SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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LONDON PAINT & WALLPAPER CO., INC. d/b/a LONDON TRUE VALUE HARDWARE and d/b/a LONDON PAINT AND HARDWARE CO., and LEONARD KESSELMAN,

Plaintiffs,

- against -

SIDNEY KESSELMAN and EVELYN KESSELMAN, As Trustees of KESSELMAN LIVING TRUST DATED OCTOBER 6, 1997, SIDNEY KESSELMAN, EVELYN KESSELMAN, and TERRI ZIMMERMAN,

Defendants.

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Index Number: 152878/2015

Motion Sequence No.: 004

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on plaintiffs' motion to amend the complaint and the cross-motion of defendants Sidney Kesselman, individually and as co-trustee of the Kessleman Living Trust, and Terri Zimmerman, for summary judgment dismissing the complaint:

| | Papers Numbered: |
|---|---|
| Notice of Motion – Affirmation – Exhibits | 1 |
| Notice of Cross-Motion – Affirmation – Affidavit – Exhibits | 2 |
| Affirmation in Opposition to Cross-Motion and in Further Support of Motion – Exhibits | 3 |
| Affidavit in Opposition to Cross-Motion and in Further Support of Motion – Exhibits | 4 |
| Affirmation in Further Support of Cross-Motion | 5 |
| Affidavit in Further Support of Cross-Motion – Exhibits | 6 |

Upon the foregoing papers, plaintiffs' motion to amend the complaint is denied and defendants' cross-motion for summary judgment dismissing the complaint is granted.

**Background**

This action arises out of an intra-family dispute over a mixed-use building at 191 Ninth Avenue (the "Building") in the now tony Chelsea neighborhood of Manhattan. The Building is owned by a revocable trust in the name of the parents, defendants Sidney Kesselman and Evelyn Kesselman ("Sidney" and "Evelyn"), both of whom are over the age of 90 and reside in Florida. Plaintiff Leonard Kesselman ("Leonard"), and defendant Terri Zimmerman ("Terri"), are the only son and daughter, respectively, of Sidney and Evelyn. Leonard operates plaintiffs London Paint & Wallpaper Co., Inc. (in its various iterations) ("London Paint"), which is the commercial tenant of the Building. Essentially, Leonard, who for more than thirty years exclusively managed the Building and whose business, London Paint, has had exclusive occupancy of the commercial space therein at well-below market rent, alleges that Terri has, of late, unduly

influenced Sidney and Evelyn to improperly increase London Paint's below-market monthly rent and to achieve more of a future interest in the Building for herself.

This case can be resolved by answering one question: is there a valid, enforceable agreement between the family members as to London Paint's commercial tenancy and Leonard's interest in the Building upon his parents' demise? The answer, as the record reveals, is no.

**The Parties; the Trust; the Alleged "Rental Agreement"; and the Trust, as Amended**

The following facts are undisputed, unless otherwise indicated. Sidney opened London Paint in 1951 and purchased the Building in 1965, from which time London Paint has occupied the Building's first floor commercial space and basement. In the early 1980s, Sidney retired and Sidney and Evelyn moved to Florida. In 1983, Leonard acquired London Paint from Sidney. In 1984, Sidney and Leonard entered into a ten-year lease for London Paint's occupancy of Building, pursuant to which London Paint paid rent of $1,000 per month.

On October 6, 1997, Sidney and Evelyn transferred ownership of the Building to defendant the Kesselman Living Trust (the "Trust"). Although the Court has not been provided with a copy of the Trust, everyone agrees that under the Trust, Sidney and Evelyn were equal co-trustees, and, upon Sidney and Evelyn's death, Leonard and Terri were to have equal 50/50 interests in the Building.

