

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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RITA MARIA SANCHEZ DE HERNANDEZ, ET AL., :  
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Plaintiffs, : Index No. 601518/06  
:  
- against - : IAS Part 56  
:  
BANK OF NOVA SCOTIA a/k/a SCOTIABANK, : Hon. Richard B. Lowe  
:  
Defendant. :  
:  
:  
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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR  
MOTION FOR LEAVE TO REARGUE SCOTIABANK'S MOTION FOR SUMMARY  
JUDGMENT AND, UPON REARGUMENT, TO VACATE THE COURT'S  
AUGUST 4,2009 ORDER AND DENY THE MOTION**

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Plaintiffs Rita Maria Sanchez de Hernandez, *et al*, respectfully submit this Memorandum of Law in Support of Their Motion for Leave to Reargue and show the Court as follows.

### **PRELIMINARY STATEMENT**

Plaintiffs are a group of former shareholders in the Mexican financial holding company known as Grupo Financiero Inverlat, S.A. de C.V (“GFI”). In May 2006, this lawsuit was initiated against Scotiabank for engaging in wrongful conduct that resulted in Scotiabank obtaining stock in GFI that rightfully belongs to the Plaintiffs.

In late 2008, Scotiabank filed a motion for summary judgment. The Court granted the motion in an order entered on August 21, 2009 (“the Order”, PX 290).<sup>1</sup> The Court ruled that Plaintiffs’ breach of contract claim was barred by the statute of limitations because it was filed more than six years from the date that Scotiabank first breached the contract.

The Order misapplies a century-old controlling principle of law—that the statute of limitations cannot run until a plaintiff has the right to enforce his claim in court. The authority cited in the Order, *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 615 N.E.2d 985, 987 (1993), acknowledges the principle of law, but concludes that under the facts of that case, the plaintiff had the right to enforce his claim in court at the time of the alleged breach.

On the undisputed facts of this case, that was not true here. Before each Plaintiff had any claim to any shares at all, he had to go through an administrative process conducted by representatives of the Mexican Government to determine his eligibility. The Mexican Government did not decide which shareholders satisfied the eligibility standards until January 2004. Until then, none of the Plaintiffs had the right to enforce their claims in court. Therefore, as a matter of fundamental fairness, the statute of limitations could not possibly have begun to

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<sup>1</sup> Plaintiffs’ counsel served Notice of Entry of the Order on the Defendant on September 1, 2009. (PX 291).

run until January 2004—far less than six years from the date the Plaintiffs actually filed their suit.

If the Order is left uncorrected, this case will be the only one on record in which a Court has barred a claim by applying the statute of limitations during a period in which a claimant could not have enforced his rights in court. To correct the misapplication of a controlling principle of law, Plaintiffs seek leave to reargue the motion for summary judgment and request that, upon re-argument, the Court vacate the Order and deny Scotiabank's motion for summary judgment.

## **ARGUMENT**

### **I. THE STANDARD FOR A MOTION FOR REARGUMENT**

Under CPLR 2221(d)(2), a motion for re-argument may be granted “upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision.” *Carillo v. PM Realty Group*, 16 A.D.3d 611, 611, 793 N.Y.S.2d 69, 70 (2nd Dep’t 2008); *Spinale v. 10 West 66<sup>th</sup> St. Corp.*, 193 A.D.2d 431, 597 N.Y.S.2d 345 (1<sup>st</sup> Dep’t 1993). A motion to reargue is particularly warranted where the moving party demonstrates that the court misapplied a controlling principle of law in its original order. *See Diorio v. City of New York*, 202 A.D.2d 625, 609 N.Y.S.2d 304 (2nd Dep’t 1994); *Dunitz v. JLM Consulting Corp*, 22 A.D.3d 455, 803 N.Y.S.2d 653 (2nd Dep’t 2005). Courts often grant motions to reargue summary judgment motions and vacate their previous summary judgment orders where they conclude they have misapplied the law in their initial orders. *See, id.*; *Keh Soo Park v. J.G. White Engineering Corp.*, 99 A.D.2d 719, 472 N.Y.S.2d 332 (1<sup>st</sup> Dep’t 1984); *Carillo v. PM Realty Group, supra*.

