

EXHIBIT C

LEXSEE 1999 U.S. DIST. LEXIS 13594

Caution
As of: Jan 22, 2008

ROBERT M. BARRETT, JR., Plaintiff, v. POAG & McEWEN LIFESTYLE CENTERS-DEER PARK TOWN CENTER, LLC, a Tennessee Limited Liability Company, and POAG & McEWEN LIFESTYLE CENTERS, LLC, a Tennessee Limited Liability Company, Defendants.

No. 98 C 7783

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 13594

**August 23, 1999, Decided
August 26, 1999, Docketed**

DISPOSITION: [*1] Defendants' motion to dismiss granted in part and denied in part. Counts I, II and IV of Barrett's complaint dismissed but motion to dismiss denied with respect to Count III.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants moved to dismiss plaintiff's action claiming breach of partnership agreement, breach of fiduciary duty, interference with prospective economic advantage, and other theories in relation to an agreement regarding a real estate purchase.

OVERVIEW: Plaintiff sued defendants for breach of partnership agreement, breach of fiduciary duty, interference with prospective economic advantage, and other theories in relation to an agreement regarding a real estate purchase. Defendants moved to dismiss for failure to state a claim on which relief could be granted. The court granted the motion as to breach of partnership agreement. The agreement was subject to the statute of frauds, and the agreement did not adequately describe plaintiff's claimed property. The court granted the motion as to breach of fiduciary duty. Plaintiff failed to plead profit sharing, and therefore failed to establish the existence of a joint venture. The court denied the motion as to tortious interference with prospective economic advantage. Plaintiff adequately alleged actions directed at a third party, as plaintiff stated he had secured preliminary commitment

for the sale of the property, and defendants knowingly acted to interfere with the sale.

OUTCOME: The court granted the motion as to breach of partnership agreement because the agreement failed to meet requirements of the statute of frauds. The court dismissed the claim of breach of fiduciary duty because plaintiff failed to show joint venture existed. The court denied the motion as to tortious interference.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

[HN1] On a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a complaint will be dismissed only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. The issue is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence in support of his or her claims.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

[HN2] Courts must treat all well-pleaded factual allegations in the complaint as true and must also draw all reasonable inferences from those allegations in the plain-

tiff's favor in deciding a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss. Courts need not, however, strain to find inferences favorable to the plaintiffs which are not apparent on the face of the complaint. Nor are they required to ignore facts set forth in a complaint or exhibits that undermine the plaintiff's claim, much less to accept legal conclusions alleged or inferred from the pleaded facts.

Business & Corporate Law > General Partnerships > Formation > General Overview

Contracts Law > Types of Contracts > Partnership Agreements

[HN3] Partnership agreements are governed by the law of contracts.

Contracts Law > Breach > General Overview

Contracts Law > Statutes of Frauds > General Overview

Contracts Law > Types of Contracts > General Overview

[HN4] To allege a breach of contract, the plaintiff must assert formation of a contract, its terms, performance by the plaintiff, that defendants breached and damages. As long as the terms of the contract are set forth in their entirety and defendants are informed of the alleged misconduct, plaintiffs have stated a claim.

Contracts Law > Formation > Execution

Contracts Law > Remedies > Specific Performance

Contracts Law > Statutes of Frauds > General Overview

[HN5] The Statute of Frauds states that no action shall be brought to charge any person upon any contract for the sale of lands, or any interest in or concerning them unless the contract or a memorandum or note thereof is in writing and signed by the party to be charged. 740 Ill. Comp. Stat. 80/2. A real estate contract cannot be enforced unless it contains (1) the names of the vendor and vendee; (2) a description of the property which is sufficiently certain so that it can be identified; (3) the price, the terms and conditions of sale; and (4) the signature of the party to be charged.

Business & Corporate Law > Joint Ventures > General Overview

Contracts Law > Statutes of Frauds > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > Enforceability > Statutes of Frauds

[HN6] Joint ventures for the development of real estate are generally exempt from the Statute of Frauds unless

there is a provision for the transfer of specific land from one party to the other. The fact that the contract is one for a land partnership or for a division of profits and losses does not take it out of the Statute of Frauds if there is a provision that requires a transfer of land from one of the contracting parties to another.

Business & Corporate Law > Joint Ventures > Formation

Contracts Law > Statutes of Frauds > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

[HN7] In Illinois, joint ventures and partnerships formed for the development of real estate are generally exempt from the Statute of Frauds.

Contracts Law > Statutes of Frauds > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > Enforceability > Statutes of Frauds

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

[HN8] An agreement by which two parties agree that one will purchase the land and then transfer a portion of that land to the other falls within the Statute of Frauds.

Contracts Law > Statutes of Frauds > General Overview

[HN9] Under Illinois law, complete performance of a party's duties under a contract normally subject to the Statute of Frauds removes that contract from the ambit of the Statute.

Contracts Law > Statutes of Frauds > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > Enforceability > Statutes of Frauds

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

[HN10] A description of property is sufficiently definite under the Statute of Frauds if it will enable a surveyor, by aid of extrinsic evidence, to locate the property.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Rights of Partners > Losses & Profits

Business & Corporate Law > Joint Ventures > Management Duties & Liabilities

[HN11] A joint venture is an association of two or more persons to carry out a single enterprise for profit and the rights and liabilities of its members are tested by the same legal principles which govern partnerships.

Business & Corporate Law > General Partnerships > Formation > General Overview

Business & Corporate Law > Joint Ventures > Formation

Contracts Law > Types of Contracts > Joint Contracts

[HN12] In general, a plaintiff must plead the following elements to demonstrate that a joint venture existed: (1) an express or implied agreement to carry on some enterprise; (2) a manifestation of intent by the parties to be associated as joint venturers; (3) a joint interest as shown by the contribution of property, financial resources, effort, skill or knowledge by each joint venturer; (4) some degree of joint proprietorship or mutual right to exercise control over the enterprise; and (5) provision for the joint sharing of profits and losses.

