

<b>Hasson v S. B. J. Assoc., LLC</b>
2012 NY Slip Op 32344(U)
May 1, 2012
Supreme Court, Suffolk County
Docket Number: 21860-2009
Judge: Emily Pines
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**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**COPY**

**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 11-10-11; 01-12-12  
Motion Submit Date: 02-14-2012  
Motion Sequence Nos.: 009 MOTD  
010 MG

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**HENRY HASSON, MARVIN RICHMAN, JOHN  
DEGREGORIO and GREENS AT HALF HOLLOW  
HOME OWNERS ASSOCIATION, INC.,**

**Plaintiffs,**

**-against-**

**S. B. J. ASSOCIATES, LLC., GREENS AT HALF  
HOLLOW, LLC, STEVEN KAPLAN, ADRIATIC  
DEVELOPMENT CORP., RUSSELL MOHR, JOSEPH  
LAFFERTY, JAMES KAPLAN, GREENS GOLF CLUB,  
LLC and THE TOWN OF HUNTINGTON,**

**Defendants.**

\_\_\_\_\_ X

**ORDERED** that the motion (Mot. Seq. # 009) by defendants S.B.J. Associates, LLC, Greens at Half Hollow, LLC, Steven Kaplan, Adriatic Development Corp., Russell Mohr, Joseph Lafferty, James Kaplan and Greens Golf Club, LLC, pursuant to CPLR 3211 to dismiss the Fourth Amended Complaint as asserted against them is granted in part and denied in part, as set forth herein; and it is further

**ORDERED** that the cross-motion (Mot. Seq. # 010) by defendant Town of Huntington for summary judgment on its cross-claim is granted.

*RA*

In this action, Plaintiffs Greens at Half Hollow Home Owners Association, Inc. and members of its Board of Directors, Henry Hasson, Marvin Richman and John DeGregorio (collectively “HOA”), sue the developer/sponsor of a condominium development known as The Greens at Half Hollow (“The Greens”), several related entities and former sponsor-appointed HOA Board members (collectively “Greens Defendants”) and the Town of Huntington (“Town”) as a necessary party for, among other things, breach of contract, breach of fiduciary duty, unjust enrichment, imposition of a constructive trust, and violation of Town Law § 268. The gravamen of this action is the HOA’s claim that the Greens Defendants failed to transfer title to a parcel of land (the “Shed Parcel”) located within the condominium development to the HOA upon completion of the development. Currently before this Court are two motions. In the first, the Greens Defendants move, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the HOA’s Verified Fourth Amended Complaint as asserted against them. In the second, the Town cross-moves for summary judgment on its cross-claim against the Greens Defendants alleging that the Greens Defendants violated the Huntington Town Code and approved subdivision site plans by constructing a building on the Shed Parcel which was designated as open space and by retaining ownership of the Shed Parcel.

### ***PLEADINGS***

The Verified Fourth Amended Complaint served by the HOA sets forth “Operative Facts” as follows. On October 21, 1999, defendant S.B.J. Associates LLC (“SBJ”) purchased a 382 acre tract of land in Melville, New York from the New York State Urban Development Corporation. At that time the property was zoned R-80, which permitted single-family residences on two-acre lots. On September 12, 2000, the Town adopted the Greens at Half Hollow Master Plan and amended Chapter 198 of the Town Code by adding § 198-21.2, entitled “R-PUD The Greens at Half Hollow Planned Unit Development District.” Section 198-21.2(A) of the Town Code provides:

Purpose and intent. The purpose and intent of the Greens at Half Hollow Planned Unit Development District (R-PUD) . . . is primarily to address the housing and recreational needs of senior citizens, and to facilitate the design and development of a planned community consisting of a variety of housing types, accessory uses and open space. These R-PUD regulations are intended to establish development parameters within which individual site plans and/or subdivisions will be developed in a

manner consistent with the planning objectives described in the Greens at Half Hollow Master Plan, and the Greens at Half Hollow Master Plan Map (collectively the “Greens at Half Hollow Master Plan”), both adopted by the Town Board simultaneously with this section.

Section 198-21.2(C) provides, in relevant part as follows:

- (3) The R-PUD shall contain active recreational areas, passive recreational areas and open space as follows:
  - (a) Golf course: eighty (80) acres.
  - (b) Community open space: thirty (30) acres.
- (4) The Community open space shall be designated in the Greens at Half Hollow Master Plan.