**II. THE COURT’S SUMMARY JUDGMENT ORDER IS BASED ON A MISAPPLICATION OF A CONTROLLING PRINCIPLE OF LAW.**

**A. The Controlling Principle of Law: The Statute of Limitations Does Not Run Until a Plaintiff is Able to Enforce His Legal Rights in Court**

In the Order, the Court stated the controlling principle of law that is the subject of this motion to reargue: “A cause of action does not accrue until all of the facts necessary to sustaining the cause of action have occurred so that the complaining party would be entitled to obtain relief in court. (See *Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214, 221 [1996]).” (PX 290 at 6). New York courts have applied this rule of law for over a hundred years in deciding whether a claim was filed timely. See, e.g., *Parmenter v. State*, 135 N.Y. 154, 31 N.E. 1035 (1892); *Cary v. Koerner*, 200 N.Y. 253, 259, 93 N.E. 979 (1910) (“The term when ‘the cause of action has accrued’ . . . limiting the periods within which actions must be commenced means the time when the plaintiff first became enabled to maintain the particular action in question.”); *Jacobus v. Colgate*, 217 N.Y.235, 245, 111 N.E. 837 (1916) (Cardozo, J.) (“A cause of action does not accrue until its enforcement becomes possible.”).

In *Roldon v. Allstate Insurance Co.*, 149 A.D.2d 20, 544 N.Y.S.2d 359 (2nd Dep’t 1989)

the Court explained the rationale for the rule:

. . . [I]t is contrary both to fairness and to reason to permit the Statute of Limitations to run while a claimant is, through absolutely no fault of his own, unable to sue . . . [T]his common-law concept has become firmly embedded in American law.” *Id.* at 33.

The rule that limitations cannot run while a claimant is unable to enforce his rights in court applies in breach of contract cases and all other types as well. See *Edlux Construction Corp. v. State of New York*, 252 A.D. 373 (3d Dep’t 1937) *aff’d* 277 N.Y.635 (1938); *Barchet v. New York City Transit Authority*, 20 N.Y.2d 1, 228 N.E.2d 361 (1967); *Giblin v. Nassau County Medical Center*, 61 N.Y.S.2d 67, 459 N.E.2d 856 (1984); *Aetna Life & Cas. Co. v.*

*Nelson*, 67 N.Y.2d 169, 492 N.E.2d 386 (1986); *City of New York v. State of New York*, 40 N.Y.2d 659, 357 N.E.2d 988 (1976); *Roldon v. Allstate Insurance Co.*, *supra*; *Brown v. State*, 250 A.D.2d 314, 681 N.Y.S.2d 170 (3d Dep't 1998). For example, in *Edlux Construction Corp. v. State of New York*, *supra*, the Court applied the rule in a contract case to postpone the start of the limitations period until nineteen months after the alleged breach of contract.<sup>2</sup>

In *Edlux*, the plaintiff agreed to build sewer lines for the State of New York. The plaintiff alleged that the State had breached the agreement in 1933, but did not file suit until 1935. The statute of limitations for claims against the State was six months. The State argued that the claim was untimely because it was filed more than six months after the alleged breach of contract. The Court rejected the statute of limitations defense because from the time of the alleged breach until shortly before the case was filed, the State was immune from suit and, therefore, the plaintiff could not enforce its contractual rights. Only after the State audited and denied the plaintiff's claim did the State waive immunity and give the plaintiff the right to enforce its contract claim in court.

In reaching the conclusion that the claim was timely even though it was filed more than six months from date of the alleged breach, the Court concluded: "It is absurd to contend that a statute of limitations within which a claim must be sued runs when there is no court or tribunal before which the State can be summoned to answer the suit." *Edlux*, *supra*, at 375. Instead, relying on the principle of law that controls this case, the Court held that limitations began to run when the plaintiff was first able to enforce his contract claim in court. *Id.* at 374; *see also Oerlikon Machine Tool Works Buehrle & Co. v. United States*, 121 Ct. Cl. 616, 102 F. Supp. 417 (1952) vacated on other grounds, 151 F. Supp. 332 (1957) (Statute of limitations tolled during

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<sup>2</sup> *Edlux* was affirmed by the Court of Appeals, without an opinion. 277 N.Y.635. The Court of Appeals cited *Edlux* approvingly in *Ely-Cruikshank Co.*, 81 N.Y.2d 399, 402, 615 N.E.2d 985, 986 (1993).

period plaintiff was ineligible to bring breach of contract claim against government during World War II because its name was on a “blocked nationals list”).

