J-E02005-16

2017 PA Super 72

NICHOLAS D. ANDREWS

Appellant

v.

CROSS ATLANTIC CAPITAL PARTNERS, INC.

NICHOLAS D. ANDREWS

Appellant

v.

DONALD R. CALDWELL

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1694 EDA 2014

Appeal from the Judgment May 22, 2014
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2011-06164, 2011-09776-CT

NICHOLAS D. ANDREWS

v.

CROSS ATLANTIC CAPITAL PARTNERS, INC.

Appellant

NICHOLAS D. ANDREWS

v.

DONALD R. CALDWELL

Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1825 EDA 2014

Appeal from the Judgment Entered May 22, 2014
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2011-06164

NICHOLAS D. ANDREWS

Appellant

v.

CROSS ATLANTIC CAPITAL PARTNERS, INC.

NICHOLAS D. ANDREWS

Appellant

v.

DONALD R. CALDWELL

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1934 EDA 2014

Appeal from the Judgment Entered May 22, 2014
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2011-06164-CT

BEFORE: FORD ELLIOTT, P.J.E., BENDER, P.J.E., BOWES, J., PANELLA, J., SHOGAN, J., LAZARUS, J., OLSON, J., OTT, J., and DUBOW, J.

DISSENTING OPINION BY BOWES, J.: **FILED MARCH 21, 2017**

I respectfully dissent from the majority's disposition in this matter. I agree with Cross Atlantic Capital Partners, Inc. ("Cross Atlantic") and Donald Caldwell (collectively "Appellants") that the statute of limitations had expired when this action was instituted. I would therefore reverse the judgment entered against Appellants and order entry of judgment in favor of Appellants as to all claims raised by Nicholas D. Andrews ("Andrews").

The relevant facts are as follows. Cross Atlantic is a private equity firm raising money from institutional investors and placing it in investment funds. Each fund purchases equity interests in companies that are viewed as having potential profitability and that are known as portfolio companies. The funds are organized as limited partnerships with Cross Atlantic acting as general partner. As general partner, Cross Atlantic operates as the investment manager, making investment decisions, selecting companies in which to invest, and offering advice to the portfolio companies. The limited partners are the investors who place their money in the fund.

The limited partners receive an ownership interest in each fund in return for their investments and are entitled to most of the profit since they bear the majority of the risk if the fund loses money. Cross Atlantic provides some infusion of capital into each fund, so it is entitled to a smaller percentage of profit than the limited partners and has a lower priority for receipt of any profits generated by a fund.

In 1999, Cross Atlantic formed an investment vehicle called the Technology Fund, L.P., which was designed to provide capital for technological companies. Although XATF Management, L.P. ("XATF") was the Technology Fund's general partner, Cross Atlantic served as the general partner for XATF Management, L.P., as well as the investment manager of the Technology Fund. There were approximately one hundred limited

partners in the Technology Fund, who provided approximately $114 million in funds while XATF invested an additional $6 million.

The plaintiff in this action, Andrews, began to work for Cross Atlantic as a principal on September 1, 1999. Principals research prospective portfolio companies, conduct market research, and meet with the entrepreneurs running a company in which Cross Atlantic is contemplating investing funds under its control. Principals do not have an ownership interest either in Cross Atlantic or in any investment fund managed by Cross Atlantic. Andrews' salary was $125,000, with the potential for a bonus of $75,000 at the end of his first year. While employed there, Andrews researched and recommended GAIN Capital as a portfolio company in which the Technology Fund would invest, and thereafter, he negotiated a $2.5 million investment by Cross Atlantic in GAIN in return for a 22.75% stock ownership interest by Cross Atlantic.