Torts > Business Torts > Commercial Interference > Prospective Advantage > Elements

[HN13] The elements of tortious interference with prospective economic advantage are that: (1) the plaintiff had a reasonable expectation of entering into a valid business relationship; (2) the defendant knew of this expectancy; (3) the defendant purposefully interfered to prevent the expectancy from being fulfilled; (4) the plaintiff suffered damages from the interference; and (5) action by the interfering party directed towards the party with whom the plaintiff expects to do business.

Contracts Law > Consideration > Detrimental Reliance
Contracts Law > Consideration > Promissory Estoppel
Contracts Law > Statutes of Frauds > General Overview

[HN14] Promissory estoppel cannot sustain a claim based on promises otherwise barred by the Statute of Frauds.

COUNSEL: For ROBERT M BARRETT, JR, plaintiff: Michael J. Abernathy, Paul J. Walsen, Bell, Boyd & Lloyd, Chicago, IL.

For POAG & MCEWEN LIFESTYLE CENTERS-DEER PARK TOWN CENTER, LLC, POAG & MCEWEN LIFESTYLE CENTERS, LLC, defendants: Howard Steven Suskin, Kendra Seelye Collier, Jenner & Block, Chicago, IL.

JUDGES: JOAN B. GOTTSCHALL, United States District Judge.

OPINION BY: JOAN B. GOTTSCHALL

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff, Robert Barrett, brought this suit against defendants, Poag & McEwen Lifestyle Centers-Deer Park Town Center, LLC, and Poag & McEwen Lifestyle Centers, LLC, for allegedly violating an agreement regarding a real estate purchase. Specifically, Barrett raises as causes of action breach of partnership agreement, breach of fiduciary duty, interference with prospective economic advantage, and promissory estoppel. Defendants have moved to dismiss all four counts under *FED. R. CIV. P. 12(b)(6)* for failure to state a claim on which relief can be granted. For the following reasons, defendants' [*2] motion is granted as to Counts I, II, and IV but denied as to Count III.

I. BACKGROUND¹

1 The following facts are taken from Barrett's Verified Complaint and are assumed to be true. See *Fredrick v. Simmons Airlines, Inc.*, 144 F.3d 500, 502 (7th Cir. 1998).

In April 1998, Barrett became interested in buying the Kastning Property, a 10.929 acre plot located in Lake County, Illinois, consisting of two adjacent parcels, for the purpose of developing an assisted living community. Barrett only needed about half the property, however, so when he learned that defendants, developers of a shopping center on land adjacent to the property, were interested in buying the property but also required only half of the land, he decided to propose the formation of a partnership.

Sometime between April and June 1998, Barrett proposed to J. Scott Lucas, defendants' agent and Chief Financial Officer, that they join together to purchase the property. The parties agreed orally that: 1) defendants [*3] would negotiate with the Kastnings to secure a purchase option; 2) Barrett would cease efforts to purchase the property; 3) Barrett would assist defendants with due diligence; 4) defendants would buy the property in their own name; and 5) defendants would then transfer roughly half the property to Barrett in exchange for a pro-rata share of the purchase price. Compl. PP 11-12. The precise proportion of land each party was to receive was not agreed upon, however. *Id.* P 12.

Lucas sent Barrett a signed letter on June 18, 1998, that stated that defendants were to purchase the property

and "make use of 5.4 acres"; that Barrett would "purchase the balance"; that defendants "will require approximately 5.4 acres" of the land; that the price to Barrett would be \$ 110,000 per acre; that the parties agreed to divide all costs pro rata; and that "I am sure that other issues or concerns will present themselves. . . . Please take note of these items so that we can be sure that we are in basic agreement so far." *Id.* P 13.

At this point, Barrett began to finalize plans to develop the property, securing a "preliminary commitment" from a corporation that owned and operated assisted living [*4] communities to buy the portion of the Kastning Property he was to receive. *Id.* P 14. Defendants, through Lucas, were aware that Barrett had located a buyer for his share of the land.

Lucas negotiated for an option on the property, consulting with Barrett about terms of the agreement and negotiation strategies. Barrett was required to and did approve the terms of the option ultimately secured by Lucas on behalf of the parties. The option agreement approved by both parties and then signed by the trustees of the Kastning Property on June 24, 1998, required a \$ 5,000 signing bonus and \$ 10,000 option payment in exchange for a 45 day period within which Barrett and defendants could conduct the necessary due diligence. *Id.* P 18.

Both Barrett and defendants then began the due diligence process. As contemplated by the agreement between the parties, Barrett participated by reviewing and approving proposals for surveys to be performed on the property. Barrett also sent defendants a \$ 5,490 check on July 30, 1998, for his pro-rata share of the option payment and signing bonus, as per the parties' "then-current understanding of the percent of the total Kastning Property acreage each [*5] was to receive." *Id.* P 20.

On September 11, 1998, defendants returned the check, uncashed, and notified Barrett that the "originally proposed transaction is no longer viable." *Id.* P 21. As a result, Barrett brought suit in Illinois state court. Defendants removed the case to this court on December 4, 1998.

II. DISCUSSION

Defendants have moved to dismiss for failure to state a claim all four counts of Barrett's complaint. The court grants the motion with respect to Counts I (breach of partnership agreement), II (breach of fiduciary duty), and IV (promissory estoppel), but denies the motion with respect to Count III (interference with prospective economic advantage).