In 1994, upon the expiration of London Paint's aforesaid ten-year lease, the parties did not enter into another formal written lease for London Paint's occupancy of the Building. Instead, on October 13, 1997, Sidney, Evelyn, Terri, and Leonard entered into, and signed, a self-styled "Rental Agreement," which states in pertinent part:

> Should Sidney or Evelyn be in possession of the Building . . . or as an entity owned by the survivor at the time of the survivor's demise, it is agreed that London Paint. . . or any other company or business occupying the store or any other rental space in the Building, will pay the "fair rental value" in exchange for occupying such space. The fair rental value shall be determined by a licensed real estate agent knowledgeable in rentals for that area in Manhattan. If Leonard and Terri cannot agree on a real estate agent, each of Leonard and Terri shall select one and if they cannot agree on the fair rental value, both real estate agents shall select a third licensed real estate agent who shall determine the fair rental value. Also, the Building shall be managed by both Leonard and Terri.

According to Leonard, in addition to the Rental Agreement, the parties orally agreed that prior to the sale of the Building, or Sidney and Evelyn's demise, London Paint's below-market rent would be increased *only if*: Sidney and Evelyn needed more money to maintain their lifestyle, the new rent was "affordable" to London Paint, and the parties unanimously agreed to the increase. Leonard also claims that in reliance on said oral agreement he substantially improved the Building in 1973 and 1989, and committed his time and labor to operate London Paint at the Building. It is undisputed, however, that Leonard was paid $450 per month to manage the Building.

On May 21, 2002, Sidney and Evelyn entered into a "First Amendment of the Sidney and Evelyn Kesselman Living Trust" (the "First Amended Trust"), which amended *only* that part of the Trust as set Leonard and Terri's respective interests in the Building upon Sidney and Evelyn's demise. Among other things, Sidney and Evelyn increased Terri's interest in the Building to 60% and decreased Leonard's interest to 40%, with rights to manage the Building commensurate with said interests. The First Amended Trust also provided, as did the Rental Agreement, that "effective the 1st day of the upcoming month" following Sidney and Evelyn's demise the rent to be charged to London Paint (and all other tenants) "shall be raised to a minimum of fair market value."

Sidney suffered a stroke in 2012. Soon thereafter, Terri began to spend more time with Sidney and Evelyn, and assist them as needed, at their home in Florida.

On November 5, 2014, Sidney and Evelyn amended the entire Trust by way of a "First Restatement of the Kesselman Living Trust" (the "Trust Restatement"), which, inter alia, identified Sidney and Evelyn as Trustees (Article 3), permitted Sidney to act unilaterally on behalf of the Trust (Article 13), and the Trustees to lease Trust property (Article 14). The Trust Restatement also increased, upon Sidney and Evelyn's demise, Terri's interest in the Building to 80% and decreased Leonard's interest to 20%, subject to a "rental agreement" for the commercial space (Article 6, Section 4(a)(1)(A)), which provides, as follows:

> Upon the demise of the Surviving Trustor, the rent being charged for the entire store including the addition, currently operating as LONDON PAINT COMPANY, ... shall be raised to the then fair market rental value as determined by three independent real estate agencies in the general locale.

It is undisputed that Sidney and Evelyn were, and are, entitled to amend or revoke the Trust as they see fit.

It is further undisputed that for the past thirty-two years, London Paint has paid below (and in recent years, well-below) fair market rent, to wit: $1,000 per month from 1984 to 2003 (19 years); $2,000 per month for a portion of 2003; and $3,000 per month from May 2003 to date (13 years). Indeed, Leonard admits to saving $2.3 million dollars in rent over the past three decades. Defendants allege, and plaintiffs do not hotly contest, that fair market rent is presently in the range of $17,500 per month.

In the several months prior to February 2015, Sidney sought to increase London Paint's rent from $3,000 to $11,000 per month, and Leonard may, or may not, have counter-offered to pay $8,000. Either way, no agreement was reached, and on January 21, 2015, Sidney sent Leonard an e-mail advising that the new monthly rent "is not negotiable. Your decision to accept the new rent is your choice at this point, as the issue has been delayed way too long already." Leonard refused to pay $11,000 per month.