\* \* \*

- (5) A homeowners’ association created pursuant to the laws of the State of New York shall own and maintain all common areas within the R-PUD, including roads, drainage structures and community open space, pursuant to such reasonable conditions as the Town Board may require.

\* \* \*

Section 198-21.2(K)(1) provides as follows:

The R-PUD, including the roads and open spaces to be incorporated therein, shall be developed as closely as possible with the layout and design concepts contained in the Greens at Half Hollow Master Plan. Final design shall be determined by the Planning Board, considering drainage, road contours and geometry and topography, during site plan review and approval.

Section 198-21.2(L)(1) provides, in relevant part, as follows:

Site plans for the development of the uses depicted on the Greens at Half Hollow Master Plan shall be submitted to the Planning Board for review and approval before an application for a building permit is made.

Plaintiffs also allege that Schedule G-2 to the separate Offering Plans for Condos I-IV filed by SBJ, depicts a parcel within the property (“Shed Parcel”) as a common area, and that all purchase agreements for units within Condos I-IV expressly incorporated the Condo I Offering Plan.

By deed dated May 28, 2002, SBJ sold the Property to Greens at Half Hollow, LLC (“GHH”).

In accordance with conditions in a Planning Board resolution of approval dated September 25, 2002, SBJ and GHH filed a revised Open Space Plan dated November 27, 2002, depicting 33.63 acres as Community Open Space Areas within the Greens, including the Shed Parcel. On April 9, 2003, as part of the site plan approval, the Town approved the revised Open Space Plan dated November 27, 2002, depicting 33.63 acres of Community Open Space.

On December 17, 2002, GHH filed a Declaration of Condominium with respect to Condo I. Plaintiffs allege that this had the effect of subdividing Lot 74, in avoidance of the requirements of Real Property Law § 335, such that the portion declared became Condo I and GHH continued to own the remainder of Lot 74. GHH subsequently filed declarations for Condos II-V which effectively caused further subdivision of Lot 74 by carving out from Lot 74 that portion of each condominium.

By deed dated March 8, 2004, a portion of Lot 74, approximately 84 acres, was conveyed by GHH to Greens Golf Club, LLC (“Golf Club”), subsequently developed as a golf course and clubhouse run as a private for-profit business by the Golf Club.

According to Plaintiffs, those portions of Lot 74 that were not declared condominiums pursuant to the declarations for Condos I-IV or transferred by GHH to the Golf Club remain in the ownership of GHH, including the Shed Parcel.

Plaintiffs allege that in 2005 the Town and residents of The Greens questioned the legality of a storage shed and parking lot located on the Shed Parcel that had not been depicted on any maps or approvals. Plaintiffs claim that the 2.21 acre Shed Parcel was part of the balance of Lot 74 after the filing of the Condo V declaration, title to which was retained by GHH.

In February 2006, GHH submitted an application to the Town to amend the site plan for the Greens for approval of the 7,500 square foot storage building/shed that had been built on the Shed Parcel. In May 2006, GHH submitted a proposed amended site plan and a proposed amended open space plan. GHH took the position that the shed “is used to store equipment for the maintenance of the common areas of The Greens.” Plaintiffs allege that this representation was false as the shed is used

solely for the benefit of the Golf Club. The Town did not approve the proposed amended site plan or the proposed amended open space and, by letter dated June 13, 2006, the Town advised GHH that the amended site plan application was incomplete.

On July 23, 2008, in order to resolve all claims asserted in several litigations involving The Greens, GHH and the Town entered into a Settlement Agreement. Paragraph 4 of the Settlement Agreement provides as follows:

Planning Board will approve the GHH Amended Site Plan within sixty (60) days of the completion of all of the work identified in paragraphs 1 and 2. Such Amended Site Plan shall reflect all “as built” conditions. The Department of Engineering Services shall promptly issue all building permits and certificates of occupancy for all structures depicted on the Amended Site Plan once all required inspections and approvals are complete. The aforementioned certificates of occupancy will include those for the 100 affordable units, as well as the maintenance garage and any other structure depicted on the approved Amended Site Plan requiring such certificates.

Plaintiffs allege that the Town has not issued a certificate of occupancy for the shed as GHH failed to comply with its obligations under the Settlement Agreement.

