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Re: Sargent v. Schneller
C.A. No. 235-S
Date Submitted: April 14, 2005

Dear Counsel:

Plaintiff Mark Sargent ("Sargent") contends that he entered into an oral contract with Defendant Katherine Schneller ("Katherine") for the acquisition of a tract of land, on State Line Road in Delmar, Sussex County, Delaware (the "Property").[1] Sargent seeks specific performance of the oral contract and asserts that Katherine should be estopped from relying on the Statute of Frauds because of

[1] The Property, consisting of 11.82 acres with a dilapidated residential structure, is also known by its Sussex County Tax Map Parcel Number of 5-32-21.00-18.00.

his part performance under their oral agreement. For the reasons discussed below, I conclude, in this post-trial letter opinion, that no oral agreement was reached and, even if the parties had orally agreed to the sale, there was no actual part performance to allow Sargent to avoid the Statute of Frauds and, therefore, Katherine is not obligated to convey the Property to Sargent.

I. BACKGROUND

Edna Tappan ("Edna") died intestate on May 6, 2003. She was survived by her two daughters, Miriam Asher ("Miriam") and Katherine. Edna's Estate consisted of approximately $600 in a bank account and the Property. Katherine and her daughter, Defendant Karen Schneller ("Karen"), were appointed administratrices of the Estate.[2] Edna had spent her last five years in a nursing home, but she had been unable to pay the cost of nursing home care. Thus, Delaware Health and Social Services was owed in excess of $249,000 and held a lien against Edna's Estate, including the Property (the "Medicaid Lien").[3] All proceeds from the sale of the Property will be applied to the Medicaid Lien. To

[2] PX 2.
[3] DX 7.

facilitate the sale of the Property Katherine hired attorney Lynn O'Donnell ("O'Donnell").

Sargent first contacted Katherine about the Property in 2002, before Edna's death.[4] These contacts were made by phone and by mail and Katherine responded that the Property was not for sale. Following Edna's death, Sargent again contacted Katherine, and, after informing Sargent that Medicaid had a lien on the Property and that neither she nor her sister was interested in purchasing the Property, Katherine directed Sargent to contact O'Donnell. Sargent first contacted O'Donnell on September 9, 2003; O'Donnell provided Sargent with more information on the Property on September 10, 2003. According to Sargent, during the conversation on September 9, 2003, Sargent said that he would purchase the Property for a then yet-to-be-determined price and that O'Donnell agreed to sell him the Property. Sargent further testified that on September 10, 2003, O'Donnell notified Sargent that there would have to be an appraisal of the Property, but that they both agreed that Sargent would buy the Property for whatever price was established through an appraisal. O'Donnell testified that she made no such

[4] *See, e.g.*, PX 1.

commitment to Sargent and, instead, that her conversation with Sargent consisted of Sargent's expressing his desire to purchase the Property and O'Donnell's informing him that she would have to speak with her clients. While O'Donnell could not recall precisely what was said in those discussions, she does recall that she told him that it was premature to prepare a contract at that stage.[5] When Katherine was later billed for these conversations (and a conversation which she had with O'Donnell), she sent a letter to Sargent requesting that he pay it because he had contacted her attorney.[6] Sargent obliged and reimbursed her the $68 on October 8, 2003.

Sometime after he spoke with Katherine and O'Donnell in September 2003, Sargent went to the Property on two occasions and performed light yard work in the nature of removing debris and cutting grass. Sargent stated that he asked permission to do so from Katherine because, as he was going to be purchasing the Property, he wanted to maintain it. Katherine thought he wanted to clean it up so vandals would not come on the Property. While Katherine agreed that she gave Sargent permission to enter the Property and perform some maintenance, she stated

[5] PX 3.
[6] PX 4.

that permission was not pursuant to any agreement or understanding between the two, but, instead, that she merely acquiesced to Sargent's desire to clean up the Property. Katherine acknowledged that Sargent's motivation to perform some maintenance on the Property was perhaps fueled by his expectation that he would eventually be the purchaser, but that there was no agreement between the two.