On January 29, 2015, Leonard and his wife Helene showed up at Sidney and Evelyn's home, allegedly unannounced, and brought Evelyn to their attorney's office, where she signed an affidavit stating that she did not consent to be removed as Co-Trustee or to increasing London Paint's rent, and that she wanted her children to share equally in her estate. It appears that Evelyn was not provided with a copy of the Trust Restatement to review or confirm her signature

thereupon, and was only provided with "correspondences" between Sidney, Terri and Leonard. On February 25, 2015, in the absence of an agreement for London Paint's new rent, Sidney, on behalf of the Trust, sought to terminate London Paint's month-to-month tenancy by service of a Thirty-Day Notice of Termination. On March 11, 2015, Sidney sent Leonard a letter advising that Terri would be managing the Building effective April 2015. This litigation ensued.

**The Instant Action and Motion for Preliminary Injunction**

On March 24, 2015, Leonard commenced this action to enforce certain alleged "Family Agreements," consisting of the Rental Agreement and oral promises upon which Leonard allegedly relied and which the parties allegedly performed, pursuant to which (a) London Paint allegedly has a "leasehold" interest in the Building until the Building is sold or Sidney and Evelyn pass away, with a rent of no more than $3,000 per month "for the term of [its] tenancy"; and (b) Leonard has a vested 50% interest in the Building upon Sidney and Evelyn's demise. In the main, the complaint alleges that following Sidney's stroke in 2012, Terri exercised undue influence over Sidney and Evelyn to increase London Paint's monthly rent and reduce Leonard's interest in the Building from 50% to 20%, in violation of the Family Agreements. In support of his request to enforce the Family Agreements and prohibit defendants from terminating London Paint's tenancy, the complaint asserts five separate causes of action: specific performance (first); declaratory judgment (second); equitable estoppel (third); injunctive relief (fourth); and breach of contract (fifth).

Simultaneously with the commencement of this action, plaintiffs moved, by proposed Order to Show Cause, preliminarily to enjoin defendants from commencing proceedings to evict London Paint from the Building. On March 25, 2015, this Court signed plaintiff's proposed Order to Show Cause, but declined to grant plaintiffs a temporary restraining order enjoining defendants from commencing eviction proceedings pending determination of the motion. On or about April 15, 2015, the Trust commenced a summary holdover proceeding against London Paint.

By Decision and Order dated July 27, 2015, this Court granted plaintiffs a preliminary injunction, conditioned upon plaintiffs posting of a bond in the sum of $15,000. The Court found that Leonard had plausible claims as to the parties' alleged agreements, and as to Terri's purported undue influence. By Decision and Order dated April 28, 2016, the Appellate Division, First Department modified this Court's July 31, 2015 Decision and Order, to the extent of vacating the $15,000 undertaking as "not rationally related to [defendants'] potential damages" and remanding the matter to set a new undertaking in line with fair market rent for the commercial space. London Paint & Wallpaper Co., Inc. v Kesselman, 138 AD3d 632 (1st Dep't 2016).

**Plaintiffs' Motion and Defendants' Cross-Motion**

Plaintiffs now move to amend the complaint to assert a cause of action for a judgment declaring that the Trust Restatement "is not legally valid and/or enforceable" due to Sidney and Evelyn's alleged lack of "the requisite mental capacity" and Terri's "undue influence." The Trust, Sidney and Terri (collectively, "moving defendants") oppose the motion upon various grounds.

Moving defendants cross-move for summary judgment dismissing the complaint in its entirety as against all defendants upon the grounds that it fails to state a cause of action, is barred by documentary evidence, and is barred by the Statute of Frauds. In support of the cross-motion, moving defendants submit, inter alia, the pleadings, the 2002 First Amended Trust, the 2014 Trust Restatement, and recent appraisals of the rental value of the Building. Moving defendants

also submit Sidney's affidavit, in which he denies that the Rental Agreement is a lease and denies the existence of any oral agreements as claimed by Leonard. Sidney also alleges, inter alia, that the Trust was amended several times over the years, including in 2002; he was of sound mind for each amendment; no promises were made to Leonard about "a specific inheritance amount or percentage" to which he would be entitled; and London Paint paid "artificially low rent" for years based upon Leonard's misrepresentations about current market rents in the area.

