Polo Grounds At Melville, LLC v William J. Schneider Revocable Living Trust
2015 NY Slip Op 31834(U)
September 10, 2015
Supreme Court, Suffolk County
Docket Number: 29161-13
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

INDEX No. 29161-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/11/15
SUBMIT DATE 6/26/15
Mot. Seq. # 002 - Mot D
Pre Trial Conf. Sched. 10/30/15
CDISP Y____ N __X__

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POLO GROUNDS AT MELVILLE, LLC,

Plaintiff,

-against-

WILLIAM J. SCHNEIDER REVOCABLE LIVING TRUST, ROBERT CURCIO, MATTHEW CLASSI and MELVILLE FARMS REALTY, LLC,

Defendants.

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WILLIAM J. SCHNEIDER REVOCABLE LIVING TRUST,

Cross-Claimant

-against-

ROSARIO S. CASSATA and RICHARD SCUDERI,

Cross-Claim Defendants.

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THOMAS A. ABBATE, PC
Attys. For Plaintiff
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MEYER, SUOZZI, ENGLISH et al
Attys. For Defendants
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Upon the following papers numbered 1 to 12 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Opposition papers 4-5 ; Reply papers ; Other 6-7 (memorandum); 8-9 (memorandum); 10-11 (supplemental affirmation); 12 (transcript of oral argument) ; and after hearing counsel in support of and in opposition to the motion on June 12, 2015, it is

ORDERED that this motion (#002) by the defendants in this action, which sounds in breach of contract, tort and declaratory relief, is granted to the extent set forth below; and it is further

ORDERED that the caption of this action is hereby amended to read as set forth above so as to reflect the addition of the last named defendant, Melville Farms Realty, LLC by stipulation of the parties as indicated in the answer served and filed herein on December 18, 2014 and to reflect the December 22, 2014 oral order issued by the Honorable Jerry Garguilo, J.S.C., which consolidated a prior commenced action by the plaintiff against defendant William J. Schneider Revocable Living Trust, bearing Index Number 15304/2008 with this action and the marking of that prior commenced action as "disposed by consolidation"; and it is further

ORDERED that the Chief Clerk shall, upon receipt of a copy of this order, present same to the Clerk of the Court who shall thereupon remove all papers maintained in the file of Index No. 15304/08 and place them in the file maintained in this action bearing Index No. 29161/13; and it is further

ORDERED that the Clerk entering this order in the court's electronic filing system shall note that the file maintained under Index No. 15304/08 has been " disposed by consolidation" under the terms of this order and shall likewise note the consolidation of that action into this one in the file maintained in this action; and it is further

ORDERED that a pre trial conference is scheduled for **October 30, 2015**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York. Counsel for the respective parties are directed to appear at this time to ready this matter for trial.

This action (Index No. 29161/13) and a related action (Index No. 15304/08) commenced by the plaintiff solely against defendant, William J. Schneider Revocable Living Trust (hereinafter "Trust"), arise out of a September 27, 2002 Option Agreement in which the defendant Trust agreed to sell to non-party Melville Farms, LLC, a vacant tract of land in Melville, New York. The plaintiff acquired the Option Agreement through its founding members, Rosario S. Cassata and Richard Scuderi, who were the intermediary assignees of the original optionee/purchaser, Melville Partners, LLC, as reflected in an Addendum to said Option Agreement that was executed by the plaintiff and the defendant Trust on March 28, 2003. Therein, the parties agreed to the substitution of the plaintiff as purchaser and to a modification of certain terms of the original Option Agreement to the extent set forth in the Addendum. A contract of sale in the form of the one attached to the original

September 27, 2002 Option Agreement was allegedly executed by the plaintiff or its principals, as purchaser, and the Trust, as seller, the terms of which had been incorporated and then modified by the Addendum to the Option Agreement. The contract of sale was expressly conditioned upon the approval of a partition or subdivision of the nearly 20 acre parcel as illustrated in Schedule A of their contract and the creation of a proposed 19 acre lot by the Town of Huntington, together with all other approvals required by municipal and governmental agencies. The plaintiff, as purchaser, was obliged to make a complete and good faith application for such approval within 90 days of the purchaser's exercise of the option to purchase. In the event of a denial of such approval, the contract was deemed void and the seller was obligated to return all sums paid under the terms of the contract. A closing date not later than 45 days from the approval was set with time being of the essence. In the event the plaintiff, as purchaser, failed to present its application for subdivision approval within the time specified, which was fixed at March 31, 2003, the defendant Trust, as seller, had the right to so apply. Under the terms of the Addendum to the Option Agreement, this March 31, 2003 deadline was extended to June 30, 2003.