On July 25, 2008, GHH sold the last buildings in The Greens to its affiliate, Adriatic Development Corp., but did not submit a deed for recording at that time. On October 16, 2008, Adriatic filed an Offering Plan for Condo V. On December 9, 2008, Adriatic filed a declaration for Condo V with the Suffolk County Clerk, which had the effect of breaking up the balance of Lot 74 into three parcels. On December 10, 2008, the deed from GHH to Adriatic dated July 25, 2008 was recorded. Plaintiffs allege that the end result was that GHH conveyed the last residential portion of Lot 74 to Adriatic and retained title to the Shed Parcel and other land, in contravention of the Town Code and all prior approved plans for The Greens. Plaintiffs claim that as a result the residents of The Greens have less common area and community open space to enjoy than was promised in the various offering plans and incorporated in the purchase agreements. Additionally, Plaintiffs allege that the shed, trailers and parking lot which are located on the Shed Parcel adjacent to one of two entrances/exits to The Greens are an eyesore to the entire Greens community.

The Verified Fourth Amended Complaint sets forth four causes of action. The first cause of action is asserted against SBJ and GHH and alleges that the retention by GHH of the Shed Parcel

constituted a breach of each an every purchase agreement for Condos I-IV which, by referring to the zoning of The Greens and the offering plans for Condos I-IV, represented that the Shed Parcel would be part of the common areas of The Greens. Plaintiffs seek specific performance in the form of transfer of the Shed Parcel to the HOA as well as compensatory damages for the loss of use and enjoyment of the Shed Parcel, the aesthetic value of the Shed Parcel, and the cost to the HOA of acquiring or leasing land or office space for use as permanent HOA offices. The second cause of action is asserted against the individual defendants and seeks monetary damages for breach of fiduciary to the HOA by causing, permitting and/or failing to oppose the retention of the Shed Parcel by GHH. The third cause of action asserted against GHH and The Golf Club alleges that said entities have been unjustly enriched by GHH's retention of the Shed Parcel. The fourth cause of action seeks the imposition of a constructive trust of GHH's record-ownership of the Shed Parcel for the benefit of the HOA. The fifth cause of action asserted pursuant to Town Law § 268 alleges that GHH's retention of the Shed Parcel and the provision of less than 33.68 acres of open space constitutes a violation of Town Code § 198-21.2(A), (C)(4) and (5).

### ***CROSS-CLAIM BY TOWN OF HUNTINGTON***

The Town has asserted a cross-claim against the Greens Defendants alleging that the continuing occupancy and use of the building and trailers of the Shed Parcel violates Town Code § 198-21.2 and all approved subdivision site plans regarding construction of buildings on areas designated as open space. The Town asserts that GHH's continued ownership of the Shed Parcel also violated Town Code § 198-21.2 because the Shed Parcel was approved as open space and commons area which, under the Town Code, are required to be owned by the HOA. The Town also claims that GHH has breached the terms of the Settlement Agreement and has failed to make any submissions to the Town in an attempt to legalize the building on the Shed Parcel or have a reduction in the amount of open space approved. The Town seeks an order directing the removal of the trailers and all other structures and parking areas from the Shed Parcel and directing GHH to restore the land to open space and transfer title to the HOA.

### ***GREEN DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT***

In the papers submitted in support of their motion, the Greens Defendants admit that GHH retained title to the Shed Parcel for its own use and constructed the maintenance building in 2004 "to facilitate the care and maintenance of the Greens first-class 80-acre golf course". GHH states that "it believed it prudent to retain control of these particular properties in order to insure quality control over these valuable amenities." According to the Greens Defendants, at the end of the development process, "the Sponsor necessarily retained ownership of the balance of the land not deeded out" including the golf course, community building and Shed Parcel. Greens Defendants contend that Plaintiffs' contention that



the Shed Parcel should have been a common area is contradicted not only by the terms of the Greens offering plans, but also by the Greens Condominium Maps dated September 13, 2011, delineating the borders of the Greens. Additionally, Greens Defendants contend that Schedule G-2 to the Offering Plans, relied on by Plaintiffs as depicting the Shed Parcel as a common area, does not in any way depict or suggest such a conclusion. Greens Defendants argue, among other things, that the Fourth Amended Complaint must be dismissed because (1) the maintenance building was not disclosed in the offering plans and there is no private right of action for disclosure omissions, (2) the second cause of action against the individual defendants is barred by the three-year statute of limitations, and (3) documentary evidence establishes the Plaintiffs' zoning-based claims are without merit because Plaintiffs never commenced a proceeding pursuant to CPLR Article 78 challenging the Town's 2006 acceptance of GHH's calculations confirming full compliance with zoning requirements regarding open space. Greens Defendants also argue that "plaintiffs' five (5) claims fail to state a cause of action, and are otherwise barred by the Statute of Frauds, documentary evidence, and under well settled case law . . ."