In reply, Leonard and Sidney submit further affidavits, denying each other's allegations. Leonard's affidavit consists, in the main, of ad hominem attacks on Sidney and Terri, a restatement of his version of the alleged Family Agreements, and an admission that London Paint saved $2.3 million in rent over the past three decades. Sidney's affidavits contain, inter alia, allegations that Leonard is a liar who has been taking advantage of his family for years and that the Building income is insufficient to cover Sidney and Evelyn's expenses, causing them "severe financial burden."

**Defendants Are Entitled to Summary Judgment Dismissing the Complaint**

Pursuant to CPLR 3212(b), the Court may grant summary judgment "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." This statute empowers the court to "search the record" and award summary judgment to any party, even a non-moving party, on any causes of action or issues that are the subject of the summary judgment motion. Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280, 281 (1st Dep't 2006) ("the court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"); Murray v Murray, 28 AD3d 624, 625 (2nd Dep't 2006) ("Although the defendant did not move for summary judgment, the Supreme Court had the authority pursuant to CPLR 3212(b) to search the record and award summary judgment to a nonmoving party with respect to an issue that was the subject of the motion before the court.").

Upon searching this record, it is clear that there are no questions of fact and plaintiffs' complaint is subject to dismissal in its entirety as against all defendants, for failure to state a cause of action and as barred by the Statute of Frauds, as asserted in moving defendants' first and fourth affirmative defenses, respectively. That the parties have not completed discovery, including party depositions, does not prevent entry of judgment dismissing the complaint. The acrimony and bad-blood between these family members – as made evident in their affidavits – merely muddies the waters but does not create any material issues of fact as to whether the alleged Family Agreements are valid and enforceable. Rather, as explained below, the undisputed proof, viewed through the lens of well-settled authority, establishes that the alleged Family Agreements are neither valid nor enforceable, that London Paint's month-to-month tenancy may be terminated by the Trust, and that Leonard does not have a vested 50% interest in the Building.

At the outset, contrary to plaintiffs' argument, the preliminary injunction issued in favor of plaintiffs does not constitute the law of the case as to the alleged merit of plaintiffs' claims, or to the alleged lack of merit to moving defendants' affirmative defenses. See Walker Mem'l Baptist Church v Saunders, 285 NY 462 (1941) (appellate affirmance of preliminary injunction does not constitute adjudication that "complaint sets forth a good cause of action" but "serves only to hold the matter in statu quo until opportunity is afforded to decide upon the merits"; "granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for"); Ratner v Fountains Clove Rd. Apts. Inc., 118 AD2d 843 (2nd Dep't 1986).

Thus, this Court may, and now does, determine the motion as if no preliminary injunction was granted.

**Specific Performance of the Alleged Family Agreements**

The remedy of specific performance necessarily presupposes the existence of an express agreement because the Court cannot obligate a party to do something that it has not agreed to do. See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109 (1981) (language must be "sufficiently certain and specific so that what was promised can be ascertained"); see generally Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, 482 (1989) ("unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy ... This is particularly significant where specific performance is sought.").

Where material terms are indefinite, or left for future negotiations, the parties have nothing more than an unenforceable "agreement to agree." See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, supra, 52 NY2d at 109-110 ("it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. This is especially true of the amount to be paid for the sale or lease of real property."); see also Procan Const. Co., Inc. v Oceanside Dev. Corp., 148 AD2d 689 (2nd Dep't 1989) ("at best the parties entered into an unenforceable agreement to agree"); Kusky v Berger, 33 Misc 2d 564, 566 (Supreme Court, Nassau County 1962), aff'd, 20 AD2d 851 (1964) ("Few principles are better settled in the law of contract than the proposition that, 'If a material element of a contemplated contract is left for future negotiations, there is no contract enforceable under the statute of frauds or otherwise.'")