Once the appraisal was completed, O'Donnell wrote to Katherine on October 8, 2003, informing her of the $43,000 appraised value.[7] Katherine told O'Donnell to sell the Property for the full appraised value. Sargent's next contact with Katherine was on October 13, when he received Katherine's letter informing him that the appraised value of the Property was $43,000.[8] In the same letter, Katherine also told Sargent that there was another neighbor interested in the Property, but that she had not told anyone else about the appraisal. Sargent testified that on October 16 he had contacted Katherine and had asked her if he could purchase the Property for the appraised value, and that she had agreed. Katherine testified that, while she may have spoken with Sargent at that time, she

[7] PX 5. In the letter, O'Donnell advised Katherine that she had received calls from two potential buyers.
[8] PX 6.

had no recollection of ever coming to an agreement with him, and throughout her testimony denied ever coming to terms with Sargent. Indeed, it appears that Katherine believed that the State controlled the Property because of the Medicaid Lien and that it was up to O'Donnell to sell the Property.

On November 4, 2003, Karen, as requested by Katherine, mailed a house key for the Property to Sargent. Karen testified that Sargent was sent the key, not because an agreement had been reached to sell him the Property, but because he was interested in looking at the house and that he was considering purchasing the Property. Sargent points to language in the letter—"[a]s you can imagine this is very difficult for me knowing someone else will be living on the land [Edna] loved so much"—as evidence that there was an agreement that he would purchase the Property.[9] However, I accept Karen's testimony that this merely indicated her apprehension and sadness on realizing that someone else would eventually own the Property.

Another potential buyer, David L. Rice ("Rice"), contacted Katherine at some point to inquire about the Property and she directed him to O'Donnell. Rice,

[9] DX 7; *see also* Transcript at 14-15, 113.

using the opening of hunting season as his frame of reference, testified that he learned of the Property's availability prior to October 3, 2003, while he was setting up a deer stand. He then phoned both Katherine and O'Donnell, and on October 3, 2003, (according to him) he dispatched a letter to Katherine expressing his interest.[10] Sargent argues that Rice could not possibly have expressed interest to Katherine prior to October 13, 2003, based upon language in the letter from Katherine to Sargent notifying him of the appraisal price. In that letter Katherine states that "[t]he old farm has been appraised at $43,000. I haven't told anyone else this because the man who owns the surrounding property wants to buy it."[11] Sargent argued that if Rice had contacted Katherine, then Katherine would have made a note in this letter confirming that Rice had in fact contacted her. O'Donnell was unable to say for certain when Rice first expressed interest in the Property, but she was certain that she received an offer on the Property from him on November 3, 2003, in the amount of $50,000[12] and that he had contacted her prior to the offer.

[10] DX 4. The letter is undated.
[11] PX 6; *see also* Transcript at 12-13, 63, 148.
[12] DX 5a.

Sargent, after having not heard back from O'Donnell after numerous phone calls, hired an attorney who wrote O'Donnell a letter in which he offered to purchase the Property on behalf of Sargent for $43,000.[13] O'Donnell notified Sargent and his attorney, in a letter dated November 5, 2003,[14] two days after Rice submitted his bid, that there was another bidder for the Property. The parties then began bidding on the Property, and Sargent's bid topped out at $72,000.[15] Rice, with a bid of $85,000, eventually won the auction for the Property.[16] O'Donnell notified Sargent's lawyer in a letter dated December 8, 2003, that Rice had bid $85,000, and she never received a response from Sargent or his attorney.[17] With no further bid, O'Donnell concluded the bidding process.

After the auction ended, Sargent faxed Karen a letter on December 15, 2003, in which he offered to purchase the Property for $43,000 and to pay her attorneys' fees.[18] He also recommended that Katherine and Karen fire O'Donnell because he believed they were not being well represented. They declined to take such action.

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[13] DX 3. This letter made no mention of any oral agreement.
[14] DX 5b.
[15] DX 5e, 5h, 5j, 5k.
[16] DX 5l.
[17] DX 5m.
[18] DX 6. In his letter, Sargent did not refer to any oral agreement.

Sargent's final attempt to acquire the Property occurred at Katherine's home, in early January 2004. Sargent had called Katherine and told her that he was going to come by her home. Sargent testified that the purpose of this visit was to show Katherine pictures of his family and the old house he used to live in. However, prior to arriving at Katherine's house, Sargent had been at the law offices of Tunnell and Raysor, his new attorneys. While at the offices of Tunnell and Raysor, Sargent was given a blank contract for the sale of land. Sargent never brought the contract into Katherine's house, and the first thing that Katherine said to Sargent was that she was not going to sign anything. Katherine had asked Hubert Mock ("Mock"), a personal friend, to be with her during Sargent's visit. Mock confirmed that, although Sargent never brought the contract into the house, Sargent mentioned it a number of times during the visit. Additionally, Mock recalled that Sargent repeatedly stated to Katherine that she had initially agreed to sell him the Property and that Katherine denied ever having made an agreement with Sargent. Sargent's visit lasted no more than 15 minutes.