[HN1] On a *Rule 12(b)(6)* motion to dismiss, a complaint will be dismissed only if "it is clear that no relief

could be granted under any set of facts that could be proved consistent with the allegations." *Ledford v. Sullivan*, 105 F.3d 354, 357 (7th Cir. 1997). The issue is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence in support of his or her claims. *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995)). [*6] [HN2] Courts must treat all well-pleaded factual allegations in the complaint as true and must also draw all reasonable inferences from those allegations in the plaintiff's favor. *MCM Partners, Inc. v. Andrews-Bartlett & Assoc.*, 62 F.3d 967, 972 (7th Cir.1995). Courts need not, however, "strain to find inferences favorable to the plaintiffs which are not apparent on the face of the complaint." *Coates v. Illinois State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977). Nor are they required to ignore facts set forth in a complaint or exhibits that undermine the plaintiff's claim, *Hamilton v. O'Leary*, 976 F.2d 341, 343 (7th Cir. 1992), much less to accept legal conclusions alleged or inferred from the pleaded facts. *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1559 (7th Cir. 1991).

A. Count I: Breach of Partnership Agreement

In Count I, Barrett alleges that defendants breached the alleged partnership agreement. Defendants have moved to dismiss this count on the basis that the agreement is unenforceable under the Statute of Frauds. According to defendants, neither the parties' oral agreement nor the letter [*7] can support Barrett's claim, for an oral agreement to transfer real estate is unenforceable, and the letter lacks the information about the location, size, and price of the land to be conveyed that is required by the Statute of Frauds. Barrett, who characterizes the agreement as a partnership agreement to develop land, responds that the Statute of Frauds does not apply to such agreements and that, in any event, the complaint provides enough detail to state a claim for breach of contract. Because the description of the property Barrett was to receive was not adequately alleged, the court finds that the Statute of Frauds bars enforcement of the parties' agreement and thus must dismiss Count I.

[HN3] Partnership agreements are governed by the law of contracts. *Wislow v. Wong*, 713 F. Supp. 1103, 1107 (N.D. Ill. 1989). [HN4] To allege a breach of contract, the plaintiff must assert "formation of a contract, its terms, performance by the plaintiff, that defendants breached and damages." *Id.* at 1107-08 (citing *Cleland v. Stadt*, 670 F. Supp. 814 (N.D. Ill.1987)). "As long as the terms of the contract are set forth in their entirety and defendants are [*8] informed of the alleged misconduct, plaintiffs have stated a claim." 713 F. Supp. at 1108. Certain types of contracts, however are subject to the Statute of Frauds and cannot be enforced unless they have met its requirements. The first question in this case,

then, is whether the alleged partnership agreement must satisfy the Statute.

1. Statute of Frauds: Applicability

[HN5] The Statute of Frauds states that "no action shall be brought to charge any person upon any contract for the sale of lands,... or any interest in or concerning them" unless the contract or a memorandum or note thereof is in writing and signed by the party to be charged. 740 ILL. COMP. STAT. § 80/2. A real estate contract cannot be enforced unless it contains "(1) the names of the vendor and vendee; (2) a description of the property which is sufficiently certain so that it can be identified; (3) the price, the terms and conditions of sale; and (4) the signature of the party to be charged." *McDaniel v. Silvernail*, 37 Ill. App. 3d 884, 346 N.E.2d 382, 384 (Ill. App. Ct. 1976) (affirming dismissal of request for specific performance where description of property was uncertain). Defendants argue that [*9] the purported agreement inadequately alleges elements 2 (sufficient description) and 3 (price, terms, and conditions of sale).

Several courts have stated that [HN6] joint ventures² for the development of real estate are generally exempt from the Statute of Frauds "unless there is a provision for the transfer of specific land from one party to the other. . . . The fact that the contract is one for a land partnership or for a division of profits and losses does not take it out of the Statute of Frauds if there is a provision that requires a transfer of land from one of the contracting parties to another." ³ *Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339, 342 (2d Cir. 1963), (quoting 2 CORBIN ON CONTRACTS 418-19, 422-23 (1950)); see also *Gunsorek v. Heartland Bank*, 124 Ohio App. 3d 735, 1997 Ohio App. LEXIS 6015, *21, 707 N.E.2d 557 (Ohio Ct. App. 1997) (holding that "when the essential component of a partnership agreement is the conveyance of real property from one partner to another (either directly or through the partnership), and the alleged breach of said agreement is the failure of the partner to convey such property, [*10] the Statute of Frauds is implicated"); *Johnson v. Gilbert*, 127 Ariz. 410, 621 P.2d 916, 919 (Ariz. Ct. App. 1980) (holding that "a contract requiring a transfer of land from one partner or joint venturer to another is within the Statute of Frauds"). The court is aware of no authority holding the contrary proposition, namely, that an agreement for the development of real estate that also requires a transfer of land from one of the contracting parties to the other is exempt from the Statute of Frauds.

2 A joint venture is "an association of two or more persons to carry out a single enterprise for profit." *Barton v. Evanston Hosp.*, 159 Ill. App. 3d 970, 513 N.E.2d 65, 67, 111 Ill. Dec. 819 (Ill. App. Ct. 1987). In his complaint, Barrett alleged

that he and defendants were partners; in their motion to dismiss, defendants, citing *Barton, id.*, pointed out that relationships formed for carrying out a single enterprise are properly termed joint ventures. As "joint venture" appears to be the relevant term, and as Barrett himself appears to have accepted this change in terminology in his response, the court will refer to the relationship between Barrett and defendants as a joint venture from this point forth.