Approximately nine months after he was hired, Andrews was informed that he was not going to be promoted to partner, and he resigned shortly thereafter, on June 1, 2000. Andrews received three months' salary and a $75,000 payment representing the bonus that he would have earned had he stayed at Cross Atlantic until September 1, 2000. Pertinent to this matter is paragraph five of the Separation Agreement ("Agreement") entered into between Cross Atlantic and Andrews on July 5, 2000. Cross Atlantic agreed

therein that Andrews was entitled to a portion of the Technology Fund's carried interest, as follows:

> By the end of this Severance Period, you will have vested one year of service towards 1.0% of carried interest in CACP Technology Fund, L.P. and 0.5% carried interest in The Co-Investment 2000 Fund, L.P. Therefore, you will receive 0.2% and 0.1 % carried interest as your earned and vested carry in CACP Technology Fund, L.P. and The Co-Investment 2000 Fund, L.P., respectively. In addition, as special consideration for your effort put forth on GAIN Capital, we will offer you a full 1.0% and 0.5% carried interest on that particular transaction to be earned, paid and distributed at such time that the distribution is made to all other Limited Partners of the funds. Distributions of your participation in these carried interests will be in all cases identical to what you would have received if still employed by the funds.

The contract did not define carried interest.

On September 3, 2003, Andrews read a press release indicating that some GAIN shareholders had sold a portion of their shares. On September 4, 2003, Andrews sent Cross Atlantic's Chief Financial Officer, Brian Adamsky, an email about whether the Technology Fund was one of the shareholders that sold GAIN stock:

> I saw the press release for Gain's [deal] with Tudor on VentureWire, and noticed in Mark's quote a reference to 'liquidity to existing shareholders'. Did XATF sell some or all of its position into the round? If so, **the sale would trigger an obligation under my separation agreement**, so please advise as to the amount and timing of payment to me.

Plaintiff's Exhibit 6 (emphasis added). Thus, Andrews conveyed his belief that he was entitled to a percentage of the proceeds from any sale of GAIN shares by XATF.

Later that same day, Cross Atlantic's president, Glenn Rieger, expressed Cross Atlantic's position that it disagreed with Andrews' interpretation of the language in the separation agreement:

> Nick - It has been a while, I hope all is well! GAIN has made a lot of progress since your resignation from CACP, and continues to be one of our better performing companies. As we were putting this transaction together with Tudor I had in the back of my mind our contractual obligations to you. Believe me if l felt there was an obligation to payout to you, I would be the first to contact you because that would mean a payout to me as well. The $10MM deal with Tudor was a series C round with all but $1MM being used to redeem common A & B stock. Mark is the largest recipient in the group clearing over $6 MM personally. XATF is receiving $1.1 MM to be distributed to its [limited partners] while retaining between 18.8-19.4% ownership based on an EBITDA[1] ratchet that will not be finalized until 12/31/04. The operative sentence of your agreement is the last sentence of paragraph #5 –"Distributions of your participation in these carried interests will be in all cases identical to what you would have received if still employed by the funds." **Since XATF is not into its carry at this time, there is no distribution to the GP under the carry provision of the Partnership Agreement and hence, no distribution to any employees/partners/others from the GP as a result of this transaction.** I will keep you posted on the outcome of the fund as it may relate to any carry as those events occur.

Plaintiff's Exhibit 6 (emphasis added). A few days later, on September 9th, Andrews sent Rieger the following email:

> I went over to my storage place and dug out the separation agreement and my attendant materials, and in reading the file confirmed that **we have a genuine disagreement about the**

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[1] EBITDA is an acronym for "earnings before interest, taxes, depreciation and amortization." Andrews does not claim that the reference to EBITDA helps his case, so I need not address it further.

> **nature of the agreement**. While this is not a big deal when the immediate amount involved is $11,000 I think we can agree that **we are better off reconciling our views before the number goes up**. Paragraph 5 of the agreement is language you proposed. While I think I can understand how you read the 'if still employed' clause to create some ambiguity as regards the fund-level carry, as regards the gain-specific 'carry' there can be no doubt about the intent and meaning of 'special recognition to be earned, paid, and distributed at such time as the distribution is made to—Limited Partners.' Obviously this language is all contextualized by the fact that I was not an LP myself, by the lack of a predecessor agreement or other basis for an 'if still employed' comparison, and most of all by the performance gap between Gain and XATF. I think we all expected at the time of the agreement, and still hope today, that XATF would and will make payouts. (I'm actually quite encouraged by your email in this regard - if you were thinking about me on this deal but expecting to pay all early simultaneously, XATF must be pretty close to paying out.) Nonetheless, **I think we should prepare for the possibility that Gain winds up positive and XATF negative by clarifying the language of paragraph 5 as soon as possible**.

