SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler *Justice* **PART:** 17

KATHY HSIU,

Plaintiff,

- against -

ESTATE OF KENNETH CHI and EVA CHE-CHING CHI, as Administratrix of the ESTATE OF KENNETH CHI,

Defendants.

INDEX NO.: 158784/2012

MOTION SEQ. NO.: 001

DECISION and ORDER

Motion by defendants to dismiss the first through fourth causes of action pursuant to CPLR § 3211(a)(5) & (7) and Cross-Motion by plaintiff deeming the proposed amended complaint served.

	Papers Numbered
Defendants' Notice of Motion to Dismiss, Pursuant to CPLR § 3211(a)(5) & (7)	1
Affirmation of Defendants' Counsel John M. Crane, Esq., in Support of Defendants' Motion to Dismiss with Exhibit "A" Attached	2
Affidavit of Defendant Eva Che-Ching Chi in Support of Defendants' Motion to Dismiss	3
Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss	4
Plaintiff's Notice of Cross-Motion Deeming Proposed Amended Complaint Served	5
Affirmation of Plaintiff's Counsel Amy Y. Chen, Esq., in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Cross-Motion with Exhibits "A" through "F"	6
Affidavit of Plaintiff Kaity Hsiu in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Cross-Motion	7
Affirmation of Defendants' Counsel John M. Crane, Esq., in Reply to Plaintiff's Opposition to Defendants' Motion	8
Supplemental Affidavit of Defendant Eva Che-Ching Chi in Further Support of Defendants' Motion to Dismiss and in Response to Plaintiff's Cross-Motion with Exhibit "A"	9
Transcript of Oral Argument of May 6, 2013	10
Letter from Defendants' Counsel, John M. Crane, Esq., dated May 28, 2013, Submitting Additional Case Law Requested by the Court at the May 6, 2013 Hearing	11
Letter from Plaintiff's Counsel, Amy Y. Chen, Esq., dated June 17, 2013, Submitting Additional Case Law Requested by the Court at the May 6, 2013 Hearing	12

Cross-Motion: ☐ No ☑ Yes **Number of Cross-Motions:** 1

Upon the foregoing papers, it is hereby ordered that this Motion and the Cross-Motion are both granted to the extent set forth in the attached separate written Decision and Order.

Dated: December 5, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	☐ **Final Disposition**		☑ **Non-Final Disposition**		
Motion is:	☐ Granted	☐ Denied	☑ Granted in Part	☐ Other	
Cross -Motion is:	☐ Granted	☐ Denied	☑ Granted in Part	☐ Other	
Check if Appropriate:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
	☐ DO NOT POST		☐ REFERENCE		

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

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KAITY HSIU,

Plaintiff,

-against-

ESTATE OF KENNETH CHI and EVA CHE-CHING CHI, as Administratrix of the ESTATE OF KENNETH CHI,

Defendants.

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Index No. 158784/2012

DECISION and ORDER

Hon. Shlomo S. Hagler, J.S.C.:

Defendants Estate of Kenneth Chi and Eva Che-Ching Chi, as administratrix of the Estate of Kenneth Chi, ("defendants" or "Estate") move for an order, pursuant to CPLR § 3211(a)(5) & (7), dismissing with prejudice the first through fourth causes of action alleging promissory estoppel, breach of contract, and unjust enrichment claims. Plaintiff Kaity Hsiu ("plaintiff" or "Hsiu") opposes the motion and cross-moves for an order, pursuant to CPLR § 3025(a), deeming the amended complaint as served.

As a threshold matter, the cross-motion to deem the amended complaint served as of right is granted without opposition. There is no dispute that Hsiu's statutory time within which to serve an amended complaint had not yet expired at the time that the cross-motion was made (*see* CPLR § 3025[a]). Therefore, the amended complaint is deemed served. Inasmuch as both parties have treated the instant motion as a motion to dismiss the amended complaint, the instant motion will be decided with reference to the amended complaint.

