

**Beechwood Garden City Bldg. Corp. v 550 Stewart  
Acquisition, LLC**

2011 NY Slip Op 33665(U)

May 2, 2011

Supreme Court, Nassau County

Docket Number: 020263-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**BEECHWOOD GARDEN CITY BUILDING CORP.,**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 020263-10**

**Motion Seq. No: 1**

**Submission Date: 3/4/11**

**-against-**

**550 STEWART ACQUISITION, LLC,**

**Defendant.**

-----x

**The following papers having been read on this motion:**

**Notice of Motion, Affirmation in Support and Exhibits.....x**

**Affirmation in Opposition and Exhibits.....x**

**Reply Affirmation.....x**

This matter is before the Court for decision on the motion filed by Defendant 550 Stewart Acquisition LLC ("550 Stewart" or "Defendant") on January 11, 2011 and submitted on March 4, 2011. For the reasons set forth below, the Court grants Defendant's motion and dismisses the Complaint.

**A. Relief Sought**

Defendants move for an Order, 1) pursuant to CPLR § 3211(a)(7), dismissing all of the causes of action in the Complaint; and 2) pursuant to CPLR § 3211(a)5), dismissing the second cause of action in the Complaint.

Plaintiff opposes Defendant's motion.

**B. The Parties' History**

The Complaint (Ex. A to Yetman Aff. in Supp.) alleges as follows:

550 Stewart is the owner of real property ("Property") known and described as 555 Stewart Avenue, Garden City, New York. In late 2009, 550 Stewart and Beechwood entered

into negotiations regarding the potential sale (“Sale”) of the Property. In August of 2010, principals of 550 Stewart and Beechwood attended a meeting at which the material terms for the Sale were agreed on and memorialized in a writing (“Agreement”).

The Agreement provided that 1) Beechwood would purchase the Property for a specified sum, and thereafter develop the Property based on approvals (“Approvals”) that 550 Stewart was to obtain from governmental entities; 2) the closing would take place after 550 Stewart obtained the Approvals and a building permit, which Beechwood would use to develop the Property; and 3) Beechwood and 550 Stewart would cooperate in performing certain tasks related to the development of the Property (“Development”), and each would retain a portion of the profits earned from the sale of the finished units at the Property.

Pursuant to the terms of the Agreement, and in partial performance thereof, 550 Stewart took steps to obtain the Approvals and advised the relevant governmental entities that, if the Approvals were granted, Beechwood and 550 Stewart would develop the Property. Beechwood’s reputation as a large and well-known developer on Long Island assisted 550 Stewart in obtaining the Approvals and enhanced the value of the Property.

As a result of the Agreement, Beechwood devoted significant time and resources to the Development, and declined other opportunities to develop in the area where the Property was located. Beechwood’s actions were taken in reliance on the Agreement, and Beechwood is ready, willing and able to perform its obligations under the Agreement to purchase the Property. 550 Stewart is in breach of the Agreement by refusing to sell the Property to Beechwood. The Complaint contains four (4) causes of action: 1) a request for specific performance of the Agreement, 2) breach of contract, 3) unjust enrichment, and 4) promissory estoppel.

In his Affirmation in Support, Defendant’s Counsel notes that the Complaint does not include a copy of the Agreement, and does not allege that Defendant signed the Agreement. In addition, Defendant’s Counsel disputes Plaintiff’s allegation that the parties agreed to the material terms of the sale, and provides a copy of a letter dated September 7, 2010 (Ex. B to Yetman Aff. in Supp.) in which counsel for Defendant advised counsel for Plaintiff that 1) Defendant “will not be proceeding with the possible sale of [the Property];” 2) after good faith efforts by the parties, “a contract acceptable to both parties could not be achieved;” and 3) Defendant “has decided to move in a different direction at this point.”

Defendant also disputes Plaintiff's claim that it devoted significant time and resources to planning for the Development in reliance on the Agreement. Defendant's counsel provides a copy of documentation (Ex. C to Yetman Aff. in Supp.) reflecting the minutes of a September 11, 2008 meeting of the Board of Trustees of the Village of Garden City ("Village") at which the Board voted in favor of final site plan approval of the Property. 550 Stewart subsequently extended that site plan approval in 2009 and 2010 ("Extensions"). Beechwood was not part of the initial approval or the Extensions.

Counsel for Defendant also provides documentation (Exs. C and D to Yetman Aff. in Supp.) reflecting that 550 Stewart received site plan approval from the Village for the Property in 2008, and an entity related to 550 Stewart received approval from the Village with respect to a different parcel in 2008. Moreover, pursuant to the Village Code (*see* Ex. E to Yetman Aff. in Supp.), the Village does not consider financial or construction experience in determining site plan approval.