The plaintiff submitted its first application for subdivision approval to the Town of Huntington in February of 2004 without objection from the defendant Trust. Other submissions followed in an attempt to comply with the requirements of municipal officials. On June 19, 2007, counsel for the defendant Trust set a closing date of July 6, 2007 at which the plaintiff defaulted in appearing. In December of 2007, counsel for the defendant advised plaintiff's counsel that the plaintiff was in default and that the contract would be cancelled upon the return of all sums paid by the purchaser. The defendant's counsel further advised that it was revoking its consent to any further submissions by the plaintiff to the Planning Board regarding the pending application for preliminary approval of the proposed subdivision. By letter of its trustee dated February 29, 2008, the defendant Trust, as owner of the subject premises, advised the Town of Huntington of the revocation and withdrawal of its consent to further subdivision applications submitted by the plaintiff.

By complaint filed in April of 2008 under Index No. 15304/08, the plaintiff commenced an action against defendant, William J. Schneider Revocable Living Trust and therein demands the following relief: 1) unjust enrichment due to the defendant's anticipatory breach of the September 27, 2002 Option Agreement to which the plaintiff was substituted as purchaser/subdivider under the various instruments outlined above; 2) recovery of monies expended in the plaintiff's attempt to secure subdivision approval; and 3) a judgment compelling the defendant's specific performance of the option contract of sale and mandatory injunctive relief restoring the rights of the plaintiff thereunder.

In its answer to the complaint, the Trust asserted five affirmative defenses, namely, a lack of standing, breach by the plaintiff of its obligations under the Option Agreement as modified by the Addendum of March 28, 2003, unclean hands, legal insufficiency and the plaintiff's breach of its obligations under the contract. Also included were four "cross claims" aimed at non-party principals of the plaintiff, namely, Rosario S. Cassata and Richard Scuderi, who were the intermediary

assignees of Melville Farms, LLC's Option to purchase and signatories to the contract of sale prior to their formation of the plaintiff LLC and its substitution as purchaser under the Addendum to the Option. In those cross-claims , the Trust demanded declaratory relief, specific performance and an order vacating the notice of pendency filed by the plaintiff. In addition, three counterclaims were lodged against the plaintiff in which the defendant Trust demanded declaratory relief in the form of a termination of the contact or a declaration of a waiver of the subdivision approval contingency clause and a judgment compelling the plaintiff's specific performance of the contract of sale.

By motion returnable May 1, 2008, the plaintiff moved for, among other things, preliminary injunctive relief prohibiting the defendant Trust from interfering with the plaintiff's continued prosecution of its application for subdivision approval. The defendant Trust opposed and cross moved for summary judgment dismissing the plaintiff's complaint pursuant to CPLR 3211 and 3212. By order dated April 8, 2009, the court then assigned to the action granted the plaintiff's request for the preliminary injunctive relief and denied the defendant's cross motion for accelerated judgments of dismissal of the complaint and for summary judgment in its favor on its counterclaims against the plaintiff (*see* SFO dated April 8, 2009, [Cohalan, J.]). While the denial of the defendant's cross motion was first stated to be on procedural grounds due to the defendant's failure to attach a copy of the pleadings, the court went on to reject the Trust's pleaded affirmative defense of a lack of standing on the part of the plaintiff and its demand for cancellation of the notice of pendency on substantive grounds (*see id*).

Notwithstanding the revocation of the Trust's consent to further action by the Town on subdivision applications submitted by the plaintiff, the Town issued a preliminary approval of the proposed subdivision on November 12, 2008 and it advised the plaintiff to submit its application for final approval within six months. The plaintiff did not move that quickly and on April 8, 2010, the plaintiff's request to submit a conditional final subdivision application was denied on the grounds that too much time had elapsed from the granting of the preliminary approval in November of 2008. The plaintiff was directed to proceed by submission of a new preliminary subdivision application. Following the rejection of two preliminary subdivision applications in July of 2010 and February of 2011, the Town returned all application forms and uncashed checks to the plaintiff by letter dated September 28, 2011.