BACKGROUND

In the amended complaint, Hsiu alleges that she and Kenneth Chi ("Chi"), now deceased, purchased a condominium located at apartment 1D, 342 West 85th Street in Manhattan ("the property"), as tenants-in-common, in January 2001, during their marriage. Hsiu and Chi were divorced on January 17, 2003. Hsiu alleges that, following their divorce and through October 2008, she and Chi continued to jointly own the property, operate it as a rental property, and paid the monthly mortgage payments.

Hsiu alleges that, in August 2008, Chi suggested that they sell the property because he was experiencing some financial difficulties. Hsiu alleges that, after some discussion, she and Chi entered into three verbal agreements in 2008 and 2010 regarding the property.

First, Hsiu alleges that, in August 2008, Chi verbally promised to transfer his ownership interest in the property to her in exchange for $160,000.00. Hsiu alleges that, in order to fund the transaction, she and Chi jointly refinanced the property on October 9, 2008. At the closing, Chi received and retained the sum of $166,148.83 from the mortgage company. Hsiu alleges that, as part of the agreement, she and Chi agreed that she would bear sole responsibility for repayment of the refinanced mortgage, the condominium common and assessment charges, the apartment renovation, and the operation of the property, including the retention of the rental income generated by the property. Hsiu alleges that Chi breached the first verbal promise by failing to transfer his interest in the property to her, and by retaining the mortgage money. The Estate has retained Chi's ownership interest in the property and has refused to pay Hsiu $160,000.00 of the mortgage money received by Chi.

Hsiu also alleges that, on December 28, 2010, Chi verbally promised to pay her the sum of $16,000.00, consisting of the $6,148.83 over the agreed upon purchase price that was distributed to him by the mortgage company, and $9,646.23 in refinance settlement charges. Hsiu further alleges that Chi verbally agreed to pay her the $16,000.00 in 32 equal monthly installments of $500.00, which was allegedly later memorialized in writing through e-mail exchanges. There is no dispute that Chi paid Hsiu $500.00 on January 4, 2011, prior to his unexpected death on January 31, 2011. The Estate has refused to pay Hsiu the alleged $15,500.00 balance.

Lastly, Hsiu alleges that, in January 2011, she inadvertently made an extra mortgage payment in the amount of $2,672.00 to the mortgage company. Hsiu alleges that the mortgage company issued a reimbursement check payable only to Chi, which Hsiu deposited into Chi's personal bank account, upon Chi's verbal promise to reimburse her the $2,672.00 face amount of the check. Hsiu alleges that Chi breached his promise. The Estate has refused to pay Hsiu this sum.

Based on the above allegations, Hsiu asserts six causes of action, including promissory estoppel, breach of contract, and unjust enrichment.

Motion to Dismiss

The Estate seeks to dismiss the amended first, second, and third causes of action for promissory estoppel and breach of contract as fatally defective on the grounds that the claims are barred by the statute of frauds, and that Hsiu has failed to plead all the required elements of such claims. In opposition, Hsiu contends that the amended first cause of action is legally cognizable, primarily on the ground that the statute of frauds does not apply because she has alleged sufficient facts demonstrating that it would be unconscionable not to enforce the alleged verbal promise.

On a motion addressed to the sufficiency of the pleadings, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Joel v Weber*, 166 AD2d 130, 135-136 [1st Dept 1991]; *see* CPLR § 3211[a][7]). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]). Failure to plead facts that are essential to a claim constitutes sufficient grounds for dismissal (*see Concourse Rehabilitation & Nursing Ctr. v Novello*, 309 AD2d 573, 573 [1st Dept 2003]).

First Cause of Action for Promissory Estoppel

The doctrine of promissory estoppel "may be invoked only where the aggrieved party can demonstrate the existence of a clear and unambiguous promise upon which he or she reasonably relied, thereby sustaining injury; as a general matter, an oral promise will not be enforced on this ground unless it would be unconscionable to deny it" (*Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1st Dept 1997]). To support a claim for promissory estoppel, a plaintiff must allege reliance that created a prejudicial change in position, and cannot rely on a conclusory allegation of reasonable reliance or injury (*Tierney v Capricorn Invs.*, 189 AD2d 629, 632 [1st Dept 1993]).

