claims of ownership may have caused economic harm, it is not at all certain whether Aquino's delay was inexcusable. Although Intervenor effectively presents no evidence to explain why he delayed bringing suit until August of 1998, he suggests that until July of 1997, he was receiving stock dividends with the consent of the Board (Opp. at 3, Ex .A). Given the state of the record, at this juncture the court is unable to determine, from competent evidence, whether both of the elements comprising laches exists. The

evidence presented and the inferences to be drawn from that evidence thus require the court to rule in favor of Aquino as the non-moving party. *Rios*, 3 N.M.I. at 526.

[p. 11] **CONCLUSION**

Accordingly, it is hereby **ORDERED** that Defendants' motion for summary judgment dismissing Intervenor's complaint is **DENIED**.

SO ORDERED this 6 day of April, 2000.

BY THE COURT:

/s/ Timothy H. Bellas

TIMOTHY H. BELLAS, Associate Judge