SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX -PART IA-4

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THOMAS LEE,

Plaintiff,

-against-

DECISION/ORDER

ANTHONY CIARAMELLA, YOLANDA SELVAGGI, and "JOHN DOE #1" through and including "JOHN DOE #10", said names being fictitious, the persons or parties, corporations or entities, if any, having or claiming an interest or lien upon, or occupying the premises described in the complaint,

Index No.: 381107-07

Present:
Howard H. Sherman
J.S.C.

Defendants.

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This is an action seeking, amongst other things, the specific performance of a contract to develop a waterfront parcel of land, money damages, with additional causes of action sounding in unjust enrichment, impression of an equitable lien, imposition of a constructive trust, fraud, and an accounting. Two other causes of action based on mechanics liens for work and materials furnished were dismissed by order of Justice Suarez dated February 1, 2010. The defendants Anthony Ciaramella ["Ciaramella"] and Yolanda Selvaggi have counterclaimed for money damages for alleged breach of contract by the plaintiff Thomas Lee ["Lee"']. I will also refer to Ciaramella as "defendant" since the Co-defendant Yolanda Selvaggi – Mr. Ciaramella's mother – has been named as a defendant

in this matter solely to effectuate specific performance as alleged in the complaint, as she was not an active participant in the contractual negotiations or transactions, real or imagined, between Lee and Ciaramella.

The trial without a jury was conducted before me on February 14 and 15, 2011. The witnesses at the trial were the plaintiff Lee, the defendant Ciaramella, the defendant Ciaramella's mother in law Nicoletta Sofia, and an architect, Michael DePasquale. The plaintiff Lee was represented by Maizes & Maizes by Michael H. Maizes Esq, while the defendants were represented by Delbello, Donnellan Weingarten Wise & Wiederkehr LLP by Brian T. Belowich Esq.

The Art of the Deal

> Q. Let me ask you this:
> Putting aside Exhibit F, do you have any proof in any of the documents that we discussed or that have been introduced that Tommy, on January 4, 2005, agreed to pay you 139 thousand dollars.
> A. Do I have any proof?
> Q. Yes, other than your word.
> A. I have a witness.
> Q. We heard your witness.
> Do you have anything in writing?
> A. There was nothing in writing in the whole deal.
>
> Trial Transcript ["Tr"] 275:5-275:15.

At issue in this matter is an alleged oral contract, or series of oral contracts between Lee and Ciaramella to develop real property located at 1426-1428-1430 Lake Shore Drive in the Bronx.

The defendant Ciaramella acquired title to 1430 Lake Shore Drive, Bronx New York on July 18, 2001. The purchase price was $405,000, financed with a mortgage of $365,000, with the balance in cash. His attorney at the closing was the plaintiff Thomas Lee, who had represented Ciaramella for many years. As the parcel consisted of three lots with beach front access and riparian rights, in addition to a one family residential dwelling, Ciaramella had purchased it with the intention of subdividing the parcel and building two additional structures on the two other lots. He entered into an oral agreement with Lee to accomplish this. Ciaramella moved into the existing home at 1430 Lake Shore Drive in 2001, and he continues to reside in this home.

The initial agreement was that Lee would undertake a subdivision and 'demapping' of the parcel at his own expense, and also pay the cost of the two new homes to be constructed, while Ciaramella would, in addition to providing the land, pay the carrying costs on the lot, including taxes and mortgage payments. Nothing was proven at trial as to the specifications for these new houses, but presumably both would be single family homes. The complaint also indicates that an agreement to rehabilitate the existing house – which Ciaramella continues to live in – was also a part of the contract, but the proof at trial did not touch on this additional matter.

The parties agree that this agreement was struck sometime in May 2001, two months before the closing. Ciaramella asserts that Lee represented that the entire process, including

de-mapping, subdivision, and construction of the two homes, would take no more than one year. As there is no written contract, we have only Ciaramella's representation that this one year term was a material part of their agreement. There is no dispute, however, that the parties agreed that upon completion of the two homes, Lee would receive one of the homes, and Ciaramella the other, to live in, sell, or make such use of as they chose. Which house would go to which man, and the specifications for each, does not seem to have been part of their concluded negotiation, at least at first.

The construction did not proceed as anticipated. Lee contends that Ciaramella selected an architect to file the building plans, Michael Depasquale, who failed to file until November 7, 2002.. Ciaramella testified that Lee continuously misrepresented the status of the subdivision and de-mapping process. Indeed, the evidence establishes that the de-mapping application was not filed until January 5, 2005, more than three years after the initial agreement.

Sometime in June 2002, as the defendant complained that he was not working, that he was "broke", and facing foreclosure since no construction had commenced, the parties agreed that Lee would absorb some of Ciaramella's carrying costs. The defendant claimed that Lee specifically promised to pay him $3000 per month until the project was completed, while Lee stated that he merely agreed to pay Ciaramella money from time to time to help ward off foreclosure. The consideration for this additional financial contribution by Lee

was alleged by the defendant to be Ciarmella's agreement to refrain from bringing suit against Lee. Lee stated that he agreed to this merely because he did not want the deal to collapse.

Although construction began, the Department of Buildings issued two stop work orders in 2003 halting construction because the properties had not been first subdivided or de-mapped. Construction re-commenced, without de-mapping, in 2004, and the parties engaged in acrimony over the slow pace of construction, but the evidence at trial showed that at no time in the course of their dealings did Ciaramella fire Lee, force the builder off the land , or cancel the agreement.

The matter reached a crisis point on January 4, 2005. Ciaramella and Lee met at Ciaramella's home, on a day when the defendant's mother in law, Nicoletta Sofia, was on an upper floor at the house caring for the defendant's infant daughter. Ciaramella claims that on that date Lee sweetened the deal further, in consideration for the slow pace of construction, and Ciaramella's renewed agreement to refrain from filing suit. First, Lee would pay a lump sum of $139,000 to Ciaramella immediately, from the proceeds of a closing that was imminent. This was allegedly payment for arrearage in the $3000 per month schedule, which Lee had been meeting only sporadically. In addition, defendant contends that Lee further agreed to pay him $500,000.00 at the time of closing, this apparently intended to occur upon the sale of both houses. These were allegedly damages

for five years of lost profits suffered by the defendant due to the delay in completion of the project. Again, the consideration for this second, more generous, revision of the original agreement, purportedly, was Ciaramella's agreement to refrain from filing suit against Lee for breach of their agreement, as revised in 2002.