In the amended first cause of action for promissory estoppel, Hsiu alleges that Chi verbally promised to transfer to her his ownership interest in the property, in consideration of $160,000.00 that he received as a result of their refinancing of the existing mortgage. In return, Hsiu promised

to be solely responsible for repayment of the mortgage debt. Hsiu further alleges that Chi breached that promise by failing to transfer his interest in the property to her. As such, Hsiu concludes that the Estate has improperly retained both Chi's interest in the property and the funds received from the mortgage company. Hsiu seeks to recover the amount of $160,000.00 or, in the alternative, specific performance of Chi's promise to transfer his ownership interest.

Accepting every allegation in the amended complaint as true and liberally construing the complaint in the light most favorable to Hsiu, the alleged verbal promise is clearly a contract to transfer an interest in real property that falls squarely within the ambit of the statute of frauds.

Section 5-703(1) of the General Obligations Law ("GOL") provides, in relevant part, that

> "[a]n estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless . . . by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring same."

Thus, an oral agreement to transfer an interest in real property is not enforceable (*Gaddi v Gaddi*, 108 AD3d 430, 431 [1st Dept 2013], citing GOL § 5-703[1]).

Contrary to Hsiu's contention, the e-mail exchanges between Chi and Hsiu do not constitute writings evidencing the alleged verbal agreement sufficient to satisfy the statute of frauds. "To satisfy the statute of frauds, a writing must identify the parties, describe the subject matter, state all the essential terms of an agreement, and be signed by the party to be charged" (*Urgo v Patel*, 297 AD2d 376, 377 [2d Dept 2002]; *Durso v Baisch*, 37 AD3d 646, 647 [2d Dept 2007]; *see* GOL § 5-703). Such writings may include records of electronic communications and electronic signatures (*Naldi v Grunberg*, 80 AD3d 1, 6-7 [1st Dept 2010], citing GOL § 5-701).

The e-mails produced by Hsiu consist of 13 short e-mails exchanged in March, April, and November 2009, in April, September, and December 2010, and in January 2011. Chi's e-mails appear to bear his electronic signature. Significantly, however, the e-mails, read separately or even construed together, are vague and inconclusive and do not evidence the existence of a final, binding agreement by Chi to transfer his ownership interest in the property to Hsiu because they omit the the specific terms of such an agreement. While Hsiu broadly recites some of the terms of the "title transfer" in her e-mails dated March 20, 2009 and September 6, 2010, there is no e-mail wherein Chi himself defines the property title being transferred or the agreed-upon purchase price. Moreover, Chi's unexplained request in an April 8, 2010 e-mail that Hsiu provide her date of birth and social security number to Chi's lawyer does not constitute evidence of such an agreement.

Part Performance

Hsiu's reliance on the doctrine of part performance to avoid the statute of frauds is unavailing.

> "The doctrine of part performance may be invoked only if plaintiff's actions can be characterized as 'unequivocally referable' to the agreement alleged. It is not sufficient . . . that the oral agreement give significance to plaintiff's actions. Rather, the actions alone must be 'unintelligible or at least extraordinary', explainable only with reference to the oral agreement."

(*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983], quoting *Burns v McCormick*, 233 NY 230, 232 [1922]; *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]; *see McCormick v Bechtol*, 68 AD3d 1376, 1379-1380 [3d Dept 2009], *cert denied* 131 SCt 655 [2010] [tenant's occupancy of, and investment in, premises held not unequivocally referable to alleged oral agreement establishing right of first refusal]; *Tringle v Tringle*, 40 AD3d 353, 353

[1st Dept 2007] [held that plaintiff's $20,000.00 part payment of property purchase price did not constitute part performance in light of familial relationship and defendant's ill health that could otherwise explain plaintiff's conduct]; *Lebowitz v Mingus*, 100 AD2d 816, 817 [1st Dept 1984] [plaintiff tenant's $50,000.00 renovation of premises held not unequivocally referable to defendant's alleged oral agreement to transfer premises]; GOL § 5-703).

