

Erie County Legal Journal

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Gardner v. Mellin

Erie County Legal Journal

*Reporting Decisions of the Courts of Erie County
The Sixth Judicial District of Pennsylvania*

Managing Editor: Paula J. Gregory
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Erie County Bar Association

Calendar of Events and Seminars

THURSDAY, APRIL 22, 2010

Fundamentals of Estate Administration

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 4:00 p.m. (8:30 a.m. reg.)

\$149 (member) \$129 (admitted after 1/1/06)

\$169 (nonmember)

6 hours substantive

FRIDAY, APRIL 23, 2010

Medicaid: A General Overview, Planning and

Powers of Attorney

ECBA Live Seminar

Bayfront Convention Center

8:30 a.m. - 11:45 a.m. (8:15 a.m. reg.)

\$89 (ECBA members/staff) \$135 (nonmembers)

2 hours substantive / 1 hour ethics

TUESDAY, APRIL 27, 2010

Fundamentals of Insurance Law

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 1:30 p.m. (8:30 a.m. reg.)

\$129 (member) \$109 (admitted after 1/1/06)

\$149 (nonmember)

4 hours substantive

WEDNESDAY, APRIL 28, 2010

From File to Trial:

8 Keys to Success in Court & Beyond

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 4:00 p.m. (8:30 a.m. reg.)

Lunch is Included

\$364 (member) \$344 (admitted after 1/41/06)

\$384 (nonmember)

Early Registration - If you register more than 2 days before this

presentation you will qualify for this Early Registration Fee:

\$339 (member) \$319 (admitted after 1/1/06) \$359 (nonmember)

5 hours substantive / 1 hour ethics

THURSDAY, APRIL 29, 2010

Overcoming Depression

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 10:00 a.m. (8:30 a.m. reg.)

\$39 (member) \$49 (nonmember)

1 hour ethics

SATURDAY, MAY 1, 2010

7th Annual Law Day 5K Run/Walk

Erie County Court House

9:00 a.m.

\$20 (adults) \$10 (children 12 and under)

MONDAY, MAY 3, 2010

Spousal Privilege: Can you use it, or is it up to the spouse?

ECBA Live Lunch-n-Learn

Bayfront Convention Center

12:15 p.m. - 1:15 p.m. (lunch at 11:45 a.m.)

\$29 (ECBA members/staff) \$45 (nonmembers)

1 hour substantive

TUESDAY, MAY 4, 2010

Integrity: Good People, Bad Choices & Life Lessons from the White House

PBI Video

Erie County Bar Association

9:00 a.m. - 12:00 p.m. (8:30 a.m. reg.)

\$324 (member) \$304 (admitted after 1/1/06)

\$344 (nonmember)

Early Registration - If you register more than 2 days before this

presentation you will qualify for this Early Registration Fee:

\$299 (member) \$279 (admitted after 1/1/06) \$319 (nonmember)

2 hours substantive law / 1 hour ethics

WEDNESDAY, MAY 5, 2010

Post Conviction Relief Act - The Basics

PBI Groupcast Seminar

Erie County Bar Association

12:30 p.m. - 3:45 p.m. (12:00 p.m. reg.)

Lunch is Included

\$214 (member) \$194 (admitted after 1/1/06)

\$234 (nonmember)

Early Registration - If you register more than 2 days before this

presentation you will qualify for this Early Registration Fee:

\$189 (member) \$169 (admitted after 1/1/06) \$209 (nonmember)

3 hours substantive

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AXELL C. GARDNER and K. AUDREY GARDNER, Plaintiffs
v.
CHERYL J. MELLIN and RICHARD H. MELLIN, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the record either demonstrates: no genuine issue of material fact exists as to a necessary element of the cause of action or defense; or an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to their prima facie cause of action or defense which would require the issues be submitted to a jury.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled facts in the nonmoving party's pleading.

CONTRACT / CONSIDERATION

Under the Uniform Written Obligations Act, lack of consideration is removed as a ground for avoiding a contract where a statement of the parties' intent to be legally bound to it is included therein.

CONTRACT / MISTAKEN ASSUMPTION

Literate persons have a duty to read a contract before signing it, and if such persons are unable to understand the terms of the writing, so that they are aware of its contents, they are under a duty to have one who does understand it read and explain it to them; if they do not, they are bound by their signatures and bear the risk of mistake.

CONTRACT / MISREPRESENTATION

Extrinsic evidence is generally admissible to contradict the terms of an ambiguous contract when fraud and/or misrepresentation is alleged, but is not admissible if the terms of the contract are unambiguous.

CONTRACT / PROMISSORY ESTOPPEL

A party may only maintain a claim of promissory where it can show that: (1) the party against whom the claim is alleged made a promise that they should have reasonably expected would induce action or forbearance on the part of the other party; (2) the other party actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.

CONTRACT / UNJUST ENRICHMENT

The doctrine of unjust enrichment is inapplicable where a written or express contract exists.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY,
 PENNSYLVANIA CIVIL DIVISION No. 14408-2007

Appearances: Joseph M. Walsh, III, Esq., Attorney for Axell C. and
K. Audrey Gardner
Lori R. Miller, Esq., Attorney for Cheryl J. and
Richard H. Mellin

OPINION

Connelly, J., January 20, 2010

This matter is before the Court of Common Pleas of Erie County, Pennsylvania (hereinafter "the Court"), pursuant to a Motion for Summary Judgment filed by Axell C. Gardner and K. Audrey Gardner (hereinafter "Plaintiffs Axell and Audrey Gardner," respectively; "Plaintiffs," collectively). Cheryl J. Mellin and Richard H. Mellin (hereinafter "Defendants Cheryl and Richard Mellin," respectively; "Defendants," collectively) oppose Plaintiffs' Motion. *Opposition to Motion for Summary Judgment*, pp. 1-4.

Statements of Fact

Defendants approached Plaintiffs in May of 2005, requesting an unspecified parcel of Plaintiffs' land on which they would construct a new home. *Motion for Summary Judgment*, ¶¶ 4-5; *Mellin Depo.*, pp. 10-14. Plaintiffs ultimately decided to convey¹ a ten-acre lot (hereinafter "Subject Property") to Defendants on June 17, 2005, via quitclaim deed. *Motion for Summary Judgment*, ¶¶ 6-13, Exs. C, D; *Plaintiffs' Brief in Support of Motion for Summary Judgment*, p. 1; *Mellin Depo.*, pp. 14-17. Plaintiffs and Defendants signed a Memorandum of Understanding (hereinafter "Memorandum") directly after Defendants received physical possession of the deed on June 17, 2005. *Motion for Summary Judgment*, Ex. E; *Mellin Depo.*, pp. 27-30, 81-82. Legal counsel to both Plaintiffs and Defendants at the closing, Attorney David R. Devine (hereinafter "Attorney Devine"), drafted the Memorandum that reads, in pertinent part, as follows:

[Plaintiffs] . . . by deed . . . have conveyed a ten (10) acre parcel of land . . . to [Defendants]. Should [Plaintiffs] have the financial need in their judgment, [Defendants] agree to re-convey eight (8) acres of land including the existing frame dwelling and frame barn to [Plaintiffs]. The parties acknowledge the re-conveyance would be conditioned upon: A. Subdivision approval ([Defendants] to pay subdivision costs). B. Securing a release of