The defendant produced a witness to these events, his mother in law, Nicoletta Sofia. Ms. Sofia told the Court that the raised voices of the two men made her break from her baby-sitting duties, in time to hear Lee specifically agree to pay the sums of $139,000 and $500,000, but, aside from these two monetary figures, she had almost no recollection of any other details of the incident.

Ms. Sofia was identified as a witness in this matter in 2008, and was imprecise in her testimony:

> Q. Is it your testimony that you had no conversations with your son-in law about the events that took place on the date that you described up until the time he asked you to come to Court?
> A. I think once or twice but –
> Q. He did not call you up and tell you that Tommy is suing me and you are going to need to be a witness. Lets go over it.
> A. Once or twice. There is nothing to go over.
>
> Tr. 188:11-188:17.

The answer filed by Ciaramela, as noted at the trial, contains an affirmative claim that the alleged promise to pay $500,000 was made by Lee in February 2005, not January, as alleged by the defendant and his witness at trial.

Get it In Writing

Q. When was the first time, in writing, that you ever allege that there was a deal in place for Mr. Lee to pay you 139 thousand dollars?
A. The first time when I spoke with my attorneys.
Q. After the lawsuit had already started; correct?
A. Okay.
Q. No time prior to you being sued did you make a written statement that Mr. Lee agreed to pay you 139 thousand dollars?
A. No, we knew what our agreement was. Why do I have to write it to him?

Tr. 276:3-276:12

Lee contended -- inconsistently as we shall see -- that the sum of $139,000 was the amount of monies that he had already paid to Ciaramella, not a sum that he agreed to pay prospectively. As to the further sweetener of $500,000, Lee's attorney characterizes this as a figment of Ciaramella's imagination. None of the written proofs, including numerous emails exchanged by the parties, make unambiguous reference to any alleged promise by Lee to pay $139,000 or $500,000 prospectively, a remarkable omission under the circumstances.

There is at least one highly ambiguous reference to a portion of Mr. Ciaramella's claim, however. Some time after Lee relocated to Florida, in 2007, Ciaramella went to Lee's former law office and picked up the file maintained by Lee concerning these transactions. One of the documents which he retrieved included Defendant's Exhibit F, which contains Lee's typed notation that reads in pertinent part as follows: "139 3k per month as agreed 1/4/05."

Ciaramella would have the Court interpret this cryptic entry as a memorialization of Lee's alleged promise of January 4, 2005, to pay a further $139,000, although this does nothing to bolster defendant's claim with respect to the additional $500,000. Lee argues, to the contrary, that this is proof that on January 4, 2005 he had merely agreed to pay Ciaramella $3000 monthly, as well as Lee's calculation that he had already paid him $139,000 to that point to keep the transaction viable.

Although this is a precarious endeavor, the Court finds the plaintiff's interpretation of this unsigned exhibit to be slightly more credible, noting that the reference to "139" is proceeded by a listing of alleged expenditures to Mr. Ciaramella and others. The total of this list of expenditures approximates, but does not precisely add up to $139,000:

> Q. So, is it your testimony if you add up all of those items, the ones to Anthony C. or Anthony Ciaramella, they equal 139 thousand dollars?
> A [Lee]. No, if you take the 86 from the first page and then you look at the dates subsequent to that on the final page, monies that I paid on his behalf to Lo-Long Construction, it adds up to 133 thousand and 5 thousand, not accounted for in the top of the third page, which is five thousand, you add those three numbers together, I believe you get 136 or 137 thousand dollars.
>
> Tr. 106:1-106:9.

The confusion in the question and the imprecision in the answer, paradoxically, lends it credibility as a plausible explanation of what the exhibit was intended to mean, at least as a memorialization of what the plaintiff thought the parties had agreed upon.

The reference to "139", interestingly, is set apart from the rest of the cryptic

statement, in the manner of a column entry on a spreadsheet, although not directly under the list of expenditures which precedes it.

Whatever was resolved in January 2005, the remainder of that year was marked by events of great significance to the parties and to the completion of their enterprise. In August 2005 Lee pleaded guilty to criminal racketeering for activities unrelated to this litigation, and was thereafter disbarred. He moved to Florida, where he had been pursuing other real estate projects during this time.

On August 15, 2005, the Department of Buildings issued a final construction sign-off on the project. The de-mapping application was finally approved on December 6, 2005. However, there were difficulties with the builder retained by Lee, Larry Chen of Lo-Long Construction, and the delays compelled Lee to engage a different builder to complete the project. Temporary certificates of occupancy were issued on January 18, 2007. The construction of the houses was finished on September 10, 2007, when final certificates of occupancy were issued .

Ciamarella contends, amongst other things, that Lee was obligated to pay him $3000 per month from June 2002, when Lee first agreed to help the defendant avoid foreclosure, and continuing through the issuance of the final certificates of occupancy.

On October 9, 2007, with Lee now in Florida, Ciaramella sold the house located at 1426 Shore Road to a certain Vincent Tartarone for $775,000, using some of the proceeds

to pay off the mortgage on 1430 Shore Road. He also subdivided and deeded an additional portion of the parcel to Tartarone, alleging at trial that it was the only way to satisfy the purchaser. He then re-financed 1428 Shore Drive for $200,000, and entered into a one year lease of 1428 with NextGen for $3000 per month. Upon expiration of that lease, a second month- to- month tenancy was begun at a rent of $2000 per month.

In 2008, Ciaramella and his wife filed their tax returns, reporting the sale of 1426 Shore Road in the prior year. In this return Ciaramella attributed a cost basis to this property of $431,110.

t trial, Ciaramella testified inconsistently as to where this number came from. He alleged that Lee, who was then living in another state, was refusing to supply the financial numbers needed to complete the return. However, when Ciaramella had picked up his file from Lee's office in 2007, he discovered that the file included Lee's own calculations of the costs of construction. This was marked Defendant's Exhibit F at trial. Defendant made a series of statements about this exhibit.

> Q. It is also your position that you had no accounting whatsoever from Mr. Lee and that you and your accountant made up the number for capital gains purposes, correct?
> A. No, that's not my position. I said I took it off [Exhibit] F, let me make sure I got F right. That F was a single page, it was not all connected. If that's what you're trying to tell me. If you are trying to tell me this and F was connected, it was not.
> Q. You are saying your first page of Exhibit F is what you and your accountant came up with, 400 thousand dollars basis [sic] for the property in question.
> A. Let me get to number F.