After Chi retained the $160,000.00 from the mortgage proceeds, Hsiu alleges that she assumed sole responsibility for the maintenance, renovation, and operation of the property, payment of all condominium charges, and repayment of the mortgage, and collected and retained the rental proceeds. This conduct is not unequivocally referable to Chi's alleged verbal agreement to transfer his property interest to Hsiu, and does not warrant application of the doctrine of part performance. Significantly, while the alleged verbal agreement occurred in August 2008 and the refinancing transaction closed in October 2008, Chi had still not transferred his interest to Hsiu when he died more than two and a half years later in January, 2011. There has been no explanation whatsoever for this lengthy delay. Moreover, Hsiu's alleged conduct may be explained by the undisputedly amicable relationship between Hsiu and Chi as former marital spouses and joint owners of the property since January 2003. At all relevant times, Hsiu has held a tenant-in-common interest in the property, and was fully and legally responsible for the property, including any required expenses.

The cases Hsiu cited are inapposite to the issue presented here. Clearly, under certain circumstances, part performance of an oral agreement to purchase and sell real property may be demonstrated by conduct normally associated with property ownership, including taking possession of the property, making repairs, paying all carrying charges, and receiving all rental proceeds.

Significantly, however, such conduct must be unequivocally referable to an alleged verbal agreement to transfer the property.

In the cases Hsiu cited, the conduct did not constitute part performance (*see, e.g., Burns v McCormick*, 233 NY at 232-233 [held that plaintiffs' conduct in selling their business, moving into decedent's home, and caring for him until his death did not constitute part performance evidencing decedent's verbal agreement to transfer his house and furniture to them upon his death]) or that the purported transferee, unlike Hsiu, did not already hold a present ownership interest in the property; and, therefore, had no reason to voluntarily assume ownership responsibilities, unless the plaintiff was the property owner (*see, e.g., McKinley v Hessen*, 202 NY 24, 31-32 [1911] [plaintiff brother's conduct in financing purchase of property in defendant sister's name, and in acting at all times as sole owner, and defendant's acquiescence in such actions held to constitute part performance of oral agreement that property belonged to plaintiff sufficient to satisfy the statute of frauds]; *Canda v Totten*, 157 NY 281, 287-288 [1898] [plaintiff former owner's conduct in reimbursing defendant purchaser the price he paid to purchase property at foreclosure auction held to constitute part performance of defendant's oral agreement to purchase property on plaintiff's behalf]; *Gier v Bissell*, 188 AD2d 1040, 1041 [4th Dept 1992] [plaintiff's conduct in paying defendant landowners $200 a month for 23 years, and in writing "mortgage payment" on each check, held to constitute part performance of oral agreement by defendants to transfer property to plaintiff]).

The Property as an Asset of the Estate

Hsiu's contention that the Estate acknowledged the existence of the alleged transfer agreement before Surrogate's Court is without merit. Although the original petition for letters of

administration and the Estate inventory list filed in Surrogate's Court by Che-Ching Chi, as the administratrix of the Estate, did not initially list the property as an Estate asset, the Estate has since filed amended papers that include the property as an Estate asset (*see Estate of Kenneth Chi, deceased*, Sur Ct, Queens County, file No. 2011-1038).

Unsworn E-Mail of Non-Party Is Insufficient

Contrary to Hsiu's contention, the e-mails between Hsiu and non-party Anita Payumo ("Payumo"), a former tenant who had rented the property, do not demonstrate the existence of a binding agreement by Chi to transfer his interest to Hsiu. By an e-mail to Hsiu dated August 8, 2012, Payumo appears to confirm that Chi had advised her that he had sold his interest in the property to Hsiu, and that she should send her rent checks to Hsiu. However, in this unsworn e-mail, Payumo also stated that she did not remember how or when Chi so advised her, and did not mention any other material terms of the alleged oral agreement. In addition, Payumo does not attest to the authenticity of the e-mails produced by Hsiu.

Unconscionability

Hsiu's argument that it would be unconscionable to dismiss the amended first cause of action is unavailing. "An oral promise cannot be relied upon to estop a plea of Statute of Frauds unless the circumstances are 'such as to render it unconscionable to deny' the oral promise upon which the promisee has relied" (*Ginsberg v Fairfield-Noble*, 81 AD2d 318, 320-321 [1st Dept 1981], quoting *Swerdloff v Mobil Oil Corp.*, 74 AD2d 258, 263 [2d Dept 1980]). However, unconscionable circumstances sufficient to avoid the statute of frauds are rarely found to exist.