Plaintiff's Exhibit 6 (emphases added).

This email exchange established that Andrews knew on September 4, 2003, that Cross Atlantic's interpretation of "carried interest" as to GAIN distributions in paragraph five was in conflict with his own. In his email, Andrews maintained that his right to a percentage of carried interest as to GAIN distributions was triggered any time Cross Atlantic received any money from GAIN. In its response, Cross Atlantic informed Andrews that carried interest was not present until the original investment and preferred interest were recouped.

Andrews decided not to sue in 2003 for the $11,000 to which he claimed entitlement because the amount was too small. N.T. Trial, 8/26/13, at 130 ("On a cost benefit basis, hiring a attorney to recover $11,000 didn't make sense"). In the ensuing years, Andrews followed GAIN's financial progress, reading press releases and searching the internet. N.T. Trial, 8/27/13, at 86-87. One press release indicated that Cross Atlantic was among shareholders receiving a distribution of funds from GAIN. ***Id***. at 91.

In December 2010, seven years after the email exchange wherein the parties set forth their positions about the meaning of "carried interest" on GAIN distributions in paragraph five, Andrews inquired about the Technology Fund. Mr. Adamsky sent Andrews the available financial data about that Fund, including distributions it received from GAIN. He also stated that Cross Atlantic would let Andrews know if there were any changes in the fund that would trigger an allocation to Andrews. Sales of the Technology Fund's shares in GAIN resulted in six distributions of the following amounts on the following dates:

September 10, 2003:	$ 1,090,381
April 4, 2006:	$10,000,004
January 14, 2008:	$42,433,651
December 21, 2010:	$14,993,616
March 15, 2012:	$ 3,666,451
February 13, 2013:	$ 3,128,423
Aggregate distributions:	$75,311,526

N.T. Trial, 8/28/13, at 36-38. The un-contradicted evidence was that all these distributions repaid capital contributions and preferred interest to the Fund's investors. ***Id***. at 44.

Andrews filed this lawsuit in 2011, alleging breach of contract against Cross Atlantic and a violation of the Wage Payment Collection Law ("WPCL") against Cross Atlantic and Mr. Caldwell, Cross Atlantic's Chief Executive Officer. He claimed, as outlined in his September 2003 email, that the term "carried interest" as to GAIN distributions meant any amount received by GAIN. He averred that he was entitled to one percent of all GAIN distributions, or approximately $750,000.

Appellants countered that the action was barred by the statute of limitations. The trial court agreed as to the September 2003 distribution, but, under a set of special interrogatories, allowed the jury to decide whether Andrews was entitled to one percent of 2006-2013 distributions made to GAIN shareholders. The jury returned a verdict of $742,221.45 against Appellants. The court added prejudgment interest and attorney's fees to the award, and, after Appellants' timely post-trial motion was denied, judgment was entered against them in the amount of $1,216,617.70. On appeal, Appellants maintain that the statute of limitations prevented recovery herein, and I agree.

I first address the majority's position that Appellants' statute of limitations defense is waived. Appellants preserved this defense at every

stage of the proceeding. In their answer to Andrews' complaint, they claimed that this action was barred by the applicable statute of limitations in that Andrews knew that he had the right to sue more than four years prior to instituting this lawsuit. Answer With New Matter, 10/14/11, at ¶¶33-34. Appellants then moved for summary judgment. Their first legal position was that Andrews' claims were barred by the applicable statute of limitations. Motion for Summary Judgment, 12/14/12, at 16. They argued that the claims raised herein arose "no later than 2003, when distributions had been made to limited partners related to [Cross Atlantic's] GAIN Capital Investment and no distributions were made to [Andrews] despite his demand for payment under paragraph 5 of the Separation Agreement." ***Id***. at ¶ 66. In its summary-judgment argument as to the statute of limitations, Appellants relied upon the September 2003 email exchange, wherein the parties unambiguously set forth their conflicting interpretations of the language in paragraph five of the Agreement, and Appellants observed that Andrews did not bring an action to assert his right to payment thereunder until 2011.[2] Appellants noted that, at his deposition, Andrews admitted that