In opposition, Plaintiff's counsel notes that Defendant's motion is based on the affirmation of counsel who lacks personal knowledge of the relevant facts. Thus, Defendant has not provided competent evidence in support of its claims that 1) Beechwood played no role in 550 Stewart's obtaining the Extensions; 3) the Village was not concerned about 550 Stewart's limited experience in residential development; and 4) there is no written agreement between Beechwood and 550 Stewart.

Plaintiff's counsel submits, further, that Defendant's assertions are contradicted by certain documentary evidence. Plaintiff provides two newspaper articles ("Articles") in support of its allegation that Beechwood provided meaningful assistance to 550 Stewart in obtaining the necessary governmental approvals. The first Article (Ex. A to Cramer Aff. in Supp.), which appeared in the Garden City Patch on June 10, 2010, states that an attorney representing the owner of 550 Stewart Avenue 1) "put rumors to rest...about whether or not the [Property] has been sold;" and 2) "confirmed the [P]roperty has in fact not been sold but that the owner is in the process of agreeing to a joint venture with a 'well known development company' to construct 25 townhouses at the location. The contract has been written, according to [the attorney], and is being negotiated." When asked whether Meadowbrook Pointe, a Beechwood entity, was the partner to whom he was referring, the attorney for Defendant is quoted as saying "That's one of

the people I'm speaking to...I'm not permitted to go into it. They are very interested in the project, I'll indicate that."

Plaintiff's counsel submits that Defendant's reliance on Beechwood is further demonstrated by an exchange at a September 2010 Village meeting that was reported in an article in the Garden City Life newspaper dated September 3, 2010 (Ex. B to Cramer Aff. in Opp.). In that article, it was reported that Defendant's attorney, in responding to a Trustee's request for clarification as to whether 550 Stewart was selling the Property to a new developer but keeping the same site plan, responded "We are required to keep the same plan, that's the approved plan. In terms of selling, we would be joint venturing with a marketing developer who's had a significant amount of experience in this area developing upscale houses. We'd be working together with them."

Plaintiff's counsel also argues that the documentation provided reflects that the initial approval from the Village expired September 11, 2009 and counsel for Defendant, in June of 2010, obtained a retroactive extension through September of 2010. Thus, Defendant's affirmation that Defendant sought or obtained an extension in 2009 is inaccurate.

### C. The Parties' Positions

550 Stewart submits that 1) the Complaint fails to state a cause of action for breach of contract because the Agreement is unenforceable pursuant to General Obligations Law ("GOL") § 5-703(2) in light of the fact that it is not in writing or signed by Defendant, the party to be charged; 2) the Complaint fails to state a cause of action for breach of contract because the parties did not agree to all of the material terms; 3) the part performance exception to the writing requirement is inapplicable to the matter at bar because the performance is not unequivocally referable to the purported agreement and, therefore, Plaintiff is not entitled to specific performance; 4) the part performance amounted to, at most, mere preliminary or preparatory steps, which do not constitute part performance entitling Plaintiff to specific performance; 5) the cause of action for unjust enrichment is not viable in light of the fact that a) 550 Stewart had already received site plan approval for the property for the Property in 2008, and a related entity of 550 Stewart received approval to develop a different parcel in the same municipality, and, therefore, Plaintiff did not contribute to that approval; and b) financial and construction experience are not factors that the Village of Garden City considers in determining site plan

approval; and c) 550 Stewart is not in possession of money or property rightly belonging to Beechwood; and 6) the Complaint fails to state a cause of action for promissory estoppel which requires proof of a clear and ambiguous promise to another party, who reasonably relies on the promise and is injured by reason of that reliance.

Plaintiff opposes Defendant's motion submitting, *inter alia*, that 1) Defendant's motion improperly relies on factual assertions and documents introduced through counsel who lacks personal knowledge of the relevant facts; 2) the documentation provided demonstrates that the Village was concerned about the financial experience of the party seeking the approval; 3) the Complaint alleges partial performance of an agreement to sell the Property, specifically that Beechwood devoted significant time and resources to planning for the project; 4) the cause of action for unjust enrichment is viable because it contains unrefuted allegations that Beechwood conferred a benefit on 550 Stewart, by assisting 550 Stewart in obtaining the necessary permits, for which Beechwood was not compensated; and 4) the cause of action for promissory estoppel is valid in light of the fact that 550 Stewart has not adequately challenged Beechwood's allegations that it took actions, to its detriment, in reliance on the agreement that it reached with 550 Stewart.

In reply, Defendant submits that Plaintiff's opposition fails to demonstrate how the Complaint properly pleads the causes of action contained therein. Defendant notes that Plaintiff 1) failed to attach the alleged written agreement; and 2) failed to allege that the alleged written agreement was signed by 550 Stewart, the party to be charged. Accordingly, the breach of contract claim cannot be sustained.