Hsiu alleges that it would be unconscionable to dismiss the first promissory estoppel claim because: (1) the alleged verbal agreement was first suggested by Chi, as a solution to his personal financial problems, (2) Chi's untimely death rendered him unable to fulfill his promise, and (3) Hsiu detrimentally relied on the agreement by permitting Chi to retain the mortgage proceeds, and by assuming sole responsibility for all financial obligations relating to the property, including repayment of the mortgage debt.

As discussed above, Hsiu has held a tenant-in-common ownership interest in the property since January 2001, when Chi and Hsiu purchased the property as husband and wife. As an owner of the property, her conduct in assuming full responsibility for the property and repayment of the mortgage debt is understandable and necessary, in order to maintain the value of her interest. Under these circumstances, it is not unconscionable to enforce the statute of frauds.

Second Cause of Action for Breach of Contract

The Estate seeks to dismiss the amended second cause of action on the grounds that the alleged agreement to pay Hsiu $16,000.00 is barred by the statute of frauds because it is not capable of performance within one year, and is not memorialized by a writing subscribed by Chi. In opposition, Hsiu contends that the claim is one for breach of contract, and that Chi's e-mails evidence Chi's agreement to pay Hsiu $16,000.00 in $500.00 increments.

Notwithstanding the above, Hsiu has alleged sufficient facts to avoid operation of the statute of frauds, and to support a breach of contract claim. GOL § 5-701(a)(1) requires that all agreements which, by their terms, cannot be performed within a year from their making must be in writing signed by the party to be charged, in order to be enforceable.

To state a viable claim for breach of contract, the plaintiff must plead the following elements: (1) the existence of a binding contract; (2) the plaintiff's performance of the contract; (3) the defendant's material breach of the contract; and (4) damages (*Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 [1st Dept 2004]; *Rexnord Holdings v Bidermann*, 21 F3d 522, 525 [2d Cir 1994]). Further, the plaintiff must allege, in non-conclusory language, the essential terms of the contract, including the specific terms allegedly breached by the defendant, or the claim will be dismissed (*Peters v Accurate Bldg. Inspectors Div. of Ubell Enters. Inc.*, 29 AD3d 972, 973 [2d Dept 2006]). "In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction" (*Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1st Dept 1998] [internal quotation marks and citation omitted]).

In the amended second cause of action, Hsiu alleges that, on December 28, 2010, Chi agreed in writing to pay her a total of $16,000.00, consisting of the $6,148.83 over the alleged agreed upon purchase price for Chi's ownership interest in the property that was distributed by the mortgage company, and $9,646.23 in refinance settlement charges. Hsiu further alleges that Chi agreed to pay the $16,000.00 in equal monthly installments of $500.00 for 32 months, interest-free. Hsiu alleges that, pursuant to the alleged agreement, Chi paid her $500.00 in January, 2011. Hsiu seeks to recover the sum of $15,500.00.

Hsiu has produced e-mails that appear to support her allegations. In his September 9, 2010 and December 28, 2010 e-mails to Hsiu, Chi agreed to pay Hsiu $500.00 each month for 32 months, by depositing the funds directly into her bank account. By reply e-mails dated December 27, 2010 and January 1, 2011, Hsiu accepted Chi's offer and provided him with her bank account number.

On January 4, 2011, Chi transferred $500.00 to Hsiu's bank account. This evidence, if proven, is sufficient to demonstrate a meeting of the minds, and to satisfy the statute of frauds.

Third Cause of Action for Promissory Estoppel

In the amended third cause of action, Hsiu alleges that Chi verbally promised to reimburse her the sum of $2,672.00, and breached that promise. The Estate seeks to dismiss the amended third cause of action for promissory estoppel on the ground that Hsiu has failed to allege detrimental reliance on the alleged verbal promise.

As discussed above, the elements of a claim for promissory estoppel are as follows: (1) a clear and unambiguous promise by the promisor, (2) reasonable reliance by the promisee that created a prejudicial change in position, and (3) injury to the promisee (*Steele v Delverde S.R.L.*, 242 AD2d at 415; *Tierney v Capricorn Invs.*, 189 AD2d at 632).

