

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

NORMAN CHAN)	Civil Action No. 97-1039B
)	
Plaintiff,)	
)	
vs.)	
)	
SUNNY KING MAN CHAN)	ORDER AND DECISION
MATSUMOTO PROPERTIES, LTD.)	FOLLOWING TRIAL
JADE GARDEN, INC.)	ON INTERVENOR’S COMPLAINT
)	IN INTERVENTION
Defendants,)	
)	
JUAN E. AQUINO,)	
)	
Intervenor/Plaintiff)	
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This matter came before the court for trial on September 21, 2000. Yoon H. Chang, Esq. appeared on behalf of the Intervenor/Plaintiff, Juan A. Aquino (“Aquino”); Joseph Aldan Arriola, Esq. appeared on behalf of the Plaintiff, Norman Chan; and 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”). The court, having heard the arguments and reviewed all the evidence presented, now renders its written decision.

I. BACKGROUND

1. At some point prior to May 24, 1984, Intervenor Juan Aquino, Plaintiff Norman Chan, and one Thomas Chan entered into a joint venture to build and operate a restaurant known as Jade Garden. [p. 2] Aquino contends that pursuant to this agreement, he put up his property as collateral for a number of loans from the Bank of Saipan.¹ Aquino maintains that in

¹ Aquino asserts that he put up his Tuturam property to secure an initial loan of \$15,000 in May of 1984 from the Bank of Saipan (Intervenor Ex. 1). He contends that he obtained a second loan of \$20,563.31 from the Bank of Saipan in August of 1984 (Intervenor Ex. 2). 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. Intervenor Ex. 3.

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exchange for the use of his property, he was to receive an equal share of the restaurant's profits but would not be obligated for any of its losses. Although Plaintiff admits that he offered Aquino shares in a corporation to be formed at some future date, he maintains that he agreed to tender to Aquino no more than twenty percent of the company's stock.

2. Shortly after the restaurant opened, Thomas Chan appears to have abandoned the enterprise.² Nevertheless, Aquino proceeded to use his property as collateral, secured multiple loans, and delivered the proceeds from these loans to the Plaintiff. With the exception of the third loan for \$10,000, each of the mortgages, promissory notes, or loan agreements identify Plaintiff, and not Jade Garden, as the personal obligor of Aquino as a justification for the loan. See Intervenor's Trial Exs. 1-4. The evidence was uncontroverted, however, that the proceeds from all the loans were used to establish and operate the Jade Garden Restaurant.
3. At some point in 1985, Aquino became concerned that Plaintiff was about to be arrested. To protect his interest in the company, he prepared certain documents evidencing his interest in the corporation and gave them to Plaintiff for execution. Plaintiff never executed the documents, but prevailed upon Aquino simply to "trust him." When Plaintiff incorporated Jade Garden on October 21, 1985, he became the record owner of 7,500 of the 10,000 shares of the common stock.³ [p. 3] Plaintiff, however, never told Aquino that he had incorporated the company. Nor did he ever take steps to issue any shares in the corporation to Aquino.
4. Nevertheless, from 1984 to 1995, Plaintiff continued to treat Aquino as an owner of the business. The Aquinos received free meals at Jade Garden, and had parties catered from the restaurant at no cost. The van used by the restaurant was registered in the name of Aquino. Mrs. Aquino also received funds from Jade Garden that were recorded as an offset for

Aquino claims he used his house in Sugar King and his Tuturam properties to obtain a fourth loan for \$60,903.00 from the Bank of Saipan on April 1, 1993. See Intervenor Ex. 4.

² Intervenor contends that upon Thomas Chan's departure, he understood that he and his wife were to receive a fifty percent ownership interest in Jade Garden. Plaintiff, however, disputed that any such conversation took place.

³ See Intervenor's Ex. 8. The company's initial filings list Plaintiff as the owner of some 7500 shares, and one Sul Kyoung Sook as the owner of the remaining 2500 shares of corporate stock. *Id.* In an Annual report for the year 1990, filed with the Office of the Attorney General on March 4, 1991, however, Plaintiff was listed as an officer and director and the company's sole shareholder. *Id.*

director's fees. From time to time, moreover, the company called upon Mrs. Aquino to perform services for the restaurant such as picking up customers and overseeing electrical repairs.