By motion returnable in April 22, 2009, marked submitted on October 10, 2010 and determined in an order dated November 16, 2012 (Garguilo, J.), the plaintiff's second application for preliminary injunctive relief was granted by continuing the temporary restraints which directed the defendant Trust to place all monies paid on account of the contract into escrow that were imposed in the order to show cause by which the motion was interposed. The defendant Trust was thus restrained from undertaking any action aimed at cancelling the contract of sale pending resolution of the action.

In October of 2013, the subject premises were under threat of an imminent foreclosure sale due to the non-payment of certain mortgages encumbering said premises. On October 15, 2013, the

Trust sold the subject premises to Melville Farms Realty, LLC (hereinafter the "LLC"), an entity formed for that purpose by defendants in this action, Robert Curcio and Matthew Classi. The foreclosure sale was obviated and the LLC owner took title subject to the Option Agreement and Contract of Sale between the Trust and the plaintiff and subject to the then pending 2008 action commenced by the plaintiff against the Trust. In addition, the Trust assigned all of its rights under said agreements to Melville Farms Realty, LLC.

On October 31, 2013, the plaintiff commenced this action bearing Index No. 29161/13 against the Trust and the individual members of the LLC purchaser. By stipulation reflected in the defendants' answer, the parties agreed to add the LLC as a party defendant to this action and the caption was allegedly amended to reflect this change (*see* Answer of defendants filed on December 18, 2014). On December 22, 2014, Justice Garguilo ordered a consolidation of the 2008 action to this second commenced action, although no written order has been made a part of the record herein. Nor was any amended pleading asserting claims against this newly added defendant served, although it appears that the plaintiff's claims against the LLC would be deemed extended to it to the extent applicable. This court thus amends the caption to reflect the addition of Melville Farms Realty, LLC, as a party defendant to this now consolidated action and directs that all future proceedings be captioned under Index No. 29161/13 with the parties aligned in the manner set forth in the caption of this order.

In the complaint served in this second action, the plaintiff charges the Trust and individual defendants in the First, Second and Third causes of action with contempt of the two prior preliminary injunctions issued in the orders outlined above. In the next three causes of action, the plaintiff charges the defendants with the tort of interference with the contractual relations of the plaintiff. In the Seventh cause of action, the Trust is charged with a breach of its obligations under the contract and in the Eighth cause of action all defendants, including the LLC, are charged with unjust enrichment. The Ninth through Thirteenth causes of action allege all of the defendants to have unclean hands and that the plaintiff is entitled to set aside the conveyance from the Trust to the LLC as void and that neither the individual defendants nor the LLC defendant are bona fide purchasers. In the answer served on behalf of the originally named defendants and the added LLC defendant, ten affirmative defenses are asserted, including legal insufficiency, waiver, equitable estoppel, acquiescence, culpable conduct, in pari delicto, failure to mitigate damages and a reservation of future defenses. The defendants purportedly asserted cross claims against two non-parties, who are principals of the plaintiff, but the court is unaware of the jurisdictional joinder of such "cross claim defendants" or their appearances herein by answer (*cf.*, CPLR 3011).

Upon filing of the complaint, the plaintiff made an initiatory motion for injunctive relief prohibiting the defendant Trust from disbursing the money it received from its sale of the land to the LLC and prohibiting the individual defendants from selling the premises or from prosecuting applications for approval of development of the subject parcel. By order dated May 19, 2014 (Garguilo, J.), the motion was denied.

By the instant motion, the defendants seek summary judgment dismissing the plaintiff's complaints served in both actions. They challenge the claim for specific performance on the grounds of laches and the claims for unjust enrichment as legally insufficient and lacking in substantive merit. They likewise contend that the claims for recovery of monies expended by the plaintiff in pursuit of its failed attempt to obtain subdivision approval are legally insufficient and/or lacking in merit. In its opposing papers, the plaintiff vigorously contests the validity of these challenges.

The defendants also challenge the viability of the three causes of action set forth in the 2013 complaint that charge the defendants with contempt, which allege tortious interference with contractual relations and the plaintiff's demand for a declaration that defendants wrongfully terminated the contract, in response to which, the plaintiff interposed no opposition. The defendants also seek dismissal of the Eighth cause of action, which sounds in unjust enrichment due to the expenditures made by the plaintiff in pursuit of its subdivision applications, which is opposed by the plaintiff. The defendants also challenge the requests for relief in the Ninth through Thirteenth causes of action in the 2013 complaint as legally insufficient or otherwise lacking in merit, in response to which, the plaintiff did not oppose.