Hsiu alleges that, in January 2011, she inadvertently made an extra mortgage payment in the amount of $2,672.00 to the mortgage company, and that the mortgage company issued a reimbursement check payable only to Chi. Hsiu further alleges that she did not return the check to the mortgage company in exchange for a check made payable to her, but instead deposited it into Chi's personal bank account, upon his verbal promise to pay her a sum equal to the face amount of the check. Chi failed to pay Hsiu, who seeks to recover $2,672.00. Hsiu's detailed allegations regarding Chi's promise, subsequent breach, and her prejudicial change in position by depositing the check in Chi's bank account are sufficient to support a claim of promissory estoppel.

Fourth Cause of Action for Unjust Enrichment

In the amended fourth cause of action, Hsiu alleges that the Estate has been unjustly enriched by its improper retention of a sum totaling at least $178,172.00 which she seeks to recover in the amended first, second, and third causes of action for breach of contract and promissory estoppel.

To assert a legally cognizable claim of unjust enrichment, a plaintiff must allege that the plaintiff bestowed a benefit upon the defendant, that the benefit remains with the defendant, and that the defendant has not adequately compensated the plaintiff for that benefit (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120-121 [1st Dept 1998]). However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter . . . . A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [citations omitted]; *see also Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991] [the law recognizes a cause of action for unjust enrichment "in the absence of an agreement when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another] [citation omitted]). Therefore, to the extent that Hsiu's claim arises out of allegations that the Estate has been unjustly enriched by its retention of Chi's ownership interest in the property and the $160,000.00 purchase price, the amended fourth cause of action is fatally defective, since only a written contract satisfying the Statute of Frauds would permit such a recovery.

Even accepting the facts as alleged by Hsiu as true, and according her the benefit of every possible favorable inference, Hsiu has failed to allege any facts from which a confidential or

fiduciary relationship may be inferred to exist in 2008, some five years after their divorce, at the time that Chi is alleged to have made a promise to transfer his ownership interest in the property to Hsiu.

As stated above, the amended second and third causes of action for breach of contract and promissory estoppel arise out of allegations of a written agreement to pay Hsiu $16,000.00 and a verbal agreement to pay her $2,672.00. Hsiu may pursue these claims under breach of contract, promissory estoppel or unjust enrichment theories. If Hsiu can prove to the finder of fact that there were express agreements, whether written or oral, that Chi breached regarding the $16,000.00 and $2,672.00 and that she detrimentally relied on Chi's promise to repay those amounts, she can recover under the breach of contract and/or promissory estoppel causes of action. However, as the Estate has challenged the existence of Hsiu's alleged agreements with Chi regarding the $16,000.00 and the $2,672.00 mortgage overpayment deposited in Chi's account which Hsiu claims rightfully belongs to her, Hsiu may also sustain an unjust enrichment cause of action in the alternative to a disputed contract cause of action (*see, e.g., Resource Finance Co. v Cynergy Data LLC*, 106 AD3d 562, 563 [1st Dept 2013] ["The fact that there are express agreements does not bar the pleading of a quasi-contract claim, where, as here, defendants contest the validity of those agreements."]; *Veritas Capital Management LLC v Campbell*, 82 AD3d 529, 530 [1st Dept 2011] ["Campbell did adequately plead an oral contract and a breach of it. The fact that the terms and validity of the contract are in dispute allows Campbell to plead a parallel quantum meruit claim."]; *Joseph Sternberg, Inc. v Walber 36th Street Assoc.*, 187 AD2d 225, 227-228 [1st Dept 1993] ["where there is a bona fide dispute as to the existence of a contract . . . plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies."]).

CONCLUSION

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the amended first and fourth causes of action are dismissed except for the alternative unjust enrichment claims seeking damages for $16,000.00 and $2,672.00 as explained in detail above and is otherwise denied; and it is further

ORDERED that the cross-motion is granted to the extent that the amended complaint is deemed served; and it is further

ORDERED that the remainder of the action shall continue.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

ENTER:

Dated: December 5, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Shlomo Hagler
J.S.C.