5. On September 8, 1992, Defendant 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 (Def. Ex.P 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 (Def. Ex. O). 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)). Section three of the Stock Purchase Agreement further provided that any misrepresentations by the Seller concerning the financial condition and assets of the company would render the agreement null and void *ab initio* and further require the seller to refund to Matsumoto all amounts paid as consideration.
6. 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 (Def. Ex. Q). 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.
7. 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. At some point in 1994, Defendants contend they discovered that the Company had accumulated significant debt. [p. 4] As a result, in January of 1995, Man Chan became actively involved in the management of the Company. It was at this point that he met Plaintiff/Intervenor Aquino and discontinued his free meals.
8. Aquino showed Man Chan the loan documents and told him 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. Aquino also informed Man Chan that the proceeds from the loans were used to help finance the start-up costs of Jade Garden.
9. Prior to his discussion with Aquino in 1995, Man Chan claims that he was entirely unaware of any third parties who claimed an interest in Jade Garden. Plaintiff had, however, executed an assignment of dividend to Aquino dated July 14, 1997 (Intervenor Trial Ex. 12), and the company was continuing to make payments to the Bank of Saipan on the Aquino loans. Although the company also issued certain checks to Aquino and his wife in 1995, in the latter part of 1995, Plaintiff advised Man Chan that he no longer owed Aquino any money. The payments to Aquino then ceased.
 10. In June of 1997, Plaintiff brought Aquino to the office of the company's attorney, Bruce Mailman, and provided him with a copy of the restaurant's articles of incorporation. It was at this point that Aquino contends he first learned that the restaurant had been incorporated. According to Aquino, Mr. Mailman told him that the statute of limitations had probably run on any action he could bring to enforce his claims for stock. Mr. Mailman also testified, however, that he advised Aquino to obtain his own attorney to review the matter.
 11. 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.
 12. On August 5, 1998, Aquino filed his complaint in intervention to enforce the 1984 oral agreement pursuant to which he claimed a fifty percent interest in Jade Garden (Complaint in Intervention at [p. 5] ¶ 16). 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. In its Order of May 6, 2000, this court ruled that under the circumstances presented, Defendants' failure to plead the statute of limitations and laches as affirmative defenses in their Answer did not waive these defenses nor require their exclusion at trial. See Order

Denying Defendants' Motion for Summary Judgment on Intervenor's Complaint in Intervention (filed May 6, 2000).

II. QUESTIONS PRESENTED

1. Whether Plaintiff's oral promise to convey shares in a corporation to be formed is enforceable.
2. Whether Aquino's claim to stock in the Jade Garden Restaurant is barred by the statute of limitations, laches, and/or the statute of frauds.

III. ANALYSIS

1. The material facts giving rise to Intervenor's claims are essentially undisputed: even Plaintiff does not dispute that he, Aquino, and Thomas Chan formed a joint venture to build and operate a restaurant, and that the three agreed to share in the company's profits. Plaintiff further admits that he agreed to issue Aquino shares in a corporation to be formed at some future date. Although Plaintiff recalls some conversation with his wife, wherein he admitted promising Aquino only twenty percent of the company's stock, and although Aquino now claims that after Thomas Chan departed, he somehow became entitled to a fifty percent interest in the corporation, there is no credible evidence substantiating either of these positions. Based principally upon Aquino's admission to Man Chan and a course of conduct treating Aquino as if he were an owner, the court finds that Plaintiff agreed to tender Aquino one-third of the company's stock in exchange for his initial capital contributions to the company.
2. As a general rule, an oral agreement is enforceable, but the party seeking to enforce it must prove: (1) mutual assent to the contract's terms, and (2) that the terms are sufficiently definite to be enforceable. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979); *see also Phillips v. Johnson*, 514 P.2d 1337, 1343 (Or. 1973) ("before there can be a valid contract, there must be [p. 6] a meeting of the minds as to all of its terms; ... nothing can be left for future negotiation, and ... if any portion of the contract is not agreed upon, or if no method is agreed upon by which such a term or provision can be settled, there is no contract."). Although Defendants contend that the terms of the agreement between Plaintiff and Aquino

are too uncertain to be enforced, the court finds otherwise. In any number of situations, the actions of the parties may show conclusively that they have intended to complete a binding agreement, even though one or more terms are missing or are left to be agreed upon. “In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain. An offer which appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of agreement to the contrary.” RESTATEMENT (SECOND) CONTRACTS § 33, Comment a.