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[2] Andrews' cause of action under the WPCL is subject to a three-year statute of limitations, 43 P.S. § 260.9a(g) (footnote omitted) ("No administrative proceedings or legal action shall be instituted under the provisions of this act for the collection of unpaid wages or liquidated damages more than three years after the day on which such wages were due and payable as provided in sections 3 and 5."). A four year statute of limitations applies to the
(Footnote Continued Next Page)

he knew about the GAIN distributions as they were occurring. Deposition of Nicholas D. Andrews, 6/15/12, at 93-95. Thus, Andrews had to commence this lawsuit by September 2006, in order to recover under the WPCL and by September 2007 for his breach-of-contract count to be timely. Appellants were denied summary judgment.

At the close of Andrews' case, Appellants moved for nonsuit, and, among other reasons, submitted that Andrews did not meet his burden of proof on the statute of limitations. N.T. Trial, 8/28/13, at 72. They argued that Andrews knew about his claims against them in September 2003, when he admittedly was aware that GAIN distributions were being made and that Appellants did not agree that he was entitled to a share of those distributions under paragraph five. ***Id***. at 73. Appellants maintained that "it was unequivocal in 2003 that Cross Atlantic would not honor [its] obligation at that time. [Andrews] knew he had a claim. There had been an actual breach at that point, according to [Andrews'] interpretation. He believed he was owed $11,000, one percent of the distribution that was made." ***Id***. at 73-74. Under Andrews' construction, they continued, there was an actual breach of the contract by them in 2003 when they said they did not agree

(Footnote Continued) ———————————

breach of contract action. 42 Pa.C.S. § 5525(8) ("the following actions and proceedings must be commenced within four years . . . [a]n action upon a contract, obligation or liability founded upon a writing not specified in paragraph (7), under seal or otherwise, except an action subject to another limitation specified in this subchapter.").

with his reading of paragraph five. The trial court rejected that position. Appellants leveled the identical argument when moving for a direct verdict. N.T. Trial, 8/30/13, at 3-5. The statute of limitations argument was raised in a post-trial motion and addressed by the trial court.

The majority's position is that the statute of limitations issue is waived because Appellants failed to use the words "absolute and unequivocal repudiation" of the Agreement in their 1925(b) statement. Majority's Opinion at 10. I must respectfully disagree with the majority's waiver position. Appellants consistently argued that the statutes of limitations expired because they repudiated Andrew's interpretation of paragraph five in 2003, more than four years prior to when he brought this lawsuit. Appellants' concise statement of errors complained of on appeal is replete with their position that the statutes of limitations had run on this lawsuit. In pertinent part they claimed:

> 1. The Court erred and/or abused its discretion in denying Defendants' Motion for Summary Judgment, Motion for Compulsory Non-Suit and/or Motion for Directed Verdict, and otherwise in failing to rule as a matter of law and/or direct or instruct the jury that all of Plaintiffs claims are barred by the applicable statutes of limitations.
>
> a. The undisputed evidence established that the breach of contract occurred in this case in September 2003.
>
> b. In September 2003, Plaintiff knew, or through the exercise of reasonable diligence should have known, that he had a claim against Defendants for breach of contract and violation of the Pennsylvania Wage Payment and Collection Law under his interpretation of paragraph 5 of the Separation Agreement, such

that Plaintiff was required to commence this action no later than September 2006 (on the Wage Payment and Collection Law claim) and September 2007 (on the breach of contract claim).