[*11]

3 Illinois courts do not appear to have addressed this issue directly.

[HN7] In Illinois, as in New York, see *Backus*, 317 F.2d at 342; Ohio, see *Gunsorek*, 124 Ohio App. 3d 735, 1997 Ohio App. LEXIS 6015, at *21, 707 N.E.2d 557; and Arizona, see *Johnson*, 621 P.2d at 919, joint ventures and partnerships formed for the development of real estate are generally exempt from the Statute of Frauds. *Harmon v. Martin*, 395 Ill. 595, 71 N.E.2d 74, 82 (Ill. 1947) (stating that "such an agreement is not within the Statute of Frauds"); *Fitch v. King*, 279 Ill. 62, 116 N.E. 624, 624 (Ill. 1917) (holding that "an agreement for a partnership for the purpose of dealing and trading in lands for profit is not within the Statute of Frauds, and the existence of the partnership and the extent of each party's interest in it may be shown by parol [evidence]"); *VanHousen v. Copeland*, 180 Ill. 74, 54 N.E. 169, 172 (Ill. 1899) ("An oral agreement to form a partnership for the purpose of trading in real estate for profit is not within the Statute of Frauds"). Barrett relies on these [*12] cases in arguing that his agreement with defendants is exempt from the Statute of Frauds. There is no indication in Illinois law, however, that joint ventures formed for the purpose of transferring land from one joint venturer to another are also exempt. In fact, the most analogous Illinois case, *Lipkin v. Koren*, 392 Ill. 400, 64 N.E.2d 890 (Ill. 1946), indicates that such transactions fall within the Statute of Frauds.

In *Lipkin*, the court presumed that an agreement similar to the one at bar was subject to the Statute of Frauds. The plaintiff, who was negotiating to buy a piece of real estate, told the defendant that a reduced price could be obtained by making the purchase with cash. *Lipkin*, 64 N.E.2d at 892. The defendant agreed to finance the purchase if: 1) he, his brother, and the plaintiff would each become owners of a one-third interest; 2) he could negotiate the purchase; and 3) title to the property were placed in his sister's name for the sake of convenience. *Id.* Once the transaction was closed, however, the sister refused to convey the plaintiff's one-third interest in the property as well as other profits received by the partnership [*13] for rentals even though the plaintiff tendered payment for his interest. *Id.* at 893. Applying

the Statute of Frauds, the court held that the parties' detailed written agreement fulfilled the Statute and was therefore valid. *Id.* at 894.

The transaction in *Lipkin* is similar to the one in this case, where the parties agreed that one party would purchase land for the sake of convenience and then transfer a portion of that property, for payment, to the other party. *Lipkin's* assumption that land deals such as these fall under the Statute of Frauds has never been overruled or even criticized. The court thus believes that [HN8] an agreement by which two parties agree that one will purchase the land and then transfer a portion of that land to the other falls within the statute.

The court also rejects Barrett's argument that defendants have misconstrued the parties' agreement as a contract for real estate rather than as one establishing a partnership. *Lipkin* addressed the Statute of Frauds in terms of the land agreement, not the partnership, in discussing the sufficiency evidence regarding the price to be paid by the plaintiff for the land. *Lipkin*, 64 N.E.2d at 893; [*14] see also *Backus*, 317 F.2d at 342 (holding that "the label 'joint venture' will not remove the bar of the statute when, as here, the very essence of the asserted venture is a sale from one 'venturer' to the other"). The central focus of the alleged venture in this case, as in *Lipkin* and *Backus*, is an agreement to transfer land. Accordingly, the court holds that the case falls under the Statute of Frauds.⁴

4 [HN9] Under Illinois law, complete performance of a party's duties under a contract normally subject to the Statute of Frauds removes that contract from the ambit of the Statute. *Cleland v. Stadt*, 670 F. Supp. 814, 817 (N.D. Ill. 1987). Although Barrett, an experienced businessman, has alleged that he fulfilled "each partnership obligation" with the exception of "paying his pro rata share of the purchase price of the property," Compl. P 26, he has not invoked the doctrine of complete performance, relying instead on his erroneous argument that real estate deals such as his are not within the Statute. Although the court has some sympathy for Barrett's position, the court declines to rely on the doctrine as a basis for denying defendants' motion to dismiss because it is not apparent that the doctrine, which Barrett in any event failed to raise, would apply in this case. Among other things, the court notes that it has been presented with no authority indicating whether Barrett's inability to make payment—even if caused by defendants' wrongful refusal to accept payment—precludes him from asserting complete performance. The court further notes that Barrett's reference to having paid his

"pro rata share of the purchase price" is misleading, for the \$ 5490 check that he tendered to defendants was for his pro rata share of the \$ 10,000 option payment and \$ 5000 signing bonus, Compl. P 20, not for his pro rata share of the purchase price of the land itself, which he never made any effort to tender.

[*15] 2. Satisfying the Statute of Frauds

In support of his allegations, Barrett has pleaded that the parties "entered into partnership for the particular purpose of realizing the development potential of the Kastning property. This partnership was to continue in effect until the Kastning Property had been apportioned between Barrett and defendants in accordance with the partners' understanding and agreement that defendants would ultimately own approximately one-half of the property and Barrett would own the other half." Compl. P 23. Barrett further argues that the letter Lucas sent to Barrett contained the "essential aspects" of the parties' agreement, including the name of the property, the approximate acreage each party would receive, the price per acre, and provision for pro-rata sharing of costs. *Id.* P 13.

a. Description of the property

Defendants argue that Barrett has not adequately alleged a written agreement with a sufficient description of the property that was to be transferred to and purchased by Barrett. Barrett disagrees, asserting that his allegations are adequate for the purposes of a motion to dismiss. As the court agrees that the description [*16] of the property Barrett was to receive is inadequate, the Statute of Frauds bars enforcement of the alleged agreement.