3. Thus, in the case at bar, the parties need not have had a specific understanding of the amount of shares to be transferred because they agreed to split ownership. Undisputed record evidence reflects that Thomas Chan, Aquino and the Plaintiff agreed to enter into a joint venture to form and operate a restaurant, and thus Plaintiff’s promise to transfer one-third of the stock to Aquino is consistent with that agreement. Since the court finds such a promise to be reasonably certain, and because Aquino completed his part of the bargain, the only question is whether enforcement of the promise to convey stock is barred by the statute of frauds, applicable statutes of limitation and/or laches.
4. The statute of frauds did not exist in the CNMI until October 28, 1983. See 2 CMC § 4911 (Commission Comment). In material part, the Commonwealth’s statute of frauds provides that a contract which, “by its terms, is not to be performed within a year from the making thereof” is invalid absent the existence of a note, memorandum, or other writing that has been “subscribed [to] by the party to be charged or by his agent.” 2 CMC § 4914(a). The clear language of the statute, therefore, requires a writing, signed by the party to be charged, only for those contracts whose performance cannot possibly be completed within one year. Contrary to the positions asserted by [p. 7] both parties, the enforceability of a contract under the one-year provision does not turn on the actual course of subsequent events, nor on the expectations of the parties as to the probabilities of completion. Contracts of uncertain duration, such as the instant agreement to convey stock, are simply excluded from section

4914(a). See RESTATEMENT (SECOND) OF CONTRACTS § 130(1) (1979). Since complete performance of the contract to convey stock was possible within one year from the time Plaintiff made it, the contract is not within the statute of frauds. Accordingly, Defendants' attempt to prevent enforcement of the contract to convey stock on these grounds cannot be successful.

5. This court has previously ruled, moreover, that Aquino's action to enforce an oral contract falls within the six year period of limitation set forth in 7 CMC § 2505. See Order Denying Defendants' Motion for Summary Judgment on Intervenor's Complaint in Intervention (April 6, 2000) at 5. In light of this ruling, 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. Defendants further assert that as early as 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.
6. The court disagrees. As an initial matter, 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, an action on the oral contract does not accrue until "the omission of 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 [p. 8] 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 when he did approach Plaintiff with a request to document his interest, Plaintiff simply reassured him and told him he would be taken care of. Consistent with that representation and with the full knowledge of the Board, moreover, Aquino has been receiving stock dividend payments since 1997 and has otherwise been treated as a co-owner. Since the issuance of a stock certificate is not a prerequisite to the formation of a shareholder relationship,⁴ 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, Defendants' attempt to bar enforcement of the contract on statute of limitations ground will be equally unsuccessful.

7. The testimony of all parties, moreover, establishes that Aquino first discovered that a corporation had been formed in June of 1997, when he and Plaintiff met with Bruce Mailman. Since it is axiomatic that the statute of limitations does even not begin to run until the cause of action accrues, the statute in this case did not even begin to run until 1997. Because Intervenor filed his Complaint in Intervention in August of 1998, the complaint is not barred by the statute of limitations.
8. 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 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 **[p. 9]** two elements: (1) that the plaintiff delayed filing suit for an

⁴ 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).

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).

9. 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. Defendants further contend that had Matsumoto known of any additional investors, it would not have made the investment. Finally, Defendants point to Jade Garden’s claim against the Plaintiff for unlawful advances and loans in excess of \$168,000. Defendants maintain that the only recourse available to them to recover this claim is through a redemption of the outstanding stock held in the Plaintiff’s name. If that same stock is transferred to Aquino, Defendants fear that the company will be unable to recover its losses.
10. Defendants have clearly made a sufficient showing to demonstrate how Aquino’s untimely claims of ownership have caused them economic harm. On the facts of this case, however, the court cannot rule that Aquino’s delay in filing suit was inexcusable. Intervenor effectively argues that he delayed bringing suit until August of 1998 because Plaintiff lied to him. Once he learned that Plaintiff had, in fact, incorporated the company, he promptly retained counsel and filed suit to enforce his claims less than one year later.
11. Since the evidence to date thus demonstrates that Plaintiff agreed to convey one-third of the company’s shares to Aquino, Plaintiff was left with two-thirds of the company and could have transferred fifty one percent of these shares to Matsumoto under the terms set forth in the stock purchase agreement. While Plaintiff’s misrepresentations concerning stock ownership prove regrettable, they do not provide the court with a sufficient basis for summarily discarding Aquino’s claims. Should Defendants prevail on their counterclaims against the Plaintiff, then they will be entitled to avail themselves of whatever remedies are

available to them by law to collect the [p. 10] judgment. These remedies include, but are not limited to, redeeming the outstanding stock as well executing on Plaintiff's other assets.

CONCLUSION

In light of the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that Judgment shall enter in favor of Intervenor Juan Aquino and against Defendant Jade Garden Inc. and Norman Chan on Aquino's claim for the transfer of stock as more particularly described in the Entry of Judgment, filed concurrently herewith.

SO ORDERED this 26 day of December, 2000.

BY THE COURT:

/s/ _____

TIMOTHY H. BELLAS, Associate Judge