Q. Right in the front page.
A. This cover page here, that was the closest accounting that I could get from Tommy was assuming his house cost the 450 of the build, that was the best I could get out of him.
Q. Your position is you and your accountant came up with the basis on the cost of this house, based on the first page of Defendant's Exhibit F?
A. That's right. That was the best I could come up with.

Tr.265:23-266:17.

Later in his testimony the defendant offered this.

Q. It is your position that you and your accountant made up that number because Mr. Lee didn't provide you with documents setting forth his costs in building your house?
A. That's right. He did not provide me with it so I did the best I could to take care of the tax man.
Tr. 271:2-271:6

And still later:

Q. So let's go through the first page and tell us how or where you came up with the cost basis for this property of $431,110 dollars.
Tell us where on that piece of paper.
A. I did not, my accountant did. I don't come up with figures, otherwise I would do them myself.

Tr. 271:22-272:2.

In the face of this apparent inconsistency, the Court concludes that defendant used the plaintiff's own estimate of cost incurred in the construction of the home that was sold in 2007 – Defendant's Exhibit F - in order to, as he put it, "take care of the tax man."

At trial, Lee attempted to prove the precise amount that he had expended in the

construction. Due to his relocation to Florida, and subsequent criminal conviction and disbarment, as well as the delay that resulted thereafter, he was unable to produce documentation of all of the expenditures that he claims to have made, both in furtherance of the construction, and in direct payment to Ciaramella. The Court did not permit plaintiff to use photocopies of checks or bank statements, or spreadsheets prepared for trial, as evidentiary proof of his actual expenditures, either to third parties or to the defendant. This Court finds no basis for the suspension of the rules of evidence, and for inadmissible evidence to be given credence to aid a party whose conduct has caused his own predicament

As noted by defendant, in spite of Lee's claim that he paid approximately $400,000 to various contractors in order to get the two houses built -- in addition to $60,000 in "soft costs" – the admissible evidence of expenditures produced by the plaintiff amounts to the less impressive sum of $195,275. Even with this result, defendant denies that Lee has satisfactorily demonstrated that these expenditures were all related to this project, given the fact that Lee was engaged at this time in other projects with many of the same payees. Morever, Ciaramella contests Lee's claim that he paid approximately $180,000 directly to Ciaramella during the course of the project. Instead, the admissible evidence shows that the total sum of $24,000 was paid to Ciaramella in monthly increments of $3000 each, in addition to the purchase of a television set for $3500.

Going Through Changes

Q. Let me ask you this. Is it your testimony that there was a total of three deals between you and Tommy?
A. [Ciaramella]. The original, the 2002 and then the 2005.

Tr. 259:13-259:16.

What did the parties agree to change about the initial agreement, and when? The task is akin to hitting a moving target, as the parties appeared to change the deal, and what would be considered by most reasonable people to be essential terms, almost at will. The settled proposition is that any change in an existing contract must have a new consideration to support it. Estate of Anglin ex rel. Dwyer v. Estate of Kely ex rel. Kelly, 270 A.D.2d 853,855 [4th Dept. 2000].

I find that the 2002 re-adjustment was undertaken by Lee, not in consideration for the defendant's alleged agreement not to sue, but solely in his own self-interest. Plaintiff's explanation of the so-called modification of the initial agreement was entirely plausible, in this Court's view.

"Q. Tell the Court the first time that you recall the defendant objecting to the delay?

A. I believe it was some time in 2003 when I recall him –2002 or 2003, he complained that he was broke, he was not working, he had no money and he couldn't get money. He was going to be forced to – the properties were going to be foreclosed upon.

Q. In response to that objection, what if anything did the two of you agree upon?
A. We sort of modified what we originally agreed on and I wanted to protect my investment. I told him I would give him money from time to time to help him with

his expenses."

Tr .19:13-24.

In seeking to navigate this minefield of dubious accounts and unsupported claims, this contention by Lee has, to quote a memorable malapropism, 'the wring of authenticity.'

As Lee averred in a related context under cross-examination, explaining his attitude towards this transaction:

> "Q. Isn't it true that you suggested to Mr. Ciamramella that he use the rental proceeds in order to pay the mortgage on the property?
> A. Yes, as I explained at that point he told me if he did not pay the mortgage they were going to foreclose on *my* property and he had no money to pay it. So I had to pick the lesser of two evils." [emphasis supplied]

Tr. At 137:20-138:1.

In return for Lee's undertaking to help with the mortgage based on self-interest, we have the alleged consideration by defendant to refrain from filing a lawsuit in 2002. However, defendant had no damages in 2002, and as we shall see, made no effort to cancel the contract even 5 years later. In 2002, defendant was simply residing in a home that he had purchased, with a mortgage and carrying costs that he was legally obligated to pay, and which, providentially, had an additional two lots on which construction had not yet commenced. The Court finds it impossible to believe that Lee regarded this alleged forbearance by defendant as consideration for his gratuitous and unenforceable commitment, which was based solely on his own desire to preserve the integrity of the

project.

The 139 Thousand Dollar Deal

Q. When was the first time, in writing, that you ever allege that there was a deal in place for Mr. Lee to pay you 139 thousand dollars?
A. The first time when I spoke with my attorneys.
Q. After the lawsuit had already started; correct?
A. Okay.
Q. No time prior to you being sued did you make a written statement that Mr. Lee agreed to pay you 139 thousand dollars?
A. No, we knew what our agreement was. Why do I have to write it to him?

Tr. 276:3-276:12

I find no persuasive evidence in support of defendant's claim that the plaintiff agreed on January 2005 to pay an additional $ 139,000 to the defendant, allegedly from the proceeds of an impending closing. The Court reaches this conclusion in spite of the fact that Mr. Lee engaged in a spirited debate with himself on this topic:

Q. The question is this:
Do you deny that you agreed to pay Mr. Ciaramella 139 thousand dollars on or about January 4, 2005?
A. I am not certain.
THE COURT: Just to clarify in terms of confusion, you are not asking him if he agreed on January 4. On January 4, did you agreed to this or on January 4 did you give him –
MR. BELOWICH: No.
THE COURT: That's all he is asking you, not what you gave before. Not what it reflects. On January 4, 2005, did you agree, on that day, to pay the defendant 139 thousand dollars?
THE WITNESS: No.
THE COURT: Okay.
Q. No, you did not?
A. No.