As discussed above, an agreement whose central purpose is the transfer of real estate between the parties is subject to the Statute of Frauds. Accordingly, the terms of the agreement must be set forth in writing. *Lipkin*, 64 N.E.2d at 890. "[HN10] A description of property is sufficiently definite if it will enable a surveyor, by aid of extrinsic evidence, to locate the property." *Kane v. McDermott*, 191 Ill. App. 3d 212, 547 N.E.2d 708, 712, 138 Ill. Dec. 541 (Ill. App. Ct. 1989). In this case, Barrett never provides any precise description of the location or amount of land within the Kastning Property that he was to receive.⁵ Indeed, he concedes that "the precise proportion of the Kastning Property each partner was to receive had yet to be determined, [but] the partners agreed that Barrett would receive roughly one-half." Compl. P 12. The most specific allegation he includes is an approximate description of the amount of land *defendants* were to retain, as described in the letter in which Lucas states defendants "will make use of [*17] 5.4 acres" and will require "approximately 5.4 acres of the [Kastning Prop-

erty] and... [Barrett] will purchase any of the remaining [Kastning Property]." ⁶ *Id.* P 13. Even with extrinsic evidence, no surveyor could locate within the Kastning Property the parcel of land Barrett was to receive. *Basden v. Finck*, 106 Ill. App. 3d 108, 435 N.E.2d 783, 786, 61 Ill. Dec. 942 (Ill. App. Ct. 1982) (affirming dismissal of complaint where "the description of the land [was] insufficient because even a surveyor, with the aid of extrinsic evidence, would be unable to locate the property constituting the subject matter of the [purported] contract"); see also *McDaniel*, 346 N.E.2d at 384 (affirming summary judgment where "from this document, a court would be unable to locate the boundaries of the property to be conveyed" and where the boundaries had yet to be established by "mutual consent"). Accordingly, the court must find that the description of the property Barrett was to receive fails to satisfy the Statute of Frauds.

5 The court notes that cases like *Ace Novelty Co. v. Vijuk Equip. Inc.*, 1990 U.S. Dist. LEXIS 11525, 1990 WL 129510, at *8 (N.D. Ill. 1990) (holding that "only if a term is completely unambiguous will a court be able to conclusively establish its meaning as a matter of law. If there is latent ambiguity in the term at issue, the contracting parties' intentions become relevant and the issue of meaning is transformed into one of fact"), do not lend much support to Barrett's claim. The issue at hand is not so much the ambiguity of the terms as their absence, for the terms of Lucas's letter are *insufficient* as to the description of the land, not unclear.

[*18]

6 To the extent the complaint suggests that defendants sought about 5.4 acres in the "southwest corner" of the Kastning Property, Compl. P 9, presumably because that corner was adjacent to their shopping mall development, this is still not sufficient to establish the boundaries of defendants' parcel, much less Barrett's.

b. Price, terms, and conditions of sale

Defendants further argue that Barrett has not adequately alleged the price of sale, form of payment, or time frame for payment in the agreement. Barrett does not respond directly to the contention regarding price but does cite *Kane*, 547 N.E.2d at 712-13, for the proposition that the court may infer a performance date for a contract from well-established local custom. Pl.'s Resp. at 11. Given the court's disposition on the preceding issue of description of the property, it need not address the further deficiencies alleged in regard to price, form of payment, or time frame for payment.

Because the Statute of Frauds applies to the alleged agreement, and because Barrett has not met the Statute's

requirement [*19] regarding the description of his portion of the Kastning Property, the court must dismiss Count I.

B. Count II: Breach of Fiduciary Duty

In Count II, Barrett alleges that defendants breached a fiduciary duty to him by reneging on their agreement to transfer half the Kastning Property. Defendants respond by arguing that Barrett inadequately alleges the joint venture that forms the basis for alleged breach the fiduciary duty.⁷

7 The court notes that, for purposes of Count I, the parties appear to have assumed the existence of a joint venture and to have debated whether the alleged agreement was enforceable in light of the Statute of Frauds. In Count II, by contrast, the parties debate whether such a venture existed at all. The court has tracked the framework established by the parties in assessing each count.

[HN11] A joint venture is "an association of two or more persons to carry out a single enterprise for profit...and the rights and liabilities of its members are tested by the same legal principles [*20] which govern partnerships." *Barton v. Evanston Hosp.*, 159 Ill. App. 3d 970, 513 N.E.2d 65, 67, 111 Ill. Dec. 819 (Ill. App. Ct. 1987). "[HN12] In general, a plaintiff must plead the following elements to demonstrate that a joint venture existed: (1) an express or implied agreement to carry on some enterprise; (2) a manifestation of intent by the parties to be associated as joint venturers; (3) a joint interest as shown by the contribution of property, financial resources, effort, skill or knowledge by each joint venturer; (4) some degree of joint proprietorship or mutual right to exercise control over the enterprise; and (5) provision for the joint sharing of profits and losses." ⁸ *Quadro Enterprises, Inc. v. Avery Dennison Corp.*, 1997 U.S. Dist. LEXIS 19564, 1997 WL 769345, at *3 (N.D. Ill. 1997) (citing *Ambuul v. Swanson*, 162 Ill. App. 3d 1065, 516 N.E.2d 427, 431, 114 Ill. Dec. 272 (Ill. App. Ct. 1987)); see also *Barton*, 513 N.E.2d at 67 (citing *Electrical Contractors, Inc. v. Goldberg & O'Brien Electric Co.*, 29 Ill. App. 3d 819, 331 N.E.2d 238 (Ill. 1975)). Defendants argue that Barrett has failed to allege the first (the existence [*21] of an agreement--termed a "meeting of the minds" by defendants), fourth (mutuality of control), and fifth (provision for joint sharing of profits and losses) elements of a joint venture.