On January 15, 2004, as the result of the auction process, Rice and Richard D. Rice, his son, executed a written agreement to purchase the Property for $85,000.[19]

II. CONTENTIONS

Sargent contends that he and Katherine orally agreed to his purchase of the Property at a price to be determined by an appraiser. When the appraiser returned a valuation of $43,000, the terms of their agreement were sufficiently established for there to be a contract. He then points to his payment of O'Donnell's $68 bill and his two partial days of work on the premises as part performance sufficient to avoid the consequences of the Statute of Frauds.

The Defendants maintain that no oral agreement was ever reached, even though the parties anticipated that Sargent would likely acquire the Property, and, more importantly, whatever acts Sargent undertook with respect to the Property did not constitute part performance that would remove any oral agreement from the ambit of the Statute of Frauds.

[19] IX 1. Rice and Richard D. Rice (collectively, the "Intervenors") intervened in this action to protect their rights under their contract to purchase the Property.

III. ANALYSIS

A. *Specific Performance*

Because Sargent seeks specific performance, he has "the burden of proving the existence and terms of an enforceable contract by clear and convincing evidence."[20]

B. *The Absence of Agreement*

By operation of the law of intestacy, the Property, on Edna's death, passed to Katherine and Miriam, as tenants in common.[21] Thus, in order to acquire the Property, Sargent needed to reach an agreement binding not only on Katherine but also on Miriam.[22] Both Sargent and Katherine expected that Sargent would acquire the Property. Katherine, however, never agreed to sale terms and left the

[20] *Kowal v. Clark*, 2000 WL 739250, at *3 (Del. Ch. June 2, 2000) (*quoting* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 12-3, 816 (1998)); *see also DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005). "To grant specific performance, there must be proof of a valid contract to purchase real property and proof that plaintiff was ready, willing and able to perform his contractual obligations. In addition, the Court must determine whether the 'balance of equities' tips in favor of specific performance." *Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002) (footnote omitted).

[21] 12 *Del. C.* § 503(1).

[22] It is, of course, possible that Sargent could be entitled to specific performance with respect to Katherine's interest alone.

matter for O'Donnell to handle.[23] Moreover, Sargent's actions were inconsistent with his current position that he has an enforceable contract. First, he (as well as Katherine) anticipated a written agreement that would comprehensively establish the various terms governing any acquisition. Second, Sargent participated vigorously in the auction process without informing O'Donnell or Katherine of his claim to rights under an oral contract. Engaging in the auction process was not the conduct one would expect from someone with distinct contractual rights.[24] Finally, in January 2004, with the assistance of his new lawyers, Sargent obtained and took to Katherine's home a contract for the purchase of the Property.[25] After losing the auction, presenting a contract to Katherine was also inconsistent with his pending

[23] Katherine consistently and credibly testified that there was no agreement. In specific performance cases, it is not uncommon for the owner to be motivated by a change in her desire to sell the property or by an opportunity to benefit from a higher purchase price. Here, no such motivation can be ascribed to Katherine. She does not want the Property and the price at which it is sold is immaterial to her: all proceeds under any conceivable contract will be paid to reduce the Estate's Medicaid obligation, a debt for which she has no personal liability. In short, it is difficult to find any reason why Katherine would not testify truthfully—or, at least, to the best of her understanding of the truth.

[24] Sargent attempts to explain away his conduct by blaming it on bad advice from his attorney who, he says, was not aware of his payment of O'Donnell's bill of $68 or of his yard work on the Property. According to Sargent, his attorney told him that his oral contract claim was weak. Whether his attorney's views would have been changed with the additional information cannot be ascertained from the trial record. In short, his conduct—despite any post-hoc rationalization—is at odds with his current litigation position.