.....

Q. Did I ask you the following questions did you give the following answer?

"QUESTION: Do you deny that you agreed to pay Mr. Ciaramella 139 thousand dollars on or about January 4, 2005?

ANSWER: As I said, I am not certain.

QUESTION: You don't recall?

ANSWER: So I don't admit or deny.

QUESTION: You cannot recall one way or the other?

ANSWER: I am not certain if that was the number."

Was that your testimony?

A. That was my testimony, yes.

Tr.91:7-91:23, 92:10-92:23.

Nonetheless, the Court sees no probative evidence that a binding agreement to pay an additional $139,000 from an imminent closing was ever made by Lee, although the Court has no doubt that the plaintiff was capable of making any representation to the defendant to assuage him, and to convince him to let Lee press on with the project. Certainly, the absence of any written mention of this alleged commitment in the voluminous exchanges of emails, and the inexplicable failure of defendant to make demand for payment of this money in the nearly- three years which followed this meeting speaks volumes about whether it ever occurred, or if it was, whether it was taken seriously.

If I Had Half a Million

The alleged agreement by Lee to pay defendant an additional $ 500,000 at the time of closing is amongst the least credible of the contentions by these parties. I will permit the defendant's testimony on this issue to speak for itself.

Q. What was the 500 thousand dollars for?
A. That was for while he had me burying money in this pit and he was building houses everywhere, like I would have liked to have been doing.
Q. How did you arrive at 500 thousand dollars?
A. I said, what if I did one flip a year, 100 thousand dollars, compensate me for one flip. I told him that in the course of the argument.
Q. It was a hundred thousand dollars for five years, essentially?
A. Right.
Q. And how did you date that back, in other words, how did you arrive at five years?
A. It started in 2001, 2002, 2003, 2004, 2005.

Tr. 221:20-222:8.

Q. The way you came up with that number was 100 thousand dollars --
A. Yes, I said Tommy, I could have flipped a house in 2001, 2002, 2003, 2004 and 2005 and I went like with my hands, one, two, three, four, five.
Q. You could not have flipped it in 2001, it was not built yet?
A. He could have turned around and said that I couldn't flip it in 2001.
Q. He gratuitously offered you too much money?
A. He agreed to it, that's all I am telling you.

Tr. 344:25-345:10.

Defendant's counsel has made an energetic and creative attempt to extrapolate evidence of this alleged $500,000 deal from a single statement in an email by Lee -- defendant's exhibit DDD -- in which Lee observed that if the homes were sold at the current asking price "we would have lost nothing," with accompanying calculations. Although imaginative, it is not convincing.

The Court finds that defendant has wholly failed to support this contention of a binding offer by the plaintiff to make such a gratuitous and generous gift to the defendant

with convincing proof.

Taking Care of the Tax Man

The issue of the admissibility of the tax returns filed by defendant Ciaramella and his wife for the tax year 2007 was pivotal for the plaintiff in establishing what amount he had expended in developing the properties.

It is necessary to quote the lengthy colloquy that resulted from the plaintiff's use of these returns in support of his testimony.

> Q. Now, I am going to call your attention to the document that was provided to you in discovery which is labeled as Defendant's Exhibit – sorry, Plaintiff's F03 through F16.
> Can you look at the document and tell us what that is.
> A. Yes, I recognize this document.
> Q. What is it?
> A. F03 was Anthony Ciaramella and his wife's 2007 1040 United States tax return
>
> .....[colloquy]
>
> THE COURT: Are you going to offer the tax returns into evidence?
> MR. MAIZES: A portion of where he takes capital gains treatment based on the numbers that were supplied by Mr. Lee,
> He used his tax basis as the exact amount that Mr. Lee spent on his behalf for building the house.
> MR. BELOWICH: The tax return is completely irrelevant. It has no bearing on the issued involved in this case, There is no dispute that one of the properties was closed.
> The amount of tax basis that was reported on and income tax return has no bearing on any issue in this case and it is completely irrelevant.
> MR. MAIZES: I disagree your honor. He said they are disputing that Mr. Lee made payments. Mr. Lee apprised him with the amount that he paid and he takes a tax deduction for capital gains purposes and used it and it is an admission and judicial estoppel and corroborates the proof that we just spoke to.
> MR. BELOWICH: Mr. Lee was obligated under the agreements to build the houses

under his – with his, at his sole cost and expense. So the fact that he may or may not have provided Mr. Ciaramella with information showing how much he actually spent building the houses, that has no connection or bearing on the tax return itself.
MR. MAIZES: He provided the government with a tax basis which he did not pay for, which my client paid for. It is an unjust enrichment where he got a benefit from or an admission that my client paid the monies that he is now contesting, saying he did not pay and filed a tax return on it and produced it.
It is part of the case. It is an admission, it is a judicial estoppel, corroborates all the payment that my client made and shows that this defendant went ahead, not only sold and received the property, the proceeds, but then reported to the government that he incurred expenses in building it, which he is entitled to a deduction for. That's it.
THE COURT: I am going to overrule[] the objection.

Tr. 55:23-56:6; 56:17-58:7.

Although this particular exhibit was not then formally marked into evidence, it was the intention of this Court to enter it into evidence, and given the fact that there was no jury, the omission to mark it at that time was of technical significance only, especially where the document in question was later utilized by the defendant to elicit testimony from his own witness.

Indeed, it is manifest from a review of the transcript that there was some confusion at the time as to whether this exhibit was formally in evidence or not, as the defendant's counsel observed when he used these same exhibits to question his client:

Q. Did he provide with you any verbal information? Did he tell you, for example, this is how much I paid in connection with the project?
A. No.
Q. Let me show you a copy of a tax return *that's, I believe, in evidence. [emphasis supplied]*
Have you seen that tax return before Mr. Ciaramella?

A. Yes.
Q. Is that a tax return of you and your wife?
A. Yes.
Q. Look at pages marked F10 and F11.
A. Okay.
Q. You will see that it reflects a basis of 431,110 and a gain of 323,890 dollars.
Do you see that?
A. Okay.
Q. Do you have any understanding as to what those numbers represent?
A. I tell you no, not really.
Q. Did you prepare that tax return?
A. My accountant did.
Q. Do you know where he arrived at these figures?
A. These figures over here, where did he get them from? I am trying to go back based on memory. I think there is a sheet over here. If I am not mistaken, the sheet, that deal as is or deal as should be. I may have had that at that point.