8 The court's extensive review of Illinois law has revealed that Illinois courts in decades past did not necessarily require that all five of these elements be alleged in order to show the existence of a joint venture; rather, the case law posulated that the presence of these elements was

indicative of a joint venture but suggested that other factual circumstances might also be relevant to the determination. *See, e.g., Carroll v. Caldwell*, 12 Ill. 2d 487, 147 N.E.2d 69, 74 (Ill. 1957) (stating that "courts have not laid down an exact definition of what amounts to a joint adventure inasmuch as the answer depends largely upon the terms of the particular agreement, upon the construction which the parties have given it, and upon the nature of the undertaking as well as other facts. The most that can be done, it is said, is to point out certain general characteristics of the relationship of joint adventurers, and certain elements which are generally regarded as essential thereto"); *Richton v. Farina*, 14 Ill. App. 3d 697, 303 N.E.2d 218, 222 (Ill. App. Ct. 1975) (noting that "precise definition is difficult").

More recently, however, the trend in Illinois cases has been to define "joint venture" by these five elements and to require all five to be alleged. *See e.g. Fitchie v. Yurko*, 212 Ill. App. 3d 216, 570 N.E.2d 892, 899, 156 Ill. Dec. 416 (Ill. App. Ct. 1991); *Palin v. Water Technology, Inc.*, 103 Ill. App. 3d 926, 431 N.E.2d 1310, 1315, 59 Ill. Dec. 553 (Ill. App. Ct. 1982); *but see Holstein v. Grossman*, 246 Ill. App. 3d 719, 616 N.E.2d 1224, 1226, 186 Ill. Dec. 592 (Ill. App. Ct. 1993) (stating these elements are "generally" determinative of intent). Moreover, the court notes that it is aware of no Illinois case in which a court has held that a joint venture was sufficiently alleged without an allegation of profit-sharing, and even early cases emphasized that a joint venture was "an association of such joint undertakers to carry out a single project for profit... [with] a duty, which may be altered by agreement, to share both in profit and losses." *Carroll*, 147 N.E.2d at 74.

[*22] Because this case is in federal court, "the plaintiff...need not plead the elements of the claim with the same specificity necessary in state court." *Quadro*, 1997 WL 769345, at *3 (stating that "perhaps pleading 'joint venture'... would be enough absent allegations that cut against that legal conclusion but granting motion to dismiss where plaintiff 'had not adequately alleged' the element of joint control"). Nevertheless, the court must be able to infer each of the elements of a joint venture from the facts and conclusions alleged in Barrett's complaint in order to find that Count II states a claim. Since the court finds that Barrett's allegations cut against the element of profit and loss sharing, the court must dismiss Count II.

a. Joint sharing of profits and losses⁹

9 Barrett argues that he need only allege profit sharing, citing *Ditis v. Ahlvin Constr. Co.*, 408 Ill. 416, 97 N.E.2d 244, 250 (Ill. 1951), whereas defendants argue that he must allege both profit and loss sharing, citing *Donohoe v. Consolidated Operating & Production Co.*, 982 F.2d 1130, 1139 (7th Cir. 1992) (rejecting argument that a joint venture existed where there was no evidence that alleged joint venturers agreed to share in both profits and losses). Because Barrett has not adequately alleged profit-sharing, the court need not resolve this dispute.

[*23] Barrett alleges that he and defendants became joint venturers "with the common undertaking of maximizing the development potential of the Kastning property to their mutual benefit," Compl. P 31, pointing out that "by acting collectively, the partners could achieve a lower effective price per acre for the property they needed than would otherwise be possible because all transaction costs could be shared among the partners," *id.* P 10, and that "the parties recognized that they could acquire the property they needed more easily and at lower cost by working together rather than independently." *Id.* P 2. He further alleges that the parties "agreed to divide all costs associated with the inspection and acquisition of [the Kastning Property] on a pro-rata basis," *id.* P 13, including "due diligence and development costs." *Id.* P 11.

The court agrees with defendants that Barrett has not pled the element of profit sharing. Although Barrett does allege a sharing of financial costs and benefits in the arrangement, Compl. PP 2, 10, 11, 13, 31, he does not allege the sharing of profits, and his description of the nature of the deal with defendants cuts against any inference of [*24] profit sharing. Accordingly, it would not be appropriate or reasonable for the court to infer, even under Rule 8's liberal notice pleading requirements, that Barrett has alleged the sharing of profits.

First, Barrett's allegations that the parties could, by acting collectively, achieve "a lower effective price per acre" and thereby acquire the property at "lower cost" cannot reasonably be read as an allegation of *profit* sharing. Rather, these allegations suggest that the parties hoped to *save themselves money* by joining together to acquire the property, not that they hoped to reap additional money, i.e., profits, from acquiring and developing the property together. At best, therefore, Barrett has alleged a sharing of economic benefits.

Moreover, Illinois case law appears to distinguish between shared economic benefits and shared profits, which suggests that the latter is not meant to encompass the former. For example, in a case where contractors benefitted from submitting a joint quote for their respec-

tive products, the court held that the plaintiff did not establish a joint venture because "the testimony concerning this joint marketing effort does not disclose whether there [*25] was to be a sharing of profits and losses." *Palin Mfg. Co. v. Water Tech., Inc.*, 103 Ill. App. 3d 926, 431 N.E.2d 1310, 1314, 59 Ill. Dec. 553 (Ill. App. Ct. 1982); see also *Hallmark Ins. Admin., Inc. v. Colonial Penn Life Ins. Co.*, 697 F. Supp. 319, 326 (N.D. Ill. 1988) (holding that a contract that established a "commission arrangement" under which a defendant paid the plaintiff for insurance policy processing did not satisfy the element of shared profits and losses). In contrast, a more typical example of profit sharing occurs in *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807, 810 (Ill. App. Ct. 1965), in which the parties agreed orally to develop real estate into a hotel and split the profits from that hotel. The case at bar resembles *Palin* far more than *Polikoff*, and the court accordingly finds that Barrett's allegations rise only to the level of shared economic benefits, not shared profits.