In opposition to the Greens Defendants' motion to dismiss, Plaintiffs contend, among other things, that Schedule G-2 to the offering plans for Condos I-IV depicts the Shed Parcel as common area, despite the Greens Defendants reference to Schedule G-2 as a "schematic map." Plaintiffs point out that Schedule G-2 to the offering plan for Condo V is different from the other offering plans in that it depicts the Shed Parcel as outside the boundaries of Condo V and depicts the building thereon. Plaintiffs state that their cause of action for breach of contract is for breach of the purchase agreements for Condos I-IV based upon the incorporation of the offering plans, including Schedule G-2, into the purchase agreements. Plaintiffs contend that the Greens Defendants have failed to address Schedule G-2 to the offering plans, and the representations therein, as the basis for Plaintiffs' breach of contract cause of action. Moreover, the Plaintiffs contend that the Greens Defendants misrepresent that the Town approved their Open Space Plan revised May 15, 2006. Plaintiffs rely on the Town's position, as expressed in its cross-motion for summary judgment, that the Open Space Plan revised May 15, 2006, was never approved by the Town.

With regard to their first cause of action for breach of contract, Plaintiffs argue that a cause of action has been stated as the purchase agreements constitute the writing and that they incorporate the offering plans which include Schedule G-2 and also incorporate the Town zoning requirements. With regard to the second cause of action for breach of fiduciary duty, Plaintiffs argue that Defendant misinterprets this claim which seeks to hold the individual defendants liable for actions they took as individual sponsor-appointed HOA Board Members, not as members of any corporation or limited liability company. Plaintiffs further assert that they have sufficiently alleged that the Individual Defendants acted to further the interest of the Golf Club and other sponsor-entities, of which they were members, to the detriment of the HOA, by causing GHH to retain title to the Shed Parcel rather than



transferring it to the HOA. Plaintiffs contend that the cause of action for breach of fiduciary duty is not barred by the three-year statute of limitations because the claim did not accrue until December 2008, when Adriatic filed the declaration for Condo V which carved out the Shed Parcel from the boundaries of Condo V.

Plaintiffs further contend that they have properly alleged a cause of action for unjust enrichment against GHH and the Golf Club based upon the improper retention and use of the Shed Parcel. They claim that if they are successful in proving unjust enrichment, an element of a constructive trust cause of action, then they are entitled to the imposition of a constructive trust.

With regard to the fifth cause of action for violation of Town Law § 268, Plaintiffs state that it was asserted in the alternative and is essentially academic in light of the Town's cross-claim against the Greens Defendants.

### ***TOWN'S CROSS-MOTION FOR SUMMARY JUDGMENT ON CROSS-CLAIM***

In support of its cross-motion for summary judgment on its cross-claim against the Greens Defendants, the Town argues that the evidence demonstrates, as a matter of law, that the Greens Defendants' erection and continued use of the maintenance building on the Shed Parcel violates the Open Space Plan approved by the Town in 2003. The Town submits an affidavit from Charles Mangano, an Environmental Planner employed in the Town's Planning & Environmental Department. Mr. Mangano states, among other things, that the area where the building on the Shed Parcel is located was specifically proposed by the developer/sponsor and approved by the Town as open space, as depicted on the approved Open Space Plan. Although a proposed Amended Site Plan including the maintenance building and a proposed Amended Open Space plan were submitted by the developer to the Town in 2006, neither was approved because they deviated from the approved Open Space Plan to the extent that depicted the maintenance building and an adjacent parking area in an area previously approved as "Open Space." The Town provides copies of the approved Open Space Plan and proposed Amended Open Space Plan. The Town contends that these documents demonstrate that the developer/sponsor altered the approved Site Plan, which includes the approved Open Space Plan, without authorization. Accordingly, the Town argues that the Shed Parcel must be transferred to the HOA as Town Code § 198-21.2(C)(5) mandates that the HOA shall own and maintain all common areas, including open space.