However, under the maxim "what can be made certain is certain," a contract with an indefinite term – such as the amount of monthly rent – may still be enforceable if either a methodology for determining the term is set forth "within the four-corners" of the contract, or it invites "recourse to an objective extrinsic event, condition or standard on which the amount was made to depend." Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, supra, 52 NY2d at 110; Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, 483 (1989) (price term in contract to purchase real estate "sufficiently definite" for enforceable contract where it provided price to be fixed by Department of Health); 166 Mamaroneck Ave. Corp. v 151 East Post Road Corp., 78 NY2d 88, 93 (1991) ("The decision of these parties to submit any dispute as to the amount of rent payable during the renewal period to an arbitrator--a third party with considerable discretion, but whose discretion is delineated by law--provides an objective standard that renders the renewal clause definite and enforceable.").

It is equally well-settled that an agreement which disposes of an interest in real property must be in writing in order to be enforceable. General Obligations Law ("GOL") § 5–703 ("An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust ... over or concerning real property cannot be created ... unless ... by a deed or conveyance in writing, subscribed by the person creating ... the same"); Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Grp. PLC, 93 NY2d 229, 235 (1999) ("oral agreement to convey an estate or interest in real property ... is 'nugatory and unenforceable,' and '[a] party to the agreement may legally and rightfully refuse to recognize or perform it'"); see also EPTL § 13-2.1 (agreement to "establish a trust" or "make a testamentary provision of any kind" must be in "writing and subscribed by the party to be charged").

Where, however, it can be shown that the parties' conduct is "unequivocally referable" to an oral agreement relating to an interest in real property, the equitable doctrine of part performance excepts the oral agreement from the strict application of the Statute of Frauds. See Anostario v Vicinanzo, 59 NY2d 662, 664 (1983). "Unequivocally referable" conduct refers to the conduct of the party attempting to avoid the Statute of Frauds and must be shown to be inconsistent with any other explanation. Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Grp. PLC, supra 93 NY2d at 237 ("Because the doctrine of part performance is based upon the equitable principle that it would be a fraud to allow one party, insisting on the Statute, to escape from performance after permitting the other party, acting in reliance, to substantially perform, the acts of part performance must have been those of the party insisting on the contract, not those of the party insisting on the Statute of Frauds."); Anostario v Vicinanzo, supra 59 NY2d at 664 ("It is not sufficient, as Presiding Justice Mahoney noted in the dissent below, that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be "unintelligible or at least extraordinary," explainable only with reference to the oral agreement").

Viewed under these authorities, the record unequivocally demonstrates that, at best, the Rental Agreement, even if a writing within the meaning of GOL § 5-703, is nothing more than an unenforceable agreement to agree. Moreover, the alleged oral agreements pursuant to which Sidney and Evelyn purportedly granted London Paint a leasehold interest in the Building and Leonard a future 50% interest in the Building are barred by the Statute of Frauds and plaintiffs may not invoke the equitable doctrine of part performance.

**The Rental Agreement**

Affording plaintiffs the benefit of every favorable inference that can be drawn from this record, the Rental Agreement is a writing, signed by Sidney and Evelyn, the parties to be charged, *purporting* to lease the commercial space of the Building to London Paint until such time as the Building is sold, or Sidney and Evelyn's demise.[1] The Rental Agreement also contains a monthly rent amount – below-market rent – arrived at through the canon of construction *expressio unius est exclusio alterius*. See generally Hasselback v 2055 Walden Ave., Inc., __ AD3d __ [2016 WL 2602569] (4th Dep't 2016) ("Under the standard canon of contract construction expressio unius est exclusio alterius, that is, that the expression of one thing implies the exclusion of the other"). Because the Rental Agreement makes clear that future rent (at the time the Building is sold or upon the demise of Sidney and Evelyn) is to be set at the "fair rental value," the Court infers that the parties agreed that London Paint's present monthly rent is to be below-market (such conclusion is further supported by the language of the First Amended Trust and Trust Restatement, which both expressly set future rent at fair market)[2]. In this regard, the Rental Agreement would appear to satisfy the Statute of Frauds.

