

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

NORMA GOMEZ,

Plaintiff,

-against-

ELPIDIO FELICIANO, a/k/a ELLIOTT
FELICIANO, JR., SEAHORSE PROPERTIES,
INC. and STELLA FELICIANO,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 19645-08
XXX
MOTION SUBMISSION
DATE: 1-5-11

MOTION SEQUENCE
NO. 7

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion, Affirmation, and Exhibits | X |
| Affirmation in Opposition and Exhibits | X |
| Affirmation in Reply and Exhibits | X |

Defendants move for summary judgment against Plaintiff pursuant to CPLR §§3211 and 3212, arguing that the alleged oral agreement is barred by the Statute of Frauds and the transfers of the properties were gifts. Plaintiff opposes the motion, arguing that there was an oral agreement that is exempt from the Statute of Frauds and that Defendants' payments demonstrate partial performance and thus, acceptance of the agreement.

Defendants' motion is granted.

This is an action for breach of contract, fraud, and breach of confidential relationship, in which Plaintiff purportedly transferred three pieces of property to Defendants (Plaintiff's son, daughter-in-law, and their company) in exchange for

monthly payments of \$3,000 over a twenty (20) year period. No writing was entered into to memorialize this alleged contract, but Plaintiff claims that there was an oral agreement between the parties. Plaintiff commenced this action when Defendants ceased making payments in accordance with the alleged oral agreement. Defendants claim that there was no oral agreement, that the properties were a gift, and that any payments that were made to Plaintiff were made for her well-being and were not related to the transfer of the properties.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center*, 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman, supra*. The primary purpose of a summary judgment motion is issue finding, not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974).

The central issue in the instant matter is whether the alleged oral contract falls outside the purview of the Statute of Frauds. If the Statute of Frauds does apply then there is no enforceable contract.

GOL §5-701 requires every agreement that cannot be performed within one year to be in writing and subscribed by the party to be charged. GOL §5-703 similarly requires that a contract for the sale of real property be in writing and subscribed by the party to be charged. These statutes comprise the Statute of Frauds applicable to the instant matter as the subject of the transaction is real property for which alleged payments were to be made over a period of twenty (20) years.

On or about February 28, 2002, Plaintiff transferred 1038 Faile Street, Bronx, New York to Defendants as evidenced by the copy of the deed annexed to Defendants' motion papers as Exhibit "H". On or about February 12, 2004 Plaintiff transferred 1033 Faile Street, Bronx, New York and 585 Prospect Avenue, Bronx, New York to Defendants as evidenced by the copies of the deeds annexed to Defendants' motion papers as Exhibits "R" and "S". However, no written contract was entered into as to these transfers.

Plaintiff alleges that an oral agreement was entered into between the parties that in exchange for the three (3) properties Defendants agreed to pay Plaintiff \$3,000 a month for twenty (20) years beginning on July 1, 2003. Plaintiff further contends that this agreement was memorialized in writing by an unsigned, undated agreement that was annexed to Plaintiff's Summons and Complaint as Exhibit "B" (and which is annexed to Defendants' motion papers as Exhibit "P"). While it is possible that this writing indicates Plaintiff's view of the parties' intentions, not only does Defendant,

Elpidio Feliciano, deny that Plaintiff ever asked him to sign the agreement, but Plaintiff admits that Elpidio would not sign it in an affidavit and in her deposition. Further, this writing was apparently prepared well after the transfer of the properties as Elpidio's address is listed as being in North Carolina, and he did not move to North Carolina until some time in 2006 (see Exhibit "G" of Plaintiff's motion papers). As such, this writing does not satisfy the requirements of the Statute of Frauds.

Additionally, Plaintiff contends that the agreement dated April 28, 2002 and signed by both parties, which is annexed to Plaintiff's Summons and Complaint as Exhibit "A" and to Defendants' motion papers as Exhibit "N" "contemplates a sale of the properties" to her son. While this writing might satisfy the Statute of Frauds, it is not relevant to the terms of the alleged (oral) agreement between the parties. In fact, in the first sentence of the agreement Plaintiff states that she will "leave" 1033 Faile Street, Bronx, New York and 585 Prospect Avenue, Bronx, New York to her son. There is no mention of consideration for the properties, nor is there any mention of 1038 Faile Street, Bronx, New York. The only payments mentioned are payments to be made to Plaintiff's daughters. However, those payments are related to the timing of Plaintiff's death, not to the transfer of the properties. The last paragraph of this agreement seems to "contemplate a sale" by Plaintiff of the properties to her son as it states that she intends to do so in "the next 24 months". However, there is no consideration or payments to her mentioned. In essence this is nothing more than an agreement to agree, which is unenforceable under the Statute of Frauds. *See, Benedict Realty Co. v. City of New York*, 45 AD3d 713 (2d Dept. 2007).

Plaintiff argues that the alleged oral agreement falls within the partial performance exception of the Statute of Frauds because she fully performed by transferring the three properties, and Defendants partially performed by making monthly payments of \$3,000 for seventy-nine (79) months. However, the doctrine of part performance can only be invoked if the actions of the parties can be characterized as "unequivocally referable" to the agreement alleged. The actions must be explainable only with reference to the oral agreement. *Anostario v. Vicinanza*, 59 NY2d 662 (1983); *Benedict Realty Co. v. City of New York*, 45 AD3d 713 (2d Dept. 2007); *Cooper v. Schube*, 86 AD2d 62 (1st Dept. 1982), *affd*, 57 NY2d 1016; *Klein v. Jamor Purveyors, Inc.*, 108 AD2d 344 (2d Dept. 1985).