In opposition to the Town's cross-motion, the Greens Defendants submit an affirmation of counsel and an affidavit of Steve Kaplan, a member of GHH and the Golf Club, agreeing with the recitation of facts set forth in the affirmation by counsel. The Greens Defendants contend, among other

things, that the Town's cross-claim constitutes a breach of the Settlement Agreement entered into in 2008, wherein the Town agreed to issue a certificate of occupancy for the maintenance building on the Shed Parcel. The Greens Defendant also contend that the documentary evidence demonstrates that the maintenance building was never located on open space. The Greens Defendants argue that upon completion the Greens development includes 30 acres of open space in compliance with § 198-21.2 of the Town Code and, therefore, their retention of the Shed Parcel and construction of the maintenance building thereon, does not violate Town Code. Essentially, The Greens Defendants contend that they could alter the approved Open Space Plan as they saw fit, as long as there existed at least 30 acres of open space upon completion of the development.

In reply, the Town argues, among other things, that the 2008 Settlement Agreement did not obligate it to issue a certificate of occupancy for the maintenance building until after an Amended Site Plan, including an Amended Open Space Plan reflecting the reduction in open space from the approved Open Space Plan, had been approved. The Town asserts that an Amended Site Plan has not been approved because the remediation work required under the 2008 Settlement Agreement was not been completed in accordance with the terms of the 2008 Settlement Agreement.

## ***DISCUSSION***

### ***Town's Cross-Motion for Summary Judgment***

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2<sup>nd</sup> Dept. 1996]). “[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

Here, the Town has made a prima facie showing of entitlement to summary judgment on its cross-claim against the Greens Defendants alleging that the continuing occupancy and use of the building and trailers of the Shed Parcel violates Town Code § 198-21.2 and all approved subdivision site plans regarding construction of buildings on areas designated as open space. Town Code § 198-21.2(K)(1)

requires that final design of The Greens “shall be determined by the Planning Board . . . during site plan review and approval.” Town Code § 198-21.2(L)(1) mandates that site plans for The Greens “shall be submitted to the Planning Board for review and approval before an application for a building permit is made.” Town Code § 198-21.2(C)(5) states that the HOA “shall own and maintain all common areas within [The Greens], including . . . community open space.” Town Code § 198-122(B) states that “[i]t shall be unlawful for any person or business entity to deviate in any manner from a site plan filed with and/or approved by the Department of Engineering Services, Department of Planning and Environment, Town Board, Planning Board or Zoning Board of Appeals.” The Open Space Plan dated November 27, 2002, as part of the Amended Site Plan, clearly designates the Shed Parcel as Community Open Space. The Open Space Plan dated November 27, 2002, was approved by the Planning Board in April 2003. The Town has never approved an amended Open Space Plan. It is undisputed that GHH subsequently constructed a maintenance building on the Shed Parcel and that GHH has retained title to the Shed Parcel. The Town has established that by doing so, the Greens Defendants have violated § 198-122(B) of the Town Code by deviating from the approved Open Space Plan which delineates the Shed Parcel as Community Open Space and by failing to convey title to the Shed Parcel to the HOA as community open space in accordance with Town Code § 198-21.2(C)(5).

In opposition to the Town’s cross-motion, the Greens Defendants have failed to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. The 2008 Settlement Agreement obligated the Town to issue a certificate of occupancy for the maintenance building only if the Greens Defendants complied with certain enumerated requirements. The Greens Defendants have failed to submit any evidence demonstrating that they complied with their obligations under the 2008 Settlement Agreement. Indeed, they do not even so allege anywhere in their papers in opposition to the Town’s summary Judgment motion. Thus, upon the required shifting of the burden, they have failed to demonstrate the existence of a triable issue of fact as to whether the Town violated the 2008 Settlement Agreement. Moreover, the contention that the maintenance building on the Shed Parcel was never located on open space is belied by the Open Space Plan dated November 27, 2002. The Greens Defendants do not dispute that a revised or amended Open Space Plan was never approved by the Town. The remainder of the Greens Defendants’ opposition consists of unsupported and conclusory rhetoric. Accordingly, the Town’s cross-motion for summary judgment is granted for the relief demanded in the Town’s cross-claim.

#### ***Greens Defendants’ Motion to Dismiss Plaintiffs’ Complaint***

In light of the foregoing and Plaintiffs’ concession that their fifth cause of action is academic in light of the Town’s cross-claim, that branch of the Greens Defendants’ motion seeking dismissal of Plaintiffs’ fifth cause of action is granted.

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff’s allegations against it and conclusively establishes a defense as a matter of law” (*Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]).