The problem, however, is that the amount of London Paint's monthly rent – below-market rent – is too indefinite, impenetrably vague and uncertain, and the Rental Agreement contains no methodology, formula or objective standard to bind the parties or enable this Court to determine what they agreed upon. See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, supra 52 NY2d

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[1] The Court presumes, for the sake of this argument, and in plaintiffs' favor, that the phrase "or any other company or business" is not so indefinite as to render the Rental Agreement unenforceable.

[2] Alternatively, without applying *expressio unius*, the Rental Agreement lacks a material term, i.e., monthly rent, and, therefore, would be unenforceable.

at 109 ("definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do."). The words, or lack thereof, as to the below-market rent to be charged leave no room for resolution of ambiguity. The range of what could be a below-market rent is just too great: based upon the undisputed appraisals attached to moving defendants' cross-motion, below-market rent for the commercial space could be anywhere from $3,000 (using present rent), at the lowest, to $17,500, at the highest. This is not a situation in which the parties agreed to be bound by a third-party, such as an arbitrator, or a concrete benchmark, such as rates set by a governmental agency. Cf. 166 Mamaroneck Ave. Corp. v 151 East Post Road Corp., supra; Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., supra. Under these circumstances, in determining the appropriate monthly rent, this Court would have to randomly and arbitrarily pick a number between $3,000 and $17,500, thus imposing its own view of the matter upon the parties, making a new contract for them, and then directing its specific performance. There is no authority to support such result, and indeed the settled law is to the contrary. See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, supra 52 N.Y.2d at 109 (where language not clear, "a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves).

The Court rejects Leonard's claim that the Rental Agreement sets London Paint's rent at only $3,000 per month: it simply, and clearly, does not. The Court further rejects Leonard's criteria to determine London Paint's below-market rent, i.e.: rent would be increased *only if* Sidney and Evelyn needed more money to maintain their lifestyle, the new rent was "affordable" to London Paint, and the parties unanimously agreed to the increase. First, such formula is vague and unenforceable: how exactly are the parties, or this Court, to determine how much money Sidney and Evelyn will need and how much London Paint can pay. Second, and somewhat similarly, the formula amounts to nothing more than an unenforceable agreement to agree: the parties agreed to renegotiate, sometime in the future, London Paint's rent. See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, supra; Procan Const. Co., Inc. v Oceanside Dev. Corp., supra; Kusky v Berger, supra. Moreover, the formula is not really an agreement at all: ostensibly, under Leonard's criteria, he could hold his parents financial hostage, refusing to agree to a rent increase (as he is now doing), *even when* (1) Sidney and Evelyn have a need for more money (as Sidney now claims), and (2) London Paint can afford the rent increase (which Leonard has not denied – there is no claim or proof on this record that London Paint cannot afford $11,000 in monthly rent).

Accordingly, as a matter of law, the Rental Agreement, which leaves open for future negotiations the monthly rent, amounts to a mere unenforceable "agreement to agree." See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, supra; Procan Const. Co., Inc. v Oceanside Dev. Corp., supra; Kusky v Berger, supra. Indeed, in the winter of 2015, the parties entered into negotiations to increase London Paint's rent, but could not agree: Sidney demanded $11,000, Leonard may or may not have counter-offered $8,000, and they never agreed. As explained above, this Court does not have the power to, and will not, obligate the parties to do to that which they did not agree to do by randomly fixing the rent at any amount between $3,000 and $17,500. For this reason, the first cause of action, for specific performance, is without merit and subject to dismissal.

**The Alleged Oral Agreements**

The record unequivocally establishes that the alleged oral agreements, pursuant to which London Paint has a purported leasehold interest with a rent of $3,000 per month and Leonard has a

vested 50% interest in the Building upon Sidney and Evelyn's demise, are barred by the Statute of Frauds as "nugatory and unenforceable." GOL § 5–703; Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Grp. PLC, supra; EPTL § 13-2.1.