Tr.236:8-237:8.

The plaintiff's exhibits F3-F16, which includes defendant's capital gains tax return for 2008, are herewith marked into evidence *nunc pro tunc*.

Take a House, Any House

With this housekeeping task completed, the Court turns to the plaintiff's cause of action seeking specific performance. Lee seeks an order against the defendants directing the conveyance of title of the home located at 1428 Lake Shore Drive -- since 1426 has been sold to a third party --to the plaintiff.

A Court may only award a decree of specific performance where 1. there is a valid contract between the parties; 2. the plaintiff has substantially performed under the contract and is willing and able to perform its remaining obligations; 3. the defendant is able to

perform its obligations, and 4. The plaintiff has no adequate remedy at law. Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F. Supp. 1308 [D.C.N.Y. 1979].

The elements of specific performance include the formation of a contract to which to be bound. "To establish the existence of an enforceable agreement, the plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms" Kowalchuk v. Stroup, 61 AD 3d 118, 121 [1st Dept. 2009]. There must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. Gulf Ins. Co. v. Transatlantic Reinsurance Co., 69 AD 3d 71, 94 [1st Dept. 2009].

"[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.... The rule applies all the more, and not the less, when, as here, the extraordinary remedy of specific performance is sought." Joseph Martin Jr. Delicatessen Inc. v. Schumacher, 52 NY 2d 105, 109-110 [1981].

Definiteness is required both in the terms of the agreement and in the intention to be bound; if the court cannot tell what the parties agreed to, it cannot accurately determine whether there has been a breach or how to fashion a remedy. The Court could otherwise impose terms and conditions never agreed to by the parties. Marlio v. McLaughlin, 288 AD 2d 97 [1st Dept. 2001], lv to app. den. 98 NY 2d 607 [2002].

The parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties. The practical interpretation of a contract by the parties to it for an considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence. Gulf Ins. Co. v. Transatlantic Reinsurance Co., supra.

For reasons previously stated, the Court does not find that a valid and enforceable contract was formed in this matter, as there is insufficient definiteness in the terms – indeed, some of the terms were simply omitted – and there was lacking the essential intention to be bound with respect to other terms, as evidenced by the lack of effort by either side, mostly the defendant, to enforce such terms.

However, even if this Court were somehow to determine that there had been a valid and enforceable contract, the plaintiff has wholly failed to explain why he lacks an adequate remedy in the form of money damages. Indeed, the history of correspondence between the parties, at all times, fails to demonstrate any particular attachment on the part of either party to either of the newly-constructed houses. It did not seem to matter what the completed house consisted of, or which house went to which man, or what the terms would be that would accompany the conveyance. The dealings of the parties were fatally imprecise from their inception, and the Court was persuaded throughout the testimony of both men that the sole reason for this transaction was always about the money, not the

house, or either one of them.

The Mother of All Real Estate Deals

It cannot be understated just how free-wheeling and casual were the dealings between these parties, an informality which negates any serious intention on their part of being bound by the terms of the alleged contract. The history of this matter established that the deal could be changed in material terms almost at will. Memorably, there was no meeting of the minds even as to such a fundamental matter – fundamental at least to most reasonable people – as to whether beach rights or beach front would be transferred by Ciaramella to Lee together with the purported beach house.

> Q. Do you remember when I deposed you back on April 24, 2009 and I asked you if there were any difference between the two lots that were subdivided, 1426 and 1428?
> [Ciaramella]A. Yes.
> .....
> Q. Let's turn to page 26 of your deposition line 3 through 17.
> Do you remember me asking you the following question and you giving the following answer.
> .....
> "QUESTION: Just explain to me the differences between the two houses?
> ANSWER: The houses are built identical, 1426 is further, 1428 is closer. I owned the beach behind both houses. His mother was going to live there, so him being closer if ever down the line I was going to sell part of the beach, I would have sold the further away and then his mom, I would have let her use the beach.
> QUESTION: Okay, as part of the ownership of these two lots, 1428 and 1426 do they both have use of beach front property or do they have what's called riparian rights?
> ANSWER: Yes. [sic]"

.....

Q. The question is, when you sold 1426 to those parties, did they get the benefit of the use of the beach front that adjoined that property?

A. I had to get another subdivision and enlarge it."

.....

Q. And that was part of your agreement with Mr. Lee that if he had retained title to one of the properties, he would get the beach front rights?

A. No, it is not. You are asking me, allow me to answer.

Q. It is a yes or no.

A. Let me answer.

Q. Turn to page 27 at your deposition beginning at line 11 and ending at line 19? Do you remember this question?

"QUESTION: I got it, okay, neither 1428 or 1426 has ownership or riparian rights other than the beach?

A. What page are you on?

Q. Page 27.

"ANSWER: Now 1426 and when I sold it at that point I changed it because they would not buy the house without the beach.

QUESTION: Understood.

ANSWER: So now 1426 has beach rights.

Do you remember me asking you these questions and you giving these answers?

A. Yes, okay.

Q. Does that refresh your recollection of what you agreed to do?

A. Yes, I am reading it, right.

Q. Now turn to page 28 line 4.

"QUESTION: His consideration would be that you would transfer to him one property which was 1428 without riparian or beach front rights?

ANSWER: Right.

QUESTION: However, you would let them use it because you liked them or you liked the mother?

ANSWER: Right. If I liked the mom I would let them use it. But they would not own it and there would be no deed."

Do you remember me asking those questions and giving those answers, is that correct?

A. Correct.

Q. So your understanding was if this deal would go through with Mr. Lee you would not deed him the property but the right to use the beach?

A. That's not my understanding.
Q. Okay.
A. My understanding was Tommy says he was going to take his mother's house for himself and let his mother live in this house. So, I says, well, if your mother is going to be there, this was as the houses were being built, I said if your mother is living there and she is next to me, I will let her use the beach and keep an eye on her as a friendly gesture.

TR. 292:1-292:4; 292:11-292:14; 292:18-293-5; 293:12 - 293:15; 293:18-295:15.

The Court concludes that there was no binding agreement between the parties, that material terms were not agreed upon, and that there was no intention to be bound by alleged material terms of the agreement.

Things You Remember From Law School

Q. You were an attorney in 2001, correct?
A [LEE]. Yes, sir.
Q. And were you, at that point, familiar with the statute of frauds?
A. I did not do much civil work, but I heard about it in law school.
Q. Did you know from your law school days and your limited experience as an attorney that an oral agreement is void if it is not capable of being performed within one year?.....
A. I was not aware of the nuances of the statute of frauds.