Upon its review of the papers submitted in support of and in opposition to the instant motion, the court grants the defendants summary judgment to the extent set forth below.

A party moving for summary judgment must make a prima facie showing of entitlement, as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Winegrad v NY Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The remedy is considered a drastic one which should not be granted where there is any doubt as to the existence of a triable issue (*see* ***Stewart Title Ins. Co. v Equitable Land Serv.***, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]). The credibility of the parties is not an appropriate consideration for the Court (*see* ***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*see* ***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action due to such party's possession of a bona fide claim or defense (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 503, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). A party who fails to oppose some or all of the established prima facie matters, as a matter of law, in the moving papers is deemed to have abandoned the claims or defenses targeted by the movant for dismissal on which its prima facie showing has been made and to have conceded that no question of fact exists (*see* ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***New York Commercial Bank v J. Realty F. Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *see also* ***Onewest Bank, FSB v Prince***, 130 AD3d 700,14 NYS3d 66 [2d Dept 2015, *where no*

opposition filed no question of fact is raised]; ***Nationstar Mtge., LLC v Silveri***, 126 AD3d 86, 7 NYS3d 158 [2d Dept 2015]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 1045, 943 NYS2d 551 [2d Dept 2012]).

Here, the moving papers of the defendants established that the First, Second and Third causes of action set forth in the 2013 complaint, which sound in contempt, are without merit due to legal insufficiency or otherwise and that the Fourth, Fifth and Sixth causes of action which sound in tort are likewise without merit and that the plaintiff failed to address, let alone establish, that questions of fact exist requiring a trial with respect to these six causes of action. The defendants are thus awarded summary judgment dismissing the First through Sixth causes of action set forth in the 2013 complaint. For these very same reasons, the court dismisses the Ninth (unclean hands), Tenth (wrongful inducement to enter contract), Eleventh (determination that the conveyance to the LLC by the Trust is void) and the Twelfth and Thirteenth regarding the status of the individual and LLC defendants as bona fide purchasers.

Left for determination is whether the moving defendants are entitled to a dismissal of the Seventh and Eighth causes of action set forth in the 2013 complaint which sound in the recovery of damages by reason of the plaintiff's breach of the Option and/or sales contract as amended by the Addendum to the Option contract under theories of contract law and unjust enrichment, respectively, and whether the moving defendants are entitled to a dismissal of each of the three causes of action set forth in the 2008 complaint which sounds in breach of the Option Agreement and sales contract, unjust enrichment and a judgment compelling the defendants' specific performance of the Option contract of sale together with mandatory injunctive relief restoring the rights of the plaintiff thereunder.

With respect to these causes of action, the plaintiff opposes the defendants' motion on two threshold procedural grounds which, if successful, would obviate the court's consideration of the merits. The first challenge is to the defendants' use of the unpleaded defense of laches as a basis of their motion for summary judgment. It is premised upon a waiver that allegedly arose by reason of the defendants' failure to assert that defense in an answer or pre-answer motion. For the reasons stated, the court rejects this procedural challenge.

It is well settled that a defendant's failure to raise affirmative defenses of the type contemplated by CPLR 3015 and 3018 may constitute a waiver thereof. The rule is not absolute as unpleaded defenses may serve as the basis of a motion for summary judgment by a defendant where no prejudice or surprise inures to an adverse party (*see* ***Sullivan v American Airlines, Inc.***, 80 AD3d 600, 602, 914 NYS2d 276 [2d Dept 2011, *an unpleaded affirmative defense "may serve as the basis for granting summary judgment in the absence of surprise or prejudice"*]; ***Horst v Brown***, 72 AD3d 434, 900 NYS2d 13 [1st Dept 2010]; ***Sheils v County of Fulton***, 14 AD3d 919, 787 NYS2d 727 [3d Dept 2005]; ***Kirilescu v American Home Prods. Corp.***, 278 AD2d 457, 719 NYS2d 93 [2d Dept 2000]). So while the threshold inquiry is whether the opponent of the defense is surprised or prejudiced thereby, appellate case authorities have instructed that such prejudice is ameliorated when

the opponent of the defendant's motion premised upon the unpleaded defense is given an opportunity to fully respond to such motion (*see* ***Horst v Brown***, 72 AD3d 434, *supra*; ***Sheils v County of Fulton***, 14 AD3d 919, *supra*). The unpleaded nature of the defendants' laches defense is not barred by the court's consideration of the merits thereof since the plaintiff was afforded the opportunity to fully respond to such unpleaded defense and did so in its opposing papers.