The rule that the statute of limitations cannot run during a time when a party is unable to enforce his claim in court is a principle of law that is a universally recognized.

The decisions of the Supreme Court and of lower courts are uniform in holding that the statute is tolled throughout the period during which a litigant is denied the right to come into court to assert his claim. . . . These holdings are of long standing. They are holdings of most respectable tribunals, both the Supreme Court and others. They have never been questioned either by any court or by Congress. They must be accepted as an established exception to all statutes of limitation. *Oerlikon Machine Tool Works Buehrle & Co. v. United States*, *supra* at 420.

**B. Plaintiffs Could Not Enforce Their Legal Rights in Court Until They Were Declared Eligible in 2004**

Plaintiffs’ legal rights and the Defendant’s legal obligations are set forth in a series of interrelated agreements including the Existing Shareholder Agreement ( hereinafter “ESHA”). Under the ESHA, those shareholders who were eligible would receive a minimum of 9% and a maximum of 45% of their prior shares (PX 15).<sup>3</sup> Those shareholders who were ineligible had no right to enforce the ESHA. As BNS acknowledged, “A conditional right, such as that provided in the [ESHA], is merely a right to enforce a contract if it can be demonstrated that the conditions to enforcement are met.” (PX 286 ¶ 81).

To be eligible to obtain any shares, a shareholder had to satisfy three conditions set out in the ESHA. (PX 15). Mexican government officials, through an administrative process, decided which shareholders satisfied those conditions and, therefore, were eligible to enforce their rights under the ESHA.

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<sup>3</sup> The Order erroneously states that “within a certain time, the shareholders would receive back a minimum of 9% of their prior shares.” (PX 290 at 2). Not all shareholders were entitled to receive back some of their shares. In order to receive back *any* shares, a shareholder had to be “eligible”. (PX 15).

As BNS explained in one of its legal memorandum:

[T]he Mexican Government developed a comprehensive scheme to govern the Former Shareholders' rights to recover a portion of their former equity interest in GFI and, in that regard, set standards and mechanisms by which it would decide whether those rights were *triggered*. . . [A]s part of this scheme, [the Government], established the Technical Committee of the Banco Union Trust, comprised solely of government officials, to determine through *an administrative process* which Former Shareholders met the criteria to receive shares. (*emphasis added*).<sup>4</sup> (PX 283 at 15).

In short, none of the Plaintiffs were eligible to enforce their rights under the ESHA until a group of Mexican Government officials said they were. Until that administrative process occurred, each Plaintiff merely had a conditional right that could not be enforced in court. As BNS put it, “eligibility is the *sine qua non* of a claim . . .” (PX 283 at 15n.9).

In *Friedman v. United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), the Court considered a statute of limitations defense in a similar fact situation. In *Friedman*, the plaintiff sued to recover disability retirement benefits. Before he could bring his claim in court, he had to obtain a decision from an administrative board as to his eligibility for benefits. The Court of Claims ruled that the plaintiff's claim was timely because it did not accrue until after the administrative board decided his eligibility. The Court first described the general principle of law:

[G]eneral limitations law . . . recognizes that in appropriate cases conditions precedent to the accrual of a cause of action can be established by statute, contract or common law, and that where such a condition precedent has been created the claim does not ripen until the condition is fulfilled . . . *Friedman, supra* at 386.

The Court went on to explain that the general principle of law always applies to cases like this one, where an administrative decision is necessary before suit can be filed:

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<sup>4</sup> In its memorandum in support of its motion for summary judgment, BNS admitted that each Plaintiff's right to shares under the ESHA depended on an eligibility finding by the Mexican Government: “Former Shareholders *found eligible* by FOBAPROA or later its successor IPAB could receive up to an additional 36% [ of the shares]. . . .” (PX 282 at 5) (*emphasis added*).