. . . .

d. **By September 9, 2003, Plaintiff knew that because of Defendants' interpretation of paragraph 5 of the Separation Agreement, Defendants would not be paying him the amounts that Plaintiff believed were due to him at that time - or any additional amounts that might become due to him at any time thereafter - under his interpretation of paragraph 5 of the Separation Agreement**.

e. **The statute of limitations began to run *at the latest* on September 9, 2003, which is when Plaintiff wrote his email to Defendants showing that Plaintiff knew to a certainty that the payments that he sought under paragraph 5 of the Separation Agreement would not be made**.

f. Plaintiff's breach of contract claim was predicated entirely on the theory that Defendants had misinterpreted paragraph 5 of the Separation Agreement in September 2003. **Defendants' misinterpretation, if any, occurred by September 9, 2003, and simply was applied consistently thereafter**, hence if Defendants' interpretation of the Separation Agreement was wrong, there was only one error, and only one breach of the Separation Agreement, **which breach occurred on September 9, 2003** and continued through to the date of trial.

g. That Defendants made no subsequent payments to Plaintiff was the natural consequence of Cross Atlantic's September 4, 2003 statement of its position that Plaintiff believed to be a breach of the Separation Agreement. Each additional instance of nonpayment was not a separate breach; rather each instance was a mere continuation of the initial breach.

Concise Statement of Errors Complained of on Appeal at 1-4 (emphases added). This language is **precisely** Appellants' position in this appeal, and, **exactly mirrors** Appellants' statute of limitations defense throughout this lawsuit. I simply cannot reconcile the majority's waiver position with the procedural history of this case.

I now address Appellants' position that this lawsuit is barred due to the expiration of the applicable statutes of limitations. The issue of whether the "the statute of limitations has run on a claim is a question of law[.]" ***Fine v. Checcio***, 870 A.2d 850, 859 (Pa. 2005). "Our standard of review over questions of law is *de novo* and to the extent necessary, the scope of our review is plenary as the appellate court may review the entire record in making its decision." ***Stamerro v. Stamerro***, 889 A.2d 1251, 1257 (Pa.Super. 2005) (citation omitted). It is established that, "The Judicial Code provides in pertinent part that limitations periods are computed from the time the cause of action accrued. 42 Pa.C.S. § 5502(a). In Pennsylvania, "a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion." ***Fine***, ***supra*** at 857. Thus, "the statute of limitations begins to run as soon as the right to institute and maintain a suit arises, [and o]nce a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from bringing his cause of action." ***Id.***

In ***2401 Pennsylvania Ave. Corp. v. Fed'n of Jewish Agencies of Greater Philadelphia***, 89 A.2d 733, 742 (Pa. 1985) (footnote omitted), our Supreme Court articulated, "Pennsylvania has long recognized that an anticipatory repudiation by an obligor to a contract gives the obligee the immediate right to sue for breach of contract[.]" Thus, a breach of contract case accrues when one party to an agreement has repudiated or renounced a contract. ***Weinglass v. Gibson***, 155 A. 439 (Pa. 1931). Simply put, the anticipatory repudiation of a contract accords the plaintiff an immediate right to sue for breach of contract. ***Id***. "To be effective, a renunciation must be absolute and unequivocal." ***Shafer v. A. I. T. S., Inc.***, 428 A.2d 152, 155 (Pa.Super. 1981). In other words, a contractual breach occurs when there is "an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." ***2401 Pennsylvania Ave. Corp.***, ***supra*** at 736 (citation omitted).

More recently, in ***Harrison v. Cabot Oil & Gas Corp.***, 110 A.3d 178 (Pa. 2015), our High Court re-affirmed that Pennsylvania continues to apply the doctrine of repudiation. Therein, it held that the institution of a declaratory judgment action seeking interpretation of a contract would not constitute a repudiation. This ruling is, of course, logically consistent with the doctrine. Asking for a judicial construction of the contract would not be a rejection of the contract. By seeking a declaratory judgment, the party is acknowledging that it will abide by the court's construction of the contract in

question, which was not a repudiation. Thus, the filing of a declaratory judgment action contesting the validity or scope of an agreement is not an anticipatory breach, because it "does not entail . . . an unequivocal refusal to perform." ***Id***. at 184.