[25] Thus, his taking a contract to Katherine's home cannot be blamed on the lawyer who advised him during the auction process.

claim.[26] In sum, Sargent has not established, through clear and convincing evidence, that he has an oral agreement with Katherine to enforce.[27]

In addition, Sargent had no contractual relationship with Miriam. He does not claim any agreement directly with Miriam—either oral or written. He asserts that Miriam was deferring to her sister.[28] Miriam, who did not testify at trial, may well have been deferring to her sister but still cannot be deemed to have bound herself to selling an interest in real estate through such an informal authorization.[29] More importantly, Miriam is not a defendant in this action, and, accordingly, the Court cannot order her to convey her interest.

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[26] Sargent's distinction that he took the contract with him but did not take it into Katherine's home is one without a difference. It is clear that his trip to Katherine's home was for the purpose of obtaining a written agreement.

[27] No one would purchase the Property without resolution of the Medicaid Lien. Whether the lien would have been released for $43,000 (the purchase price sought by Sargent) when an offer for $85,000 (Rice's) was known is a question not before the Court. However, even if the Court had found that Sargent held a valid oral contract for the purchase of the Property, his ability to secure a release of the Medicaid Lien and consummate his purchase of the Property would remain subject to doubt. *See* DX 7 (letter dated January 16, 2004, reporting that the Delaware Health and Social Services' lien would be released upon receipt of net proceeds under a contract with a purchase price of $85,000).

[28] No petition for authorization to sell the Estate's real property to pay its debts has been filed under 12 *Del. C.* § 2701.

[29] The record does not establish whether Miriam was aware of the appraisal, her sister's conversation with Sargent, the auction process, or Sargent's limited word on the Property.

C. *The Statute of Frauds and the Part Performance Exception*[30]

Delaware's Statute of Frauds, 6 *Del. C.* § 2714, provides that contracts for the sale of real estate, in order to be enforceable, must be reduced to writing.[31] Its purpose is to protect against fraud in land transactions.[32] However, to prevent injustice, "one well-rooted exception [to the statute of frauds] is the equitably-derived principle that a partly performed oral contract may be enforced by an order for specific performance upon proof by clear and convincing evidence of actual part performance."[33] However, if actual part performance cannot be sufficiently demonstrated, the Statute of Frauds precludes enforcement of any oral contract.

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[30] I have separated for analytical purposes the questions of whether there was an oral agreement and whether any such agreement was partly performed. The line separating these inquiries cannot always be drawn sharply because the conduct of the parties after supposedly reaching an oral agreement may be helpful in ascertaining whether an agreement had, in fact, been reached and the terms of any agreement.

[31] "No action shall be brought to charge any person . . . upon any contract or sale of lands . . . unless the contract is reduced to writing, or some memorandum, or notes thereof, are signed by the party to be charged therewith, or some other person thereunto by the party lawfully authorized in writing; . . ."

[32] *Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984).

[33] *Shepherd v. Mazzetti*, 545 A.2d 621, 623 (Del. 1988); *see also Quillen*, 482 A.2d at 747; *Durand v. Snedeker*, 177 A.2d 649, 651-52 (Del. Ch. 1962) (stating that part performance may be deemed to take a contract out of the provisions of the Statute of Frauds on the theory that acts of performance, even if incomplete, constitute substantial evidence that a contract actually exists); *Shepherd v. Niles*, 125 A. 669, 670 (Del. Ch. 1924).

"Generally, courts find a party's acts probative evidence of a real property contract when that act is related, in some respect to the land itself."[34] However, to take advantage of the actual part performance exception:

> the act relied on as part performance should be such as would not have been done independent of some contract or agreement relative to land; because, as you are from the act performed to infer a contract, it must therefore be an act of that description which will not admit any other inference.[35]

Additionally, the act constituting actual part performance must be a joint act, or an act which "clearly indicates mutual assent" of the parties to the oral contract.[36] Courts have generally found that taking possession of the land, making partial or full payment for the land, rendering services that were agreed to be exchanged for the land, or making valuable improvements on the land in reliance on the oral contract generally demonstrate part performance.[37] Likewise, courts have found