Defendant contends, further, that Plaintiff has failed to allege that any part performance constituted more than mere preparatory steps. In support, Defendant refers to Plaintiff's allegation that it "devoted significant time and resources to planning for the Project and passed up opportunities to participate in other development projects" (Cramer Aff. in Opp. at ¶ 22). Therefore, Plaintiff has failed to state a cause of action under the part performance exception to the writing requirement imposed on contracts for the sale of real property. Defendant argues, further, that Plaintiff has failed to establish the elements of promissory estoppel, in part because Plaintiff has not pled a clear and ambiguous promise or alleged that it suffered an unconscionable injury. Finally, Defendant argues that it is entitled to dismissal of the cause of

action sounding in unjust enrichment because Plaintiff has failed to allege the essential elements of that cause of action, including that 550 Stewart is in possession of money or property belonging to Plaintiff.

### RULING OF THE COURT

#### A. Standards of Dismissal

Pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained, *inter alia*, because of the statute of frauds.

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the Beechwood every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under

mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

The elements of a cause of action based on promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise. *Schwartz v. Miltz*, 77 A.D.3d 723, 724 (2d Dept. 2010), *lv. app. den.*, 16 N.Y.3d 701 (2011), citing *Agress v. Clarkstown Cent. School Dist.*, 69 A.D.3d 769, 771 (2d Dept. 2010), quoting *Williams v. Eason*, 49 A.D.3d 866, 868 (2d Dept. 2008).

### C. Statute of Frauds

GOL § 5-701 requires certain designated agreements, promises or undertakings to be in writing. For a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must be subscribed by the party to be charged therewith and must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Currier v. Prudential Insurance*, 266 A.D.2d 596, 598 (3d Dept. 1999), citing GOL § 5-701(a) and *HPSC, Inc. v. Matthews*, 179 A.D.2d 974, 975 (3d Dept. 1992), quoting *Mentz v. Newwitter*, 122 N.Y.491, 497 (1890), *reh. den.*, 26 N.E. 758 (1891).

### D. Part Performance

The Statute of Frauds prohibits the conveyance of real property without a written contract. *Pinkava v. Yurkiw*, 64 A.D.3d 690, 692 (2d Dept. 2009), citing GOL § 5-703(a). While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance, the claimed partial performance must be unequivocally referable to the agreement. *Id.*, citing GOL § 5-703(4) and quoting *Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group*, 93 N.Y.2d 229, 235 (1999). It is not sufficient that the oral agreement gives significance to the plaintiff's actions. The actions alone must be unintelligible or at least extraordinary, and explainable only with reference to the oral agreement. *Id.*, citing *Anostario v. Vicinanza*, 59 N.Y.2d 662, 664 (1983), quoting *Burns v.*

*McCormick*, 233 N.Y. 230, 232 (1922). The doctrine of part performance is based on principles of equity, in particular, recognition of the fact that the purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield. *Id.*, quoting *Nicolaides v. Nicolaides*, 173 A.D.2d 448, 449-450 (2d Dept. 1991).

D. Application of these Principles to the Instant Action

The Court grants Defendant's motion to dismiss the Complaint. The purported agreement between the parties concerns the conveyance of real property. Plaintiff has not produced a writing sufficient to satisfy the Statute of Frauds, and has failed to demonstrate that its partial performance, if any, was unequivocally referable to the parties' agreement. Accordingly, the causes of action for breach of contract and specific performance are not viable.

The Court also concludes that the cause of action for unjust enrichment must be dismissed in light of Plaintiff's failure to allege that any benefit was conferred on the Defendant. Finally, the cause of action for promissory estoppel must also be dismissed in light of the Court's conclusion that Plaintiff has not satisfactorily alleged a clear and unambiguous promise by Defendant, and the submissions before the Court suggest that this is a situation in which the parties engaged in negotiations regarding the sale of the Property but failed to reach an agreement.

In light of the foregoing, the Complaint is dismissed.

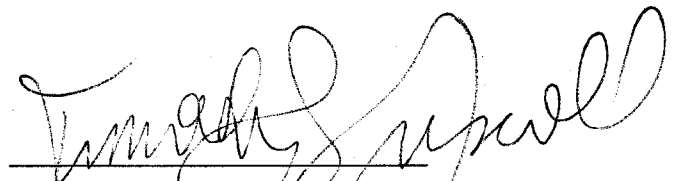
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

May 2, 2011

  
HON. TIMOTHY S. BRISCOLL

J.S.C.

**ENTERED**

MAY 09 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**