Tr 71:17-71:25, 72:10-72:11.

General Obligations Law Section 5-703

Subsection 1: " An 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 act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this subdivision does not affect the power of a testator in the disposition of his real property by will; nor prevent

any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.
Subsection 2: "A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void unless the contract or some note of memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.
Subsection 3: "A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent."
Subsection 4: "Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance."

To satisfy the statute of frauds, a writing must be subscribed by the party to be charged and must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement.

The purpose of the statute is stated in Penniman v. Hartshorn, 13 Mass. 87, 90. "[T]he bargain shall be proved by writing, and not by parol, in order that purchasers shall not be caught up on loose conversation, or that the proof of the contract shall not rest upon the recollection or integrity of witnesses."

Where a party has admitted the essential terms and actual existence of an alleged oral contract, the Statute of Frauds may not be invoked as a defense (Concordia General Contracting v. Peltz, 13 AD 3d 502, 503 [2nd Dept. 2004]).

The significance of the Statute is amplified in real estate matters:

> "Real estate negotiations are often characterized by a series of tentative oral agreements between the parties. The parties are nonetheless free to decide against entering into the sale, until the final terms are reduced to writing. The very purpose of the Statute of Frauds, as applied to real estate sales, is to distinguish these provisional "agreements to agree" from the final, binding contract. [see, Fox, Co v. Kaufman Org., 74 NY 2d 136, 140 ("(t)he purpose of Statute of Frauds is to avoid fraud by preventing the enforcement of contracts that were never in fact made.")]" Sonnenschein v. Elliman-Gibbons & Ives, 274 AD 2d 244, 248-249 [1st Dept. 2000].

Agreeing to Agree

Q. The modification that you discussed with the Court, what was your understanding of what happened to that deal and to the monies that you would have paid to the defendant pursuant to that deal?
A. Anthony was using those monies for whatever he was using them for and I was paying help because I was fearful if I did not pay them, the property would be foreclosed on. *I was hoping at the end we would do an accounting and I would get what I put in. [emphasis supplied]."*...
Q. What was your understanding?
A. I would get the house back and reimbursements for any of the payment that I made.
Q. How did the two of you communicate?
A. Usually yelling is how we communicated."

Tr. 21:3-21:12, 21:16-21:20

The ceaseless modifications that the parties testified to, real and imagined, gave rise to the precise circumstance which the Statute of Frauds was designed to obviate, the so-called agreement to agree. That is what resulted from the series of interactions of these parties.

> Q. What was your understanding of the negotiations and dealings that you had with Mr. Ciaramella in January of 2005?
> A. My understanding was that my original deal still stood. At the end, when it was either

transferred to me or sold, that I would recoup the monies that I invested in the properties.
Q. 'Did you discuss with Mr. Ciaramella modifying the deal whereby you would be reimbursed for the costs of building and there was a split of profits?
MR. BELOWICH: Objection.
THE COURT: Overruled.
A. Yes. We discussed at some point in that time frame that we could sell both, pay off any of the mortgages, any of the expenses and then we would split the net proceeds equally. He would get a credit for the land portion.
Tr at 32:5-32:19.

A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. 166 Mamaroneck Ave Corp. v. 151 East Post Road Corp., 78 NY 2d 88 [1991]. For example, a lease term of "approximately twenty years" was deemed too vague to be enforced in 180 Water Street Associates L.P. v. Lehman Brothers Holdings Inc., 7 AD 3d 316 [1st Dept. 2004]. In this matter, as we have seen, material terms came and went with the passing tides.

Accordingly, with respect to the plaintiff's cause of action for breach of contract, the Court finds that the alleged contract, in its various permutations, was consistently revised, and too indefinite to be susceptible to enforcement by the plaintiff. Moreover, the defendant's obligations on the contract -- at all times up to and including the issuance of the final certificates of occupancy – consisted *in toto* of awaiting the completion of construction by the plaintiff and his contractors, aside from making payments on the mortgage. The defendant's breach, such as it was, consisted, not of the sale of the property at 1426 Lake Shore Drive. – which Lee was enthusiastically in favor of, even though it was not part of the original agreement – but of the retention of the proceeds. But the property that was sold

to a third party was of a parcel that had been enlarged, augmented from a different portion of the parcel, a circumstance which was not contemplated in the original transaction. Lee has simply not proven the existence of a valid and enforceable contract, as circumstances changed over time, and the conditions underlying the simple-to-understand contract of May 2001 – albeit a contract with gaping holes in it -- no longer existed. The parties themselves recognized this in the form of their continued discussions as to how to ultimately resolve the transaction. This was a deal to make a deal.

A word is in order about the delay. Although Lee ultimately completed the project, his excuses for the delay are not convincing. He has failed utterly to explain why the de-mapping process was delayed for several years, and as he was acting as both legal adviser on this transaction and general contractor, the Court is not persuaded by his efforts to blame the architect for the delay. As it was, the architect filed his plans on November 7, 2002, but the de-mapping plans were not filed until January 4, 2005, perhaps not coincidentally the same day that defendant demanded a meeting with Lee in his home. The de-mapping plans were filed by an attorney hired by Lee, not by the architect. Lee admits that the DOB issued stop work orders in 2003 because the properties had not been subdivided or de-mapped. The contractor Lo-Long Construction, who was apparently a substantial cause of delay in the final completion of the homes, was selected by Lee.

However, even had there been a binding contract, Lee's lateness and other acts of

non-feasance were waived by the defendant, who never ended the project, and who, even after Lee failed to make payment of the mortgage, failed to make written demand for these monies.

Damages

The defendant, who purchased a home in 2001 in which he still resides, that was situated on a parcel large enough to be subdivided and developed, seeks damages for breach of a series of alleged contracts to develop this parcel. But this claim is based solely on a conjectural assumption of lost profits, which fail to survive serious scrutiny.

The parties take different perspectives of their dealings together. The plaintiff's view of this matter is that he performed all of his obligations under the contract, albeit in an untimely manner, chiefly due to delays caused by others, and that the defendant has reaped a windfall as a result. The defendant contends that he sustained damages due to the plaintiff's persistent delay and repeated breaches of a series of contracts, all of which were freely entered into in consideration of the defendant's refraining from bringing suit against the plaintiff. These alleged damages consist of the defendant's anticipation of substantial profits that could have been generated both by the timely completion of this real estate transaction as well as other potential transactions that defendant was unable to enter into because, as he put it, he was "burying money in this pit."