Second, because the very agreement Barrett alleges would have required splitting up the property between the parties, with each party to go its separate way in developing its parcel, the court cannot infer a sharing of profits [*26] from the overall transaction itself. Barrett's allegation that the arrangement the parties devised aimed to split costs and benefits cuts against the legal conclusion of a joint venture. The only reasonable conclusion to draw from the complaint, read as a whole, is that the joint venture would have been complete once Barrett's parcel was transferred and the costs of acquiring the property as a whole were paid, in which case no profits from either party's anticipated enterprise were ever to have been shared with the other.

Under the circumstances as alleged in the complaint, the court cannot find or infer an allegation of shared profits.

b. Other elements

In light of the court's conclusion that Barrett has not satisfied the fifth element of a joint venture, the court need not address defendants' additional arguments that Barrett failed to satisfy the first and fourth¹⁰ elements of a joint venture.

¹⁰ The court notes, however, that defendants' argument that Barrett inadequately alleged the element of mutual control is based on the inaccurate assertion that "plaintiff fails to cite anything in his complaint that alleges that plaintiff possessed the power to shape or veto *any* decision made by defendants." Def.'s Reply at 11. Contrary to defendants' statement, Barrett alleges that Lucas "consulted with Barrett about the terms of

the proposed option as well as the best strategy to use in negotiations with the trustees... [and] Barrett... was required to and did approve the terms of the option," Compl. P17, and that, per the parties' agreement, he reviewed and approved proposals as part of the due diligence process. *Id.* P 19.

[*27] As Barrett has failed to plead the sharing of profits, an element central to the existence of a joint venture, and because the nature of the agreement as described in the complaint excludes any possibility of profit sharing, the court must dismiss Count II.

C. Count III: Tortious Interference with Prospective Economic Advantage

In Count III, Barrett charges defendants with tortious interference with prospective economic advantage on the basis that defendants knew about and interfered with his plans to sell his portion of the Kastning Property to a corporation that owned and operated assisted living communities. [HN13] The elements of tortious interference with prospective economic advantage are that: 1) the plaintiff had a reasonable expectation of entering into a valid business relationship; 2) the defendant knew of this expectancy; 3) the defendant purposefully interfered to prevent the expectancy from being fulfilled; 4) the plaintiff suffered damages from the interference; and 5) "action by the interfering party directed towards the party with whom the plaintiff expects to do business." *Cook v. Winfrey*, 141 F.3d 322, 327 (7th Cir. 1998) (quoting *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 639 N.E.2d 144, 147, 203 Ill. Dec. 105 (Ill. 1993)); [*28] see also *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 288 Ill. App. 3d 880, 681 N.E.2d 564, 569, 224 Ill. Dec. 249 (Ill. App. Ct. 1997). Defendants argues that Barrett has failed to plead adequately only the last element: action directed towards a third party. Although this contention presumably would succeed were this case still in Illinois state court, in *Cook* the Seventh Circuit made it clear that district courts must apply federal notice pleading standards to such counts--and under the federal standard, Barrett's claim survives defendants' motion to dismiss.

In support of his allegation of interference with prospective economic advantage, Barrett has stated that he "had secured a preliminary commitment from a corporation to buy the portion of the Kastning Property that Barrett was to receive"; Compl. P 36; that "based on this preliminary commitment, Barrett had a reasonable expectation of entering into a valid business relationship with that corporation," *id.*; that "Defendants... knew and intentionally interfered with Barrett's expectancy, thus preventing Barrett's legitimate expectancy from ripening into a valid business relationship, by, among [*29] other

things, attempting to disavow the very existence of the partnership in order to escape their obligation to convey [the property] and appropriating for their own use and benefit the partnership opportunity to purchase the Kastning Property," *id.* P 37; and that "as a direct and proximate result of the breach by defendants of the partnership agreement, Barrett has suffered damages." *Id.* P 38. Under Cook, these allegations adequately state a claim for tortious interference with prospective economic advantage.

The claim for interference in *Cook*, 141 F.3d 322, which was found sufficient, is similar to Barrett's. In *Cook*, the plaintiff alleged that the defendant "improperly interfered with [Cook's] 'ability to enter into contracts or business relationships with third parties interested in purchasing the rights to publication of his experiences.'" *Id.* at 328. The Seventh Circuit held that Cook was "under no obligation to plead further the facts that he believes support his claim" because "the Federal rules do not require that his complaint allege the specific third party or class of third parties with whom he claims to have had a valid [*30] business expectancy. He has alleged that such an expectancy existed and that [the defendant] purposely interfered with it." *Id.*

Barrett's allegation goes into even greater detail than Cook's given that he alleges a specific agreement with a specific company and also alleges that defendants wrongfully interfered with this agreement. Compl. P 36-37. Since Cook's tortious interference claim, which was less specific than Barrett's, could not be dismissed, the court will not dismiss Count III of Barrett's complaint. See also *Promatek Indus., Ltd. v. Equitrac Corp.*, 185 F.R.D. 520, 1999 WL 124390, at *5 (N.D. Ill. 1999) (stating that "under the Federal Rules of Civil Procedure's venerable system of notice pleading, a plaintiff need not allege that it had a reasonable expectation of a business relationship with a specific third party or class of third parties").