The plaintiff's second procedural challenge is premised upon the rule prohibiting successive motions for summary judgment. While this rule has no application to those portions of this motion wherein the defendants seek dismissal of the causes of action set forth in the 2013 since no prior motion for summary judgment was interposed by the defendants with respect thereto, it is applicable to the 2008 complaint, as the defendants made a prior application for summary judgment dismissing those claims which was denied by order of the court dated April 8, 2009 (Cohalan, J.). Although the principal basis for such denial was the Trust's failure to attach copies of the pleadings served, the court went on to address the substance of certain of the contentions of the defendant Trust and rejected those contentions on the merits. For the reasons stated, the court finds that the rule prohibiting successive motions for summary judgment precludes the court's consideration of the defendants' application for dismissal of the 2008 complaint but not the Seventh and Eighth causes of action in the 2013 complaint.

Generally, successive motions for summary judgment should not be entertained absent a showing of newly discovered evidence or other sufficient cause (*see* ***Tingling v C.I.N.H.R., Inc.***, 120 AD3d 570, 992 NYS2d 43 [2d Dept 2014]; ***Vinar v Litman***, 110 AD3d 867, 868, 972 NYS2d 704 [2d Dept 2013]; ***Coccia v Liotti***, 101 AD3d 664, 666, 956 NYS2d 63 [2d Dept 2012]; ***Sutter v Wakefern Food Corp.***, 69 AD3d 844, 845, 892 NYS2d 764 [2d Dept 2010]). The rule is intended to deter the interposition of successive motions for summary judgment "in the guise of motions to renew where the new material could have been submitted with the original motion for summary judgment" (***Klein v Auerbach***, 1 AD3d 317, 766 NYS2d 580 [2d Dept 2003], *quoting* ***Laxrand Constr. Corp. v R.S.C.A. Realty Corp.***, 135 AD2d 685, 686, 522 NYS2d 584 [2d Dept 1983]). Nor should successive motions for summary judgment be made on facts or arguments which could have been submitted on the original motion for summary judgment (*see* ***Capuano v Platzner Intern. Group, Ltd.***, 5 AD3d 620, 774 NYS2d 780 [2d Dept 2004]; ***Klein v Auerbach***, 1 AD3d 317, *supra*).

Here, the defendants failed to demonstrate that new material not known forms the basis of this motion or that sufficient cause exists for the interposition of this second motion for summary judgment to the extent that a dismissal of the three causes of action advanced in the 2008 complaint is sought. Neither a change in counsel nor a change in the court presiding over the action constitutes good cause. The defendant's motion for summary judgment dismissing the 2008 complaint is thus denied. In any event, the laches defense is unavailing as there was no undue delay on the part of the plaintiff in asserting its claims against the Trust or its successor-in-interest. Even if there was undue delay, the defendant Trust did not establish an affirmative change in its position in reliance on the plaintiff's alleged delay in seeking relief and the failure of theTrust to seek relief in its own right, which it could have sought, further defeats any laches defense (*see* ***Datwani v Datwani***, 102 AD3d

616, 959 NYS2d 153 [1st Dept 2013]). Those portions of the instant motion in which the defendants seek summary judgment dismissing the 2008 complaint is thus denied.

Left for determination are the defendants' demands for summary judgment dismissing the Seventh and Eighth causes of action set forth in the 2013 complaint. The grounds advanced for dismissal of the Seventh cause of action, in which the plaintiff contends that the defendant Trust wrongfully, improperly and illegally breached the contract with the plaintiff, are: 1) legally insufficiency; and 2) that the court's prior determination denying preliminary injunctive relief to the plaintiff constitutes the law of the case with respect to the invalidity of its claim. The defendants' attack on the legal sufficiency of the averments under the heading of the Seventh cause of action, alone, and without any reference to the factual allegations advanced elsewhere in the complaint or proofs submitted, render this legal insufficiency claim unavailing. Moreover, the moving papers failed to establish by due proof in admissible form that the plaintiff has no cause of action for breach against the Trust or its successors-in-interest (*see* CPLR 3212; 3211[a][7]). Also unavailing is the defendants' claim that the denial of preliminary injunctive relief to the plaintiff constitutes due proof as to the lack of merit in the plaintiff's breach of contract claim. It is well settled that the grant or denial of a motion for a preliminary injunction does not constitute the law of the case or an adjudication on the merits of the claim for a permanent injunction and, therefore, the issues must be tried as if no application for a preliminary injunction had been made (*see* ***Town of Concord v Duwe***, 4 NY3d 870, 799 NYS2d 167 [2005]; ***Kaplan v Queens Optometric Assoc., PC.***, 293 AD2d 449, 739 NYS2d 461 [2d Dept 2003]). Summary judgment is thus denied as to the Seventh cause of action set forth in the 2013 complaint, without regard to the sufficiency of the plaintiff's opposing papers.