At the outset, Leonard failed to submit any evidence of a specific oral agreement that London Paint's rent would remain at $3,000 per month at all times until sale of the Building or Sidney and Evelyn's demise. To the contrary, Leonard admits that in the winter of 2015 the parties entered into negotiations to increase London Paint's rent above $3,000.

The record further establishes that Leonard cannot invoke the equitable doctrine of part performance to avoid the Statute of Frauds because *his* conduct is not unequivocally referable to the alleged oral agreements. By force of sheer logic, Leonard's alleged improvements[3] to the Building – made in 1973, *prior* to his even acquiring London Paint, and 1989, during a time when London Paint had a *written lease* – are not unequivocally referable to the alleged oral lease that would have only become effective years later, in 1994 at the earliest. Those improvements are as likely explainable by the preferential, below-market rent London Paint enjoyed from 1984-1994, prior to the alleged oral lease. They are also as likely explainable by the fact that London Paint directly benefitted from any improvements made to the commercial space from which it alone did business. Similarly, the alleged improvements are not "only explainable" with reference to the alleged oral agreement that Leonard has a vested 50% interest in the Building: by his own admission, Leonard saved $2.3 million in rent, an amount 28.75 times the alleged $80,000 Leonard spent to improve the commercial space in 1989. Nor is Leonard's decision to commit to operating London Paint in the Building unequivocally referable to his alleged vested 50% future interest in the Building, and can easily be explained by the below-market rent London Paint enjoyed for more than thirty years. The Court is hard-pressed to conclude that a future interest in the Building is the *only* reason Leonard operated London Paint there – indeed, what Manhattan business owner would not take full advantage of the deal London Paint enjoyed, without need for a promise of a future interest in the Building? Finally, it is undisputed that Leonard was paid $450 per month for his management of the Building.

Thus, as a matter of law, the Statute of Frauds renders the alleged oral agreements unenforceable. Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Grp. PLC, supra; Anostario v Vicinanzo, supra. For this reason, in addition to the one set forth above, the first cause of action, for specific performance, is without merit and subject to dismissal.

**Terri's Alleged Undue Influence**

In the absence of an enforceable agreement as to London Paint's tenancy, there is no evidence that Terri had a motive to unduly influence Sidney and Evelyn to change such agreement, and Leonard cannot meet the burden of proof he has on this issue. See In re Rabbitt, 21 Misc 3d 1118(A) (Surrogates Court, New York County 2008) ("The objectant has the burden of proof on the issue of undue influence. The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence."). Indeed, under the Trust Restatement, Sidney may act unilaterally on behalf of the Trust in matters affecting Trust property, and he did so. The record is devoid of evidence that Sidney lacked capacity when, during rent negotiations in winter 2015, he demanded an increase in London Paint's rent to

[3] The Court notes that Leonard failed to submit any evidence, such as cancelled checks, receipts, invoices, or the like, demonstrating when any improvements were made and their cost.

$11,000 per month, and, upon not reaching an agreement, served the Thirty-Day Notice. Leonard's advanced age, ipso facto, does not render him incapacitated, and, to this Court's knowledge, there is no authority to support such conclusion.