The court must reject defendants' criticism of Barrett's use of Cook. Defendants argue that "*Cook* merely held that 'the Federal Rules do not require that his complaint allege the specific third party or class of third parties with whom [plaintiff] claims to have had a valid business expectancy.' [141 F.3d at 328] [*31] However, conduct directed towards *some* third party is still an element of tortious interference with a prospective economic advantage. See, e.g., *Grund*, [Grund v. Donegan, 298 Ill. App. 3d 1034, 700 N.E.2d 157, 161, 233 Ill. Dec. 56 (Ill. App. Ct. 1998)]." Defendants appear to have misconstrued *Cook*. To wit: when Cook argued that a class of third parties could be inferred from his complaint, the Seventh Circuit replied:

This entire argument strays rather far afield from the minimal requirements of federal notice pleading. Having alleged that Winfrey improperly interfered with his 'ability to enter into contracts or business relationships with third parties interested in purchasing the rights to publication of his experiences,' Cook is under no obligation to plead further the facts that he believes support his claim

141 F.3d at 328. The allegation the Seventh Circuit identified as sufficient in *Cook* is similar to Barrett's allegation that Lucas "interfered with Barrett's expectancy [of 'entering into a valid business relationship with [another] corporation']". Compl. PP 36-37. It is sufficient that the court can postulate facts, [*32] consistent with Barrett's allegations, from which the element of action directed at the third party may be inferred.

In light of *Cook*, defendants' argument that Illinois law requires a specific allegation that their interfering actions were directed at a third party must fail. With a single exception, *Grund v. Donegan*, 298 Ill. App. 3d 1034, 700 N.E.2d 157, 233 Ill. Dec. 56 (Ill. App. Ct. 1998), defendants rely on cases decided before *Cook*. The court acknowledges that those cases did, indeed, require such an allegation. *Schuler*, 639 N.E.2d at 147; *Douglas Theater*, 681 N.E.2d at 569; *Silk v. City of Chicago*, 1997 U.S. Dist. LEXIS 20654, at *69 (N.D. Ill. 1997) (emphasizing that the tortious interference allegedly committed by the defendant must be directed toward a third party, not the plaintiff, in rejecting anomalous attempt by plaintiff, the breaching party, to sue the party that induced plaintiff's breach for tortious interference with prospective business advantage). But *Cook* does not.

Grund, 700 N.E.2d at 161, an Illinois state case decided several months after *Cook*, [*33] does not alter the court's analysis under *Cook* because *Grund* was based on an Illinois rule of civil procedure, section 2-615, which "attacks the sufficiency of a complaint and raises the question of whether the complaint states a cause of action upon which relief can be granted." *Grund*, 700 N.E.2d at 161 (citing 735 ILL. COMP. STAT. § 5/2-615 (West 1996)). As the state court in *Grund* explained, specific pleading was required because "Illinois is a fact pleading jurisdiction [citations omitted]. Although both sections 2-603(c) and 2-612(b) of the Code [citations omitted] mandate the liberal construction of pleadings, these provisions do not authorize notice pleading." *Id.* In contrast, Barrett's case is governed by the Federal Rules of Civil Procedure, and *Cook*'s construction of Rule 8's notice pleading requirement applies. *Cook*, 141 F.3d at

327-328. Thus, for purposes of assessing Barrett's pleadings in this court, defendants wrongly assert that Barrett must allege that defendants' interfering actions were directed at a third party. It is sufficient that the court can postulate facts, consistent with Barrett's allegations, [*34] from which this element may be inferred. Accordingly, defendants' motion to dismiss Count III is denied.

D. Count IV: Promissory Estoppel

In Count IV, Barrett alleges that he is entitled to damages on the basis of promissory estoppel because defendants reneged on a promise to convey approximately half of the Kastning Property to him at a price based on the pro-rata cost of acquiring the property. Barrett postulates that defendants knew or should have known that he would (and did) rely on this promise, that enforcement of the promise would prevent injustice, and that he suffered damages as a result of defendants' failure to keep the promise. Defendants respond that promissory estoppel cannot sustain a claim barred by the Statute of Frauds. As the court agrees with defendants that promissory estoppel is unavailable where the claim is based upon a promise that would otherwise be barred by the Statute of Frauds, the motion to dismiss is granted as to Count IV.

[HN14] Promissory estoppel cannot sustain a claim based on promises otherwise barred by the Statute of Frauds. *Peoria Assocs. Ltd. Partnership v. Best Buy Co., Inc.*, 995 F. Supp. 823, 824 (N.D. Ill. 1997); [*35] see also *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 680 N.E.2d 1347, 1352, 223 Ill. Dec. 911 (Ill. 1997) (holding that "promissory estoppel does not bar the ap-

plication of the statute of frauds in Illinois"). As the court explained in *Peoria Assocs.*, 995 F. Supp. at 824, "we see no reason to privilege for Statute of Frauds purposes half-breed promissory estoppel promises over 'real' contracts. If anything, such promises seem even more susceptible to the abuses at which the Statute is aimed." See also *Dickens v. Quincy College Corp.*, 245 Ill. App. 3d 1055, 615 N.E.2d 381, 385-86, 185 Ill. Dec. 822 (Ill. App. Ct. 1993) (stating that "it is logical that, if the Statute of Frauds bars enforcement of an oral contract...it also bars the courts from using promissory estoppel to imply the existence of a contract").

Barrett does not address this issue in his response, apparently relying on his contention that the agreement between the parties was exempt from the Statute of Frauds. For the reasons set out in Count I, *supra* section II.A., the agreement does fall within the Statute of Frauds. Accordingly, the motion to dismiss Count [*36] IV is granted.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted in part and denied in part. Counts I, II, and IV of Barrett's complaint are dismissed, but the motion to dismiss is denied with respect to Count III.

ENTER:

JOAN B. GOTTSCHALL

United States District Judge

DATED: August 23, 1999