[T]he court has uniformly applied to this type of case the doctrine . . . that where an administrative decision is mandatory the claim is not ready for suit until such a decision is had or excused. That is the condition precedent to the accrual of the cause of action. *Friedman, supra* at 390.

Other courts have applied the general rule that the statute of limitations cannot run until the plaintiff can enforce his claim in court to cases involving a mandatory administrative process. In *Lankster v. United States*, 2009 WL 2232210, \_\_Fed. Cl. \_\_ (2009), the Court found that the plaintiff's lawsuit was timely because it was brought within six years of the date the administrative agency took action on his claim. Until then, the Court reasoned, he was legally "incapable of bringing suit on his claim." *Id.* at \*8. Similarly, in *Chambers v. United States*, 417 F.3d 1218 (Fed. Cir. 2005), the Court followed the general rule that the plaintiff's cause of action did not accrue until the administrative agency decided the plaintiff's eligibility. The Court noted that without such a decision, "the case in this court would be dismissed as premature on the ground that the plaintiff did not seek or obtain a final decision within the administrative hierarchy." *Id.* at 1225.

The same holds true in this case. Any Plaintiff who sued Scotiabank before 2004 would have had his case dismissed as premature because he would not have first obtained a decision from the Mexican authorities on his eligibility to receive shares. As the Court noted in the Order, the Mexican administrative hierarchy did not issue its eligibility decisions until 2004. ("The first eligibility decisions were published on January 28, 2004." (PX 290 at 7). Without such a decision, the Plaintiffs were incapable of enforcing their breach of contract claim in court. And, therefore, under the universally-recognized exception to all statutes of limitations described above, the statute of limitations on Plaintiffs' claims could not have commenced before January 28, 2004.

### C. The Court's Order Misapplies *Ely-Cruikshank*

The Court's summary judgment Order is based on the following dispositive language:

In a breach of contract case, the cause of action begins to run from the date of the breach and expires six years later. (CPLR 213[2]; *Ely-Cruikshank Co. v. Bank of Montreal*, 81 NY2d 399, 402 [1993]). . . Here the original complaint was interposed on May 1, 2006. For the breach claim to be timely, the act constituting the breach must have occurred from May 1, 2000 forward. (PX 290 at 6).

While *Ely-Cruikshank* sets out the general rule for calculating the timeliness of a contract claim, that rule is subject to another controlling principle of law: the statute of limitations is tolled until a claimant can enforce his claim in court. In *Ely-Cruikshank* the Court of Appeals ruled that the statute of limitations began to run from the date of the alleged breach of contract, but only after concluding that, as of that date, the claimant could have obtained relief in court. *Ely-Cruikshank, supra* at 402 (“[A]ll of the elements necessary to maintain a lawsuit and obtain relief in court were present at the time of the alleged breach in this case.”).

Neither *Ely-Cruikshank* nor any case before or since has ruled that the statute of limitations in a breach of contract case runs from the date of the breach, even during a time when the claimant is unable to enforce his claim in court. To the contrary, *Ely-Cruikshank* found that the statute of limitations began to run from the date of the breach because the plaintiff could have brought his claim in court at that time. When applied correctly to the facts of a case such as this one, where all of the elements necessary to obtain relief in court were *not* present at the time of the breach, *Ely-Cruikshank* undermines the Court's Order and requires that Scotiabank's motion for summary judgment on limitations be denied.

## CONCLUSION

The Court's Order misapplies a controlling principle of law by stating that the statute of limitations began to run on the breach of contract claim on the date of the breach, even though the Plaintiffs could not enforce their claim in court for nearly four more years. As a matter of fundamental fairness and as established by a century of jurisprudence, all statutes of limitations are tolled during a period in which the claimant is incapable of suing to enforce his rights in court. The authority cited in the Court's Order, *Ely-Cruikshank*, did not modify this rule.

Under the facts of this case, the Plaintiffs did not have the right to enforce their claim in court until January 2004. Since the case was filed less than six years later, the claim for breach of contract was timely, the motion to reargue should be granted and upon re-argument, the Order vacated and the motion for summary judgment denied.

Dated: September 21, 2009  
New York, New York

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