Here, there are other possible explanations for the actions of the parties. Plaintiff's action of transferring the properties might be viewed as a gift to Defendants. Defendant, Elpidio Feliciano, testified at his Examination Before Trial that Plaintiff had discussed giving him the properties as a gift (See Exhibit "G" annexed to Defendants' motion papers), and Frank Andrea, Esq., the attorney who handled the transaction, testified at his non-party deposition that the transfers were a gift (See Exhibit "L" annexed to Defendants' motion papers). Further, and more significantly, in a signed, notarized writing dated February 12, 2004, Plaintiff states that "today I gifted two properties 1033 Faile Street, Bronx, New York and 585 Prospect Street, Bronx, New York to my son..." and "...received no consideration..." and "[o]n February 28, 2002 I also gifted 1038 Faile Street, Bronx, New York to my son..for no consideration." (See

Exhibit "M" annexed to Defendants' motion papers). As such, Plaintiff's transfer of the properties is not unequivocally referable to the alleged oral agreement.

Similarly, Defendants' action of making payments to Plaintiff for seventy-nine (79) months has another explanation. Defendant, Elpidio Feliciano, testified at his Examination Before Trial that he gave his mother money to help take care of her and that the payments were not pursuant to an agreement (See Exhibits "G" and "Y" annexed to Defendants' motion papers). Further, in attempting to prove that Defendant, Stella Feliciano, was a party to the alleged oral agreement, Plaintiff annexes to her affirmation in opposition copies of four checks that Stella wrote to Plaintiff each in the amount of \$2,500. (See Exhibit "I" of Plaintiff's affirmation in opposition). Yet there is nothing on the checks to indicate that they were in any way related to the transfer of the properties. As such, Defendants' payments to Plaintiff are not unequivocally referable to the alleged oral agreement.

While Plaintiff is correct in asserting that GOL §5-703(4) permits the Court "...to compel the specific performance of agreements in cases of part performance" even where the Statute of Frauds would normally apply, pursuant to the plain language of the Statute and the relevant case law, this section only applies to an action for specific performance. It cannot be applied in cases seeking monetary damages only. See, *Papell v. Calogero*, 114 AD2d 403 (2nd Dept. 1985), *mod. on other grounds*, 68 NY2d 705 (1986); *Mihalko v. Bloody*, 86 AD2d 723 (3rd Dept. 1982).

The three causes of action asserted by Plaintiff seek monetary damages only. Justice McCarty came to the same conclusion in denying Plaintiff's earlier motion for a preliminary injunction by order dated July 21, 2009 (See Exhibit "Q" of Defendants'

motion papers). As such, Plaintiff cannot now raise the partial performance exception to the Statute of Frauds.

Defendants have met their initial burden of making a prima facie showing that they are entitled to summary judgment on the breach of contract claim because the alleged contract is barred by the Statute of Frauds. Plaintiff has failed to produce evidence to establish that the transaction should be subject to an exception of the Statute of Frauds. As the alleged contract is barred by the Statute of Frauds there are no triable issues of fact and Defendants are thus entitled to summary judgment.

Benedict Realty Co. v. City of New York, supra.

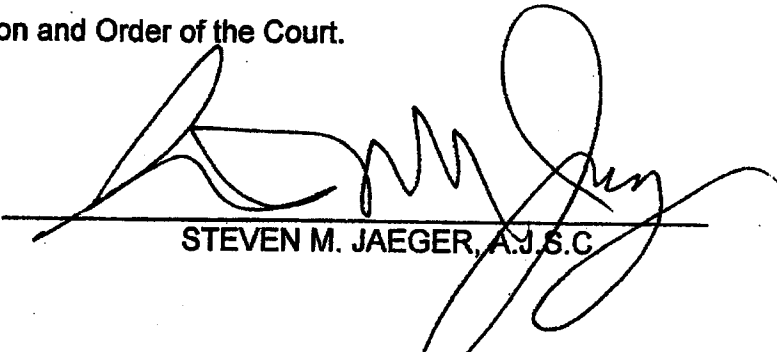
The remaining causes of action sound in fraud and "breach of confidential relationship". Defendants have made a prima facie showing of entitlement to summary judgment as a matter of law. In opposition, the Plaintiff failed to raise any triable issues of fact. A cause of action alleging fraud or breach of confidential relationship does not lie where, as herein, the only fraud or breach of confidential relationship claim relates to an alleged breach of the agreement. *Benedict Realty Co., supra* at 714 and cases cited therein. A "mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud". *WTT Holding Corp. v. Klein*, 282 AD2d 527 (2d Dept. 2001). Plaintiff may not recast her breach of contract claim as a fraud or "breach of confidential relationship" since the alleged fraud or breach in those causes of action relate only to breach of the alleged oral contract. Further Plaintiff seeks monetary damages only and has not sought a constructive trust or other equitable relief. Her third cause of action does not state a viable cause of action distinct from her cause of action

for fraud, which alleges as an element a "breach of confidential relationship". See, *DeVecchio v. Nassau County*, 118 AD2d 615 (2d Dept. 1986).

Accordingly, Defendants' motion is granted and the Complaint is hereby dismissed.

This constitutes the Decision and Order of the Court.

Dated: March 11, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED

MAR 16 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**