Here, contrary to the Greens Defendants’ contention, the terms of the Greens offering plans, Schedule G-2 to the offering plans, and the condominium maps filed do not utterly refute the Plaintiffs’ claim that the Shed Parcel was designated and approved by the Town to be Community Open Space. To the contrary, the Open Space Plan dated November 27, 2002, clearly designates the Shed Parcel as Community Open Space. Moreover, the fact that GHH remains the title owner of the Shed Parcel by carving it out of the condominium boundaries does not serve to defeat Plaintiffs’ claim. Rather, that GHH remains title owner and failed to convey title to the HOA is exactly what the HOA is trying to rectify through this action. The Greens Defendants have not demonstrated that documentary evidence in the form of the offering plans disclosed that the Shed Parcel would be retained by the Sponsor as part of the privately owned Golf Club. The Greens Defendants’ reliance on *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236 [2009]) is misplaced as Plaintiffs’ do not assert a claim based on disclosure omissions from the offering plans. Rather, Plaintiffs’ breach of contract claim is premised upon the purchase agreements which incorporate by reference the offering plans which allegedly represent that the Shed Parcel would be open space owned by the HOA as required by the Town Code. The Court finds such allegations to be sufficient to state a cause of action for breach of contract. Greens Defendants have not presented any specific authority to support their argument that the Statute of Frauds precludes Plaintiffs’ claim under such circumstances. Accordingly, that branch of the motion by the Greens Defendants seeking dismissal of Plaintiffs’ first cause of action is denied.

“To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Kennedy v. Fischer*, 78 AD3d 1016, 1017 [2d Dept. 2010]). Here, the Greens Defendants have failed to meet their burden of establishing that the Plaintiffs’ second cause of action against the Individual Defendants for breach of fiduciary duty cause of action accrued in 2004 and is therefore barred by the applicable statute of limitations. Plaintiffs’ Fourth Amended Complaint alleges that the declaration of Condo V was filed in 2008 and that the Shed Parcel was improperly retained thereafter.

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

[t]he complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must

also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

The Greens Defendants' argument that the Individual Defendants are shielded from personal liability for any alleged breach of fiduciary duty because they undertook such actions as members of corporate and limited liability entities (i.e. GHH, Adriatic and/or the Golf Club) is without merit as Plaintiffs misconstrue the second cause of action as set forth in the Fourth Amended Complaint. Plaintiffs allege that the Individual Defendants acted improperly in their capacities as sponsor-appointed members of the HOA Board of Directors, not as members of corporate or limited liability entities. Accordingly, New York Limited Liability Company Law § 609(a) is inapplicable. Moreover, the Court finds that Plaintiffs' allegations that the Individual Defendants had, and continue to have, an economic interest in SBJ, GHH, Adriatic and/or the Golf Club and that they failed in their capacities as sponsor-appointed board members to act in the best interests of the HOA by causing, permitting and/or failing to oppose GHH's retention of the Shed Parcel, are sufficient to state a cause of action for breach of fiduciary duty. The Greens Defendants have failed to demonstrate the applicability of the business judgment rule in this pre-answer motion to dismiss pursuant to CPLR 3211. Accordingly, that branch of the motion by the Greens Defendants seeking dismissal of Plaintiffs' second cause of action is denied.

To state a claim based on unjust enrichment, an equitable doctrine, "[a] plaintiff must show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit ... defendant to retain what is sought to be recovered" (*Lake Minnewaska Mtn. Houses v. Rekis*, 259 AD2d 797, 798 [3<sup>rd</sup> Dept 1999])[citation and internal quotation marks omitted]. A party is not precluded from proceeding on both breach of contract and quasi-contract theories where, as here, there is a bona fide dispute as to the existence of a contract (*see AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 AD3d 6, 20 [2d Dept. 2008]). The purpose of a constructive trust is to prevent unjust enrichment (*A.G. Homes, LLC v. Gerstein*, 52 AD3d 546 [2d Dept. 2008]). "Generally, there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Id.* at 547). "However, these requirements are not rigidly applied" (*Id.*). Here, the third cause of action sufficiently states a cause of

action for unjust enrichment as Plaintiffs allege that GHH and the Golf Club have been enriched by their retention and use of the Shed Parcel, which they claim should have been transferred to the HOA as a common area/open space upon completion of the development. Even in the absence of a confidential or fiduciary relationship between the Plaintiffs and GHH, the Court finds that the allegations in Fourth Amended Complaint are sufficient to state a cause of action for the imposition of a constructive trust. Accordingly, those branches of the Greens Defendants' motion to dismiss the third and fourth causes of action are denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Settle judgment on notice.

**Dated: May 1, 2012**  
**Riverhead, New York**

  
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EMILY PINES  
J. S. C.

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