The ***Harrison*** Court applied Restatement (Second) of Contracts § 250, which states:

> A repudiation is
>
> (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or
>
> (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

Restatement (Second) of Contracts § 250. In pertinent part, Restatement 243 provides:

> (3) Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance **as to less than the whole**, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.

Restatement (Second) of Contracts § 243 (emphasis added).

In September 2003, Cross Atlantic absolutely and equivocally refused performance of the contract as a whole in accordance with Andrews' interpretation of "carried interest." In his September 2, 2003 email, Andrews maintained that "carried interest," as applied to distributions from

GAIN, had a different meaning from the industry meaning and how it was used in other portions of the contract. Andrews suggested that the term "carried interest" meant **any monetary payment** made by GAIN.

Cross Atlantic responded that day to Andrews stating that "carried interest" meant a distribution of the Technology Fund's excess profits, which were not generated until every partner obtained a return of its original investment and after the limited partners were paid the preferred interest on their investments. I observe that this interpretation of the term "carried interest" is consistent with how that language is used in other portions of the July 5, 2000 contract and with the industry meaning of the word. In its email, Cross Atlantic denied Andrews' demand for a percentage of the GAIN distribution made that year and stated that it would not pay a percentage on anything other than money paid from GAIN after the recoupment of capital and preferred interest. Thus, the causes of action herein accrued when Cross Atlantic clearly and unambiguously voiced its total disagreement with Andrews' interpretation of the term "carried interest" and his right to any payments, as a whole, on principal and preferred interest.

Cross Atlantic's September 4, 2003 email to Andrews thus constituted an anticipatory repudiation of Andrews' view of the meaning of "carried interest" under paragraph 5 of the Separation Agreement. Consequently, the statutes of limitations herein began to run on September 4, 2003 for Andrews' breach of contract and WPCL claims. Contrary to Andrews'

argument, each distribution did not give rise to a separate action with a separate limitations period. Appellants did not merely miss one payment in a contract requiring more than payment, which would not constitute a repudiation of the contract terms. ***See Restatement (Second) of Contracts*** § 243. Appellants' obligation to pay, even under Andrews' position, was triggered only when GAIN made a distribution, which may not even have occurred after 2003. In 2003, Cross Atlantic stated that "carried interest" did not have the meaning ascribed to it by Andrews, which was a total repudiation of the entire paragraph, as interpreted by Andrews.

Rieger communicated three points in his September 4, 2003 email: (1) the Technology Fund was receiving $1.1 million from the sale of GAIN stock and was distributing over 80% of this sum to its limited partners while retaining 18-19%; (2) these distributions did not generate carried interest ("XATF is not into its carry at this time"), so Andrews was not eligible for payment of carried interest under paragraph 5 of the separation agreement; and (3) Rieger himself was ineligible for payment because the sale of GAIN stock was not carried interest ("believe me if l felt there was an obligation to payout to you, I would be the first to contact you because that would mean a payout to me as well"). Through these points, Rieger repudiated Andrews' interpretation of "carried interest" in the separation agreement as any money received from GAIN. Rieger clearly communicated that sales of GAIN stock and distributions to the limited partners and the general partner from

these sales did not, by themselves, trigger Andrews' right to payment of carried interest.

In his September 9, 2003 response to Rieger, Andrews admittedly recognized that Rieger had repudiated his interpretation of "carried interest," stating that "we have a genuine disagreement about the nature of the [separation] agreement," and that "there can be no doubt" that his interpretation of "carried interest" was correct. Andrews urged that "we are better off reconciling our views before the number goes up" beyond $11,000.00, the amount that Andrews claimed Cross Atlantic owed him from the 2003 sale of GAIN stock.

The email exchange compels only one conclusion: in September 2003, Cross Atlantic, through Rieger, directly repudiated Andrews' position that it owed him carried interest each time Cross Atlantic sold GAIN stock. Moreover, Andrews understood that Cross Atlantic rejected his interpretation of carried interest. Indeed, at his deposition, Andrews actually admitted that he knew that he had the right to sue Cross Atlantic in 2003, but decided against it because the amount in question, $11,000, was too small to justify instituting a lawsuit. This admission establishes that the statutes of limitations commenced in September 2003.