The court, however, grants the remaining portions of the defendants' motion wherein they seek dismissal of the Eighth cause of action set forth in the 2013 complaint in which the plaintiff seeks to recover monies expended in pursuing its unsuccessful subdivision application with the Town of Huntington under theories of unjust enrichment. The elements of a cause of action to recover for unjust enrichment are "(1) the defendant was enriched (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (***GFRE, Inc. v US Bank, NA***, 130 AD3d 569, 13 NYS3d 452 [2d Dept 2015], *quoting* ***Mobrak v Mowad***, 117 AD3d 998, 1001, 986 NYS2d 539 [2d Dept 2014]). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (***Paramount Film Distrib. Corp. v State of New York***, 30 NY2d 415, 421, 334 NYS2d 388 [1972]; *see* ***Sperry v Crompton Corp.***, 8 NY3d 204, 215, 831, NYS2d 760 [2d Dept 2007]).

An unjust enrichment claim may lie where defendant wrongfully holds property that should be delivered to plaintiff or to recover for a performance that conferred a benefit upon the defendant (*see* ***Farina v Bastianich***, 116 AD3d 546, 984 NYS2d 46 [1st Dept 2014]). It is not enough to show that the defendant received a benefit (*see* ***Joan Hansen & Co. v Everlast World's Boxing Headquarters, Corp.***, 296 AD2d 103, 744 NYS2d 384 [1st Dept 2002]). Rather, the plaintiff must

identify the alleged benefit conferred and the equitable basis for returning it to state a legally sufficient claim for unjust enrichment (*see* ***Lebovits v Bassman***, 120 AD3d 1198, 992 NYS2d 316 [2d Dept 2014]; ***Woods v 126 Riverside Dr., Corp.***, 64 AD3d 422, 882 NYS2d 106 [1st Dept 2009]). Although privity is not required for an unjust enrichment claim, where the claim arises from some action by plaintiff, there must be some connection or relationship between the parties that could have induced plaintiff to act or caused reliance on plaintiff's part (*see* ***Georgia Malone & Co., Inc. v Rieder***, 19 NY3d 511, 950 NYS2d 333 [2012]). Unjust enrichment, however, is not a catch all cause of action to be used when others fail (*see* ***Glinskaya v Zelman***, 128 AD3d 771, 9 NYS3d 350 [2d Dept 2015]) and is not available where an express contract exists governing the subject matter and no dispute exists with respect to it (*see* ***El-Nahal v FA Mgt., Inc.***, 126 AD3d 667, 5 NYS3d 201 [2d Dept 2015]).

Here, the defendants established that the Eighth cause of action set forth in the plaintiff's complaint is legally insufficient as there are no allegations as to the alleged benefit conferred upon the defendants nor any equitable basis for returning it. The plaintiff's efforts to obtain subdivision approval have been unsuccessful and the contract called for the transfer of surveys and other diagrams and papers to the Trust in the event that the plaintiff failed to obtain approval. No benefit to the defendants is discernable and even if it were, the defendants' retention thereof is hardly unjust (*see* ***Paramount Film Distr. Corp. v State***, 30 NY2d 415, *supra*). There is thus no legally sufficient claim for unjust enrichment advanced in the Eighth cause of action set forth in the 2013 complaint nor is one discernable from the evidentiary submissions on this motion. The defendants are thus awarded summary judgment dismissing the Eighth cause of action set forth in the 2013 complaint.

The court has considered all remaining contentions of the parties and finds them to be without merit.

In view of the foregoing, the motion is granted to the extent set forth above and denied in all other respects. In an effort to move this unduly protracted action along, the court directs counsel to appear on **October 30, 2015**, at 9:30 a.m. for a pretrial conference in an effort to ready this matter for trial.

DATED: 9/10/15

THOMAS F. WHELAN, J.S.C.