The Court finds little merit in these allegations by the two parties. The defendant's

anticipation of profits is too hypothetical to be a plausible basis for an award, even had the parties entered into a binding contract, while, as previously stated, the plaintiff's excuses for delay are unconvincing in the extreme. Clearly, the plaintiff neglected this specific project, and his neglect was the chief, though not the sole, cause of the delay in completing it, probably due to his pre-occupation with other projects. However, the defendant has failed to demonstrate how he has been damaged by the plaintiff's delay, as he has profitably emerged from the entire transaction. One of the completed homes was sold at a handsome price – especially since defendant paid nothing for the construction, and because the sale took place before the real estate implosion that began in 2008 - while he remains in sole possession of the other. Two homes arose from the vacant land adjoining his house without any significant expenditures on his part.

The Court finds no basis for an award of damages for breach of contract to either party, but turns now to the plaintiff's cause of action seeking damages based on principles of unjust enrichment.

Always Keep Your Receipts

> Q. Can you tell the Court what that document is?
> A. Yes, this is an email, the original email was from Anthony to myself dated November 4, 206. I responded to him on November 6, same date, 2006.
> Q. What was the event that were transpiring at or about that time?
> A. Once again the project was very close to getting a temporary CO and I was giving him an update about a couple of the minor things, about the Con Edison being turned on and the lights. I explained to him, if you see the third paragraph regarding his financial woes, I am willing to trade his for mine and 'I have given you everything you asked for, in fact, I have financed the entire project without encumbering at all.'

Q. Did he deny that you financed the entire project?
A. No.
Q. Why not?
A. Because I did."
Tr. 155:1 – 155:17.

In the complaint Lee contends that he expended approximately $620,000 out of pocket to construct the two homes, but he failed to furnish evidentiary proof of more than a small percentage of these expenditures. The Court ruled that spreadsheets, carbon copies of checks, un-endorsed checks and bank statements were inadmissible evidence of these expenditures. Moreover, Lee's attempt to rely on a spreadsheet that he prepared in anticipation of litigation, plaintiff's Exhibit F, was unavailing, as there was incomplete documentary proof of the expenditures alleged in it.

Although another spreadsheet prepared by the plaintiff, Exhibit H -- which was alleged to be the 'completion' of Exhibit F -- was admitted into evidence without determining what weight it would be given, [Tr 150:10-150:16] it, too, is not conclusive evidence of actual expenditures made by the plaintiff, as documentary back up for certain claimed expenses was not introduced at trial. The Court declines to give it weight as evidence in support of plaintiff's claims of expenditures made on the project.

At trial, Lee was also able to show that he paid a total of $27,500 to Ciaramella, apparently as payments on the mortgage, with $3500 of this being payment for a large screen television set.

Time Not So Much of the Essence

> [Defendant] "I said, the market dropping is not my problem, you took the seven years to do it, not me. So I told him, Tommy, sue me.
> I would like to have sued him, but because he was not available, I had to wait for him to sue me."

Tr. 225:1 - 225:5.

While a promise to forego future litigation can constitute valid consideration, the mere fact that the party does not bring suit for a period of time is insufficient, absent evidence that the party's forbearance was given in exchange for the other's promise to do some act or provide some benefit. Wood Realty Trust v. N. Storonske Cooperage Co., 229 AD 2d 821 [3d Dept. 1996]. It is manifest from the testimony that the defendant's forbearance was motivated solely for the purpose of enabling the plaintiff to complete the construction, with the intention, ultimately, of obtaining some or all the benefit for himself.

Even when the plaintiff Lee failed to make the $3000 payments in regular fashion, the defendant continued to conduct himself as if the agreement persisted, complaining, but always pushing for completion. After Lee fled to Florida, and was ultimately forced to hire a different contractor to finish the job, the defendant did not abrogate the agreement.

Even after the defendant sent an email on April 22, 2006 delivering an ominous-sounding series of ultimatums ["I will not allow another useless week to pass..I will take it upon myself to have the job finished..any work not completed by thurs 5pm, I will take upon myself to complete..."], which is defendant's exhibit RR, the defendant acquiesced to

Lee's responding email on April 26, 2006 bemoaning his reduced economic circumstances ["I'm living in a one bedroom apartment with my wife and three kids"], promising speedy completion of the project, which he alleged was more important for his own financial needs than they were for Ciaramella's. In defendant's exhibit DDD, an exchange of email messages both dated December 18, 2006, the two men discussed marketing and selling the property. As late as April 12, 2007, the defendant discussed punchlist items yet uncompleted, and requested information for use in preparing his taxes, while the plaintiff responded by requesting that defendant deed the property to the plaintiff or his wife, and discussing the division of tax liabilities between the two erstwhile partners. Defendant's Exhibit NNN. In Def. Exhibit SS the defendant explicitly admitted that "I did not try to imply at all that this delay is caused by you, nor do I blame you." The defendant simply cannot establish that he took the appropriate measures to cancel this agreement between the parties, as the evidence is overwhelming that he purposely waived compliance with any additional monetary contributions by Lee, or with substantial delays, so that he could sit back, allow Lee to complete the project, and accept the benefits.

Unjust Enrichment

> Q."What was going on at that time?
> A. Once again Anthony had sold the house, refinanced the other house, received the proceeds of the sale of that house, 775 thousand dollars and netted approximately three or 400 thousand dollars. And I am asking him, why doesn't he be fair, that I don't want to sue him and why can't we work this out.
> Q. What was his response when you told him you didn't want to sue him?

A. He told me to dot my I's and cross my T's."

Tr. 165:2-165:10.

The plaintiff implicitly urges the Court to take judicial notice that houses do not build themselves without expenditures by somebody for labor and materials. As Ciaramella failed to present evidence that he made these expenditures, the cast of possible suspects is not large.

The plaintiff's cause of action based on unjust enrichment is in the context of his complaint, the last man standing.