Andrews counters that the final sentence of Rieger's September 4, 2003 email, which was "I will keep you posted on the outcome of the fund as it may relate to any carry as those events occur," shows that the email was

not a repudiation. Andrews insists that the quoted language suggests that Cross Atlantic would someday pay Andrews carried interest on sales of GAIN stock. However, that sentence must be read in light of the remainder of Rieger's email. Read in context, the final sentence can have only one meaning, which was that, while sales of GAIN stock alone do not trigger Cross Atlantic's obligation to pay carried interest, separate events other than sales of GAIN stock may trigger this obligation, and Cross Atlantic would contact Andrews upon the occurrence of those events. In other words, if and when more than a return of initial investment and preferred interest was made through GAIN, Andrews would receive one-percent of the distribution. Rieger's email did not merely reject Andrews' right to payment for the 2003 sale of GAIN stock, as the trial court suggested; it rejected Andrews' right to payment for all future sales of GAIN stock, unless and until Cross Atlantic received more than a return of the originally-invested funds and preferred interest on those funds.

In accordance with the requirements of ***Harrison*** and ***2401 Pennsylvania Avenue Corp.***, ***supra***, Rieger's email provided a unambiguous and unequivocal communication that Cross Atlantic would in fact not perform under the separation agreement in the manner demanded by Andrews. The Supreme Court in ***2401 Pennsylvania Avenue Corp.*** found that there was no repudiation present because the allegedly breaching party recognized that he possibly had an obligation under the contract in

question. As noted in ***Harrison***, institution of a declaratory judgment action is not a repudiation since, by instituting it, the party indicates that he will abide by the court's resolution of the contrasting views of the contract language. However, in this case, Rieger unequivocally rejected Andrews' interpretation of the contract terms as a whole.

Andrews argues that each payment owed to him by Cross Atlantic gave rise to a separate cause of action with a separate limitation period. Andrews equates his case with installment contract cases where a separate statute begins running each time the defendant misses an installment, which as noted *supra*, is not subject to the repudiation doctrine. ***See Ritter v. Theodore Pendergrass Teddy Bear Prod., Inc.***, 514 A.2d 930, 938 (Pa.Super. 1986) ("where installment or periodic payments are owed, a separate and distinct cause of action accrues for each payment as it becomes due"). However, herein, Cross Atlantic did not miss an installment of a periodic payment that was due under the contract. Cross Atlantic denied that it owed any money at all under the contract in question under its understanding of the term "carried interest."

Our Supreme Court's decision in ***Barr v. Luckenbill,*** 41 A.2d 627 (Pa. 1945), is pertinent. At the conclusion of plaintiff's case, the court concluded that the action was barred by the statute of limitations and our Supreme Court concurred. In 1931, the plaintiff gave the defendant $6,500 and, in 1933, $1,000. The defendant agreed to invest the money in securities that

the defendant selected. Until the investment was made, the defendant was obligated to pay the plaintiff three percent interest on the entire $7,500. In 1933, the defendant informed the plaintiff that the defendant had loaned $4,500 of the funds to a third party at the rate of six percent interest and that the defendant therefore owed the plaintiff $3,000.

The defendant paid interest intermittently on the $3,000 but none on the $4,500, and the third party never repaid the defendant interest or principal on the loaned funds. In 1940, the defendant made some payments toward the $3,000 loan, informed plaintiff that he considered that loan satisfied, and never paid interest on the $3,000 thereafter. The plaintiff instituted the lawsuit in 1943, demanding principal and interest on the $4,500. Our Supreme Court held that, even if the $4,500 loan to the third part was unauthorized, when the defendant made that loan, he repudiated any obligation to pay interest or principal as to the $4,500. It concluded that the statute of limitations had run since the loan to the third party occurred ten years prior to the institution of the lawsuit.