Moreover, on this record, as a whole and as to the precise circumstances surrounding the Trust amendments pursuant to which Terri received a greater future interest in the Building, there is no evidence from which an inference of undue influence reasonably could be drawn. See In re Walther's Will, 6 NY2d 49, 54 (1959) ("lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation"). Sidney and Evelyn were, and are, well within their rights to revoke, partially or completely, any bequests to Leonard in the Trust, and to increase Terri's future interest in the Building, as they have done. People may freely dispose of their property as they see fit and disinherit their children for any or no reason. On this record, there is no evidence (or even an allegation) that Sidney and Evelyn lacked capacity in May of 2002 when they entered into the First Amended Trust, reducing Leonard's future interest in the Building to 40%. Similarly, the record is devoid of evidence substantiating Leonard's claim that Sidney and Evelyn lacked capacity in November of 2014 when they entered into the Trust Restatement, further reducing Leonard's interest to 20%. Rather, the record shows that Sidney and Evelyn knowingly, and of their own free will, amended the Trust in May of 2002 and again in November of 2014. Contrary to Leonard's argument, Sidney's change of mind, in and of itself, does not constitute undue influence by Terri. Equally unavailing is Leonard's reliance on Evelyn's January 29, 2015 affidavit to challenge her capacity in mid-November 2014. The affidavit, notarized outside of New York State, is inadmissable as it lacks a certificate of conformity pursuant to CPLR 2309(c). and the submission of such certificate on reply does not cure the defect. Additionally, the record demonstrates that Evelyn was *not removed* as Co-Trustee of the Trust and that Sidney *is authorized* to act unilaterally on behalf of the Trust to increase London Paint's rent. Indeed, by affidavit dated May 14, 2015, Evelyn disavowed the contents of her January 29, 2015 affidavit.

The Court rejects Leonard's contention that the "drastic" change in his future interest in the Building and Sidney's demand for increased monthly rent is "alarming" and raises the specter of undue influence. The record demonstrates that the changes to Leonard's interest in the Building have been occurring over time, not drastically or all of a sudden. Rather, Leonard's insistence that London Paint should pay only $3,000 per month rent in a market which commands something in the order of $17,500 per month rent, at a time when his elderly parents claim financial distress, and after he enjoyed $2.3 million dollars in rent savings, is unavailing. Accordingly, this Court finds that Leonard's claims of undue influence and incapacity are without merit as a matter of law, which provides an additional ground for dismissal of plaintiffs' specific performance, and other, causes of action.

**Declaratory Judgment**

In view of the foregoing, plaintiffs are not entitled to a judgment declaring that the Family Agreements are valid, enforceable, and binding, or for any of the other relief sought in the second cause of action, for a declaratory judgment.

**Equitable Estoppel**

On this record, there is no evidence of (and indeed Leonard has not even alleged) conduct on the part of Sidney, Evelyn, or Terri which amounts to a false representation or concealment of

material facts, necessary elements to an equitable estoppel claim. See BWA Corp. v Alltrans Exp. U.S.A., Inc., 112 AD2d 850, 853 (1985) ("In order for estoppel to exist, three elements are necessary: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts."). Nor does the record reveal that Leonard made a prejudicial change in his position in reliance on such representations. BWA Corp. v Alltrans Exp. U.S.A., Inc., supra. To the contrary, Leonard reaped a substantial benefit as a result of operating London Paint out of the Building, to the tune of at least $2.3 million in rent saved. Consequently, the third cause of action, for equitable estoppel prohibiting defendants from terminating London Paint's tenancy, is without merit as a matter of law.

**Preliminary and permanent injunction**

In view of the foregoing, plaintiffs cannot establish entitlement to a preliminary or permanent injunction preventing defendants from terminating London Paint's month-to-month tenancy. Accordingly, the preliminary injunction that this Court granted in its July 27, 2015 Decision and Order, is hereby vacated and all stays of the related summary holdover proceeding are hereby lifted, and the fourth cause of action is subject to dismissal.

**Breach of Contract**

As plaintiffs have no enforceable contract, their fifth cause of action, for breach of contract, is without merit as a matter of law.

**Amendment of Complaint**

Plaintiff's motion to amend the complaint is denied as the original complaint has been dismissed, and the causes of action in the proposed amended complaint are the same as those pleaded in the original complaint, except for the new cause of action respecting the Trust Restatement. On the merits, the new allegations relating to the Trust Restatement and Terri's undue influence are conclusory and without merit, for the reasons set forth above.

**Conclusion**

Plaintiff's motion to amend is denied. Defendants' cross-motion to dismiss the complaint is granted. All stays of the pending summary holdover proceeding are hereby vacated and defendants may proceed with such proceeding forthwith. The Clerk is directed to enter judgment dismissing the complaint, in its entirety, as to all defendants.

Dated: June 24, 2016

Arthur F. Engoron, J.S.C.