To prevail on a claim of unjust enrichment, a party must show 1. That the other party was enriched, 2. At that party's expense, and 3. That it is against equity and good conscience to permit the other party to retain what is sought to be recovered. Mandarin Trading Ltd. V. Wildenstein, 16 N.Y.3d 173, 182 [2011]

Unjust enrichment does not require a wrongful act on the part of the party enriched. Simonds v. Simonds, 45 NY 2d 233 [1978]. The principle of restitution is based on a theory of quasi-contract, although in fact there is no contract at all, but an obligation created by law because the defendant has obtained something of value from the plaintiff under such circumstances that in equity and good conscience he ought not to retain it. Duty, and not a promise or agreement or intention of the person sought to be charged defines it. Miller v. Schloss, 218 NY 400 [1916].

Although the plaintiff has sustained a failure of proof in producing actual documentary proof of his expenditures, the defendant's report of the cost of the construction to the tax authorities – the accuracy of which is subject to criminal penalties – provides a more than adequate substitute, based on principles of estoppel.

The doctrine of judicial estoppel is applicable where, as here, a party takes a position in one legal proceeding which is contrary to that which he took in a prior proceeding, simply because his interests have changed. Festinger v. Edrich, 32 AD 3d. 412 [2d Dept. 2006]. The purpose of the doctrine is to avoid a fraud on the Court and a mockery of the truth-seeking function. Having previously employed the figures derived from Lee's records to utilize as evidence of construction costs and basis in order to save hundred of thousands dollars in taxes, Ciaramella cannot now be permitted to deny that this sum which he provided to "the tax man" was invalid, and he is estopped from contending otherwise.

Although Lee argues that he should receive the sum of $775,000, the sale price of 1426 Shore Drive, as the value of the services he provided, this is not an accurate gauge for the value of his services, as the sale price to a third party purchaser is not an equivalent. Having failed to demonstrate the existence of an enforceable contract, that plaintiff cannot now argue that he should receive the benefit of this unenforceable bargain, which includes the profit of real estate speculation. Moreover, the house in question was sold with additional land borrowed from the defendant's other property, clearly not a circumstance

that was anticipated in the original deal, and the actual sale price of this altered parcel is therefore not an appropriate measure.

In a litigation in which the parties rely to such a large extent on testimonial credibility, the non-legal doctrine of death and taxes comes into play. Ciaramella has filed a tax return, subject to very serious criminal penalties, averring that the cost of the construction was $431,110. It is significant that this representation to the taxing authorities yielded a beneficial tax treatment of substantial benefit to the defendant. There is no other credible calculation upon which the Court can rely, so in fixing the value of Lee's services, and the extent to which it can be concluded that the defendant was unjustly enriched, this figure of $431,110 will be adopted.

Lee's Other Claims

Little time is warranted in the discussion of those causes of action seeking damages for fraud, and indeed, plaintiff has made no defense of this cause of action in his proposed findings of fact which were submitted post-trial.

The Court finds no evidence that the defendant ever sought to conceal the fact that he was selling the 1426 Shore Drive property from Lee, and indeed, the plaintiff urged him to do so in view of his own financial difficulties. His objections were limited to the fact that the defendant thereafter cut off contact with him, and retained the proceeds. Similarly, the evidence that Ciaramella surreptitiously leased the 1428 Shore Drive home is lacking, or even less probably, the contention in the complaint that the defendant defrauded Lee by

adding Selvaggi as an owner of 1430 Shore Drive, a transaction in which Lee participated. The fraud causes of action in the complaint are dismissed.

The cause of action seeking the impression of an equitable lien on 1428 Shore Drive is without merit, as there was no confidential relationship between the parties, no proof that Ciaramella owed Lee a fiduciary duty, and no agreement that the premises would be held as security for the obligation. Home Federal Savings & Loan Assn.v. Four Star Heights, 70 Misc 2d 118 [Sup Ct. Kings County, 1971]. The plaintiff repeatedly viewed the two homes as interchangeable, and there was no agreement at any time that this specific property, 1428 Shore Drive, would be held as security for payment of his profits under the deal. The absence of a confidential or fiduciary relationship is similarly fatal to the cause of action based on a constructive trust, as well as the claim for an accounting. Mendel v. Hewitt, 161 A.D.2d 849 [3d Dept. 1990]; Kaminsky v. Kahn, 20 N.Y.2d 573 [1967].

Conclusion

> Q. Now why was the agreement that you just described not formalized in writing?
> A. Tommy told me that an oral agreement was as binding as any written agreement. When I asked him about me getting a lawyer, I said, should I use Peter? He said, you don't need any other attorneys it is another expense for you. I am your attorney, I have always been your attorney. He says, I don't foresee any problems. Let's move forward with this.
>
> Tr. 199:24-200:6.

The parties doubtless had reasons of their own not to commit any of these agreements to writing, except for what diplomats refer to as "frank exchanges of views" in their emails. The Court dismisses any notion that defendant Ciaramella was an innocent

lamb led astray by his lack of a college education and implicit trust in his attorney. Both parties chose to conduct business in this manner, and the plaintiff, who admitted that his civil practice was limited during the time he was an attorney, seems to have believed that he could protect his investment by filing mechanics liens, a misapprehension that was dispelled by Justice Suarez in his earlier order. What resulted was a text book demonstration of why the Statute of Frauds has endured.

As previously noted, the defendant Yolanda Selvaggi has nothing to do with this case aside from being the legal holder of title for 1430 Shore Road. Lee requested that the Court retain jurisdiction over her to compel her to deliver an easement to a portion of 1430 Shore Road for the benefit of 1428 Shore Road and to ensure access to riparian and beach front usage, and to the extent there is a deficiency owed by Ciaramella to Lee, to compel a sale of 1430 Shore Road to satisfy that deficiency. As this Court sees no grounds for granting any relief pursuant to those claims made by plaintiff Lee, the complaint is dismissed in its entirely as against defendant Yolanda Selvaggi.

The Court finds that the plaintiff has established that the defendant was unjustly enriched in the sum of $27,500, which the plaintiff demonstrated through evidentiary proof that he paid to the defendant or on his behalf, together with the further sum of $413,110.00, which defendant utilized as proof of the actual costs of construction and which is binding upon him on principles of estoppel, for a total of $440,610.00. The other claims of the

plaintiff and the counterclaims of the defendant are dismissed for failure to support same with evidentiary proof.

The Clerk of the Court is directed to enter judgment in favor of plaintiff Thomas Lee and against Defendant Anthony Ciaramella on his cause of action for unjust enrichment in the sum of $440,610.00. together with statutory interest; beyond this the complaint and all counterclaims are dismissed.

This will constitute the decision and order of this Court.

Dated: October 27, 2011
Bronx, New York

Howard H. Sherman