The plaintiff averred that the repayment of the $3,000 restarted the statute as to the $7,500 debt, but the ***Barr*** court concluded that the repayment did not relate to the $4,500 debt and did not toll the statute as to the plaintiff's right to collection on the monies loaned to the third party. Thus, even though the plaintiff was entitled to three percent interest on the $4,500, payable as installments, the Court found that the statute of

limitations had run on the plaintiff's right to receive either principal or interest on that amount as of the date of repudiation, which was when the loan was made to the third party.

Based on these precedents, I conclude that the statutes of limitations began to run on Andrews' entire contract and WPCL claims on September 4, 2003, when Rieger repudiated Andrews' construction of the Separation Agreement. The three-year statute of limitations on Andrews' WPCL claim expired on Tuesday, September 5, 2006, as Monday was a holiday, and the four-year statute for Andrews' contract action expired on September 4, 2007. Andrews' 2011 lawsuit is time-barred in its entirety.

The decisions cited in Andrews' brief are inapposite. For example, in ***Pennsylvania Turnpike Comm'n v. ARCO***, 375 A.2d 890 (Pa.Cmwlth. 1977), an oil company entered into a long-term lease with the Turnpike Commission to operate a gas station along the Pennsylvania Turnpike. The lease prescribed that rent was payable on a monthly basis. The parties disputed the gas station's computation of rent from time to time over their twenty-year relationship, but neither party repudiated the lease. After twenty years, the Turnpike Commission brought an action to recover damages for alleged underpayment of rent by the oil company during the preceding six years of installment payments, the applicable limitations period for contract claims at that time. The Commonwealth Court declined to bar the action under the statute of limitations, explaining that "the

Commission could have no cause of action until each allegedly improperly computed payment was made and, as to each such payment, a separate and distinct cause of action would accrue." ***Id.*** at 892. That conclusion was logical because the oil company, unlike Cross Atlantic, never repudiated the contract. ***Also cf. Van Seiver v. Van Seiver,*** 12 A.2d 108, 110 (Pa. 1940) (separate statute ran for each deficient alimony payment, where deficiencies appeared to be unintentional, and there was no suggestion in Supreme Court's opinion that husband had repudiated his alimony obligations); ***Ritter v. Theodore Pendergrass Teddy Bear Prods., Inc.***, 514 A.2d 930, 935 (Pa.Super. 1986) (separate statute ran for each missed installment; no suggestion in this Court's opinion that defendant repudiated contract).[3]

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[3] Moreover, even if this action was timely, I would reject Andrews' position that "carried interest," as applied to distributions from GAIN, has a different meaning than how that term is employed in other portions of the separation agreement and than its ordinary meaning in the industry. As conceded by the majority in footnotes four and twelve, the words "carried interest" mean profits, *i.e.*, money paid after a return of capital investment and preferred interest.

When we interpret a contract, we must accord unambiguous language its ordinary meaning and give "effect to an **entire document**, if possible, and not only those portions supporting a specific conclusion." ***Lenau v. Co-eXprise, Inc.***, 102 A.3d 423, 431 (Pa.Super. 2014) (emphasis in original). A "disagreement between the parties on the meaning of language or the proper construction of contract terms does not constitute ambiguity." ***Id***. (citation omitted). It is illogical to give the same words in an agreement a different meaning, but Andrews insists that "carried interest," when applied to GAIN distributions, has a meaning different from how that term is used in the remainder of the contract. Additionally, Andrews' position is not

(Footnote Continued Next Page)

As I believe that this action should be dismissed in its entirety, it is unnecessary in this dissent to address any of the positions raised in the cross-appeal.

For the foregoing reasons, I dissent from the majority's disposition herein. I would remand for entry of judgment in favor of Cross Atlantic Capital Partners, Inc. and Donald Caldwell and against Nicholas D. Andrews.

Judge Shogan, Judge Olson and Judge Dubow join this dissenting opinion.

(Footnote Continued) ———————————

consistent with the ordinary meaning of "carried interest," which is profit paid after investment and preferred interest are satisfied. Under anyone's understanding of the word, "interest" cannot mean principal. Yet, the majority's holding gives Andrews a percentage of interest and principal when he clearly and unambiguously is entitled only to the former under the Agreement.