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[34] *Last Will and Testament of Puwalski v. Bloch*, 1996 WL 73571, *4 (Del. Ch. Feb. 9, 1996).
[35] *Shepherd v. Niles*, 125 A. at 669 (*quoting Houston v. Townsend*, 1 Del. Ch. 416 (Del. Ch. 1833)).
[36] *Id.* at 670.
[37] *See Shepherd v. Niles*, 125 A. at 670 ("Part performance may be shown by a delivery of possession by the vendor and acceptance of possession by the vendee under the oral contract."); *Quillen*, 482 A.2d at 748 ("[P]ayment in kind through personal services in lieu of cash payment . . . may be construed to be payments pursuant to an agreement or series of agreements which are not barred by the statute of frauds."); *Shepherd v. Mazzetti*, 545 A.2d at 623 ("[P]erformance by the son of his duties under the oral contract amounted to legal consideration."); *Heckman v. Nero*, 2000 WL 1041226, at *3-4 (Del. Ch. May 31, 2000) (finding that plaintiffs had partially performed the oral agreement to sell land by purchasing a $55,000

that "[a]cts which are only preparatory, such as giving directions for conveyances, taking a view of the estate or putting a deed in the hands of a solicitor to prepare a conveyance, are not considered as part performance."[38]

D. *Sargent's Attempted Demonstration of Part Performance*

In order for Sargent to be successful on his claim that he is entitled to specific performance of the alleged oral contract because he engaged in actual part performance, he must produce the evidence supporting part performance under that contract with a high degree of certainty.[39] As explained below, I find that Sargent has failed to produce substantial evidence which would satisfy the actual part performance exception to the Statute of Frauds

Sargent first asserts that his payment of $68 in legal fees, fees which were billed to Katherine by O'Donnell, is sufficient to qualify as actual part performance

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trailer home to place on the land and had made numerous improvements to the Property including significant landscaping, installing a driveway, and building a duck pond); *Taylor v. Jones*, 2002 WL 31926612, *4 (Del. Ch. Dec. 17, 2002) ("For the part performance exception to apply, however, the performance must be attributed solely to the oral agreement. For example, where a purchaser of land under an oral purchase agreement makes partial payment, makes improvements to the land, or takes possession of the land, that conduct may constitute partial performance of the contract. . . .") (footnotes omitted).

[38] *Shepherd v. Niles*, 125 A. at 670.

[39] *See Durand*, 177 A.2d at 652 (noting that "the existence and terms of the contract sought to be enforced [must be] established by that high degree of proof which has been variously categorized by the terms 'clear,' 'clear and convincing,' 'clear and satisfactory' or other equivalent expressions.").

and is also sufficient evidence of the alleged oral contract. I disagree. While it is unusual for a third party to pay someone else's legal fees, I do not find that it provides significant evidence that the parties mutually assented to a contract. At best, it is proof that the parties were working toward a contract. Katherine, who had little exposure to the legal profession thought that it was appropriate to ask Sargent to pay the legal fees that she incurred when Sargent called O'Donnell to discuss the sale of the Property. Sargent asserts that he paid the fees because he expected to purchase the Property. Sargent's expectations that he would eventually purchase the Property, however well-founded they may have been at the time, do not provide this Court with sufficient evidence of an oral contract or the terms of any such oral contract so that the actual part performance exception can be invoked.

Sargent next argues that the oral contract was partly performed because he was in possession of the Property after he received the key to the residence along with a note from Karen stating how distraught she was to see the Property go to someone else. Giving a potential buyer a key to the Property, especially when the Property includes an abandoned house in a state of disrepair, hardly provides evidence of an oral contract, let alone clear and convincing evidence. Instead,

sellers may give potential buyers keys to allow them a closer inspection of the property. To qualify for part performance, possession must be actual and notorious, and not merely constructive. "A mere technical possession, not open to the observation of the neighborhood, is insufficient."[40] Mere possession of a key is insufficient for Sargent to demonstrate that he took possession of the Property. Sargent has provided no evidence that would allow me to conclude that his possession of the key equated with his possession of the Property and, therefore, I do not find that the possession of the key is sufficient to provide Sargent an exception to the Statute of Frauds.[41] Additionally, Sargent's possession of the key provides no evidence as to the terms of any oral contract.

Lastly, Sargent asserts that, having spent portions of two days doing yard work at the Property, he improved the Property in reliance on the oral agreement and therefore satisfies the part performance valuable improvement requirement to

[40] *Shepherd v. Niles*, 125 A. at 672.
[41] This is similar to the scenario that the Court faced in *Shepherd v. Niles*, and in that case the Court concluded that "it is neither remarkable nor unusual for the prospective vendee to secure the keys and enter the premises. His act in doing so does not necessarily argue the existence of a contract to buy. It is not of such a description as will admit of no other inference than that he has agreed to purchase." *Id*. at 672.

avoid the statute of frauds.[42] The light yard work that Sargent did, mostly cleaning up debris, does not provide the Court adequate evidence to demonstrate Sargent's part performance of an oral contract because it is both insignificant to the Property and does not provide evidence of an oral contract. Sargent's yard work, which he testified took him only a few hours on two days, did not add measurable value to the Property and it did not cause sufficient detriment to Sargent for it to be considered an enhancement that would demonstrate part performance. Cases in which part performance has been found based upon improvements and expenditures generally involve material improvements and the expenditure of thousands of dollars, not simply a few hours of yard work.[43] The

[42] I note that the yard work, *i.e.*, services, was not part of the consideration for acquisition of the Property. Similarly, the sum paid for O'Donnell's bill was not part of the purchase price.

[43] *See Heckman*, 2000 WL 1041226 (finding that improvements in excess of $55,000 sufficiently demonstrate part performance.); *Bielo v. Del. Wild Lands, Inc.*, 1995 WL 106302 (Del. Ch. Feb. 8, 1995) (Plaintiffs claimed, despite not having a provision in their lease to this effect, that they had been given a right of first refusal to buy the land that they resided on and that they had made significant improvements on the lot in reliance of this right. These improvements included the building of cottages and significant work on the land. The Court held that this behavior was not inconsistent with the lease agreement, and was therefore, despite the cost, insufficient to demonstrate part performance); *In the Matter of the Real Estate of Regina Wapniarek*, 1986 WL 9611 (Del. Ch. Sept. 2, 1986) (holding that even though the plaintiff had made improvements to the land, including repairs and improvements to a farmhouse, that because his work could be explained beyond the existence of a contract, the plaintiff had not satisfied part performance); *Clough v. Clough*, 1985 WL 44698 (Del. Ch. Feb. 27, 1985) (denying summary judgment motion and finding that the plaintiff had stated facts, including full payment and valuable improvements on the land, which if proved true at trial would satisfy part performance of oral

reason that improvements must be valuable and material to the land is because the improvement serves as the substantial evidence of the oral contract and, therefore, to overcome this heavy evidentiary burden, only a significant improvement will support an oral contract. Because the yard work was minimal, I do not find, based on this conduct, that an oral contract existed for the sale of the Property or that Sargent's yard work is sufficient to demonstrate part performance.[44]

In summary, in order to prevail, Sargent must prove that there was an oral agreement and that he partly performed his obligations under that agreement in a fashion that would make it inequitable to deny him the benefit of his bargain. His burden, however, is not that of a preponderance of the evidence; instead, he must support his case with clear and convincing evidence. Under that standard, he has failed to prove either prong of his claim.

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real estate contract.); *Matter of the Real Estate of Havens*, 1981 WL 88264 (Del. Ch. May 14, 1981) (holding that plaintiff's improvements of $2,000 on the marital home, including a half-bath, a dropped ceiling in the living room, a new kitchen floor and wallpaper, carpet in the den, an air conditioner and gardening, did not enhance the value of the property in any way and were insufficient to demonstrate part performance of oral agreement that he was given the house by his ex-wife after divorce.).

[44] I am also unable to conclude that the only plausible explanation for the yard work is that there was an oral contract. Sargent may simply have believed that he would one day purchase the Property and he was getting a head start on some work. While Sargent may have relied on his subjective belief that he would eventually be the purchaser of the Property, his belief does not create an enforceable oral contract.

IV. CONCLUSION

For the foregoing reasons, judgment is entered in favor of the Defendants and Sargent's application for specific performance is denied.[45] Costs are awarded to the Defendants.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-S

[45] The Intervenors have asserted a claim for delay damages against Sargent for interfering with their investment expectations for the Property. The damages are said to have resulted from Sargent's filing of a notice of lis pendens that interfered with their acquisition of the Property and its incorporation into a residential development. Their claim for damages is denied. Sargent's claim was not presented in bad faith. In addition, the Intervenors failed to prove that they incurred any damages. It may be that their business venture, Stillwater Development Company, LLC, suffered losses (IX 3), but it is a distinct legal entity and is not a party to this action. Because Sargent did not act in bad faith and because no other cognizable reason for shifting the burden of attorneys' fees has been suggested, no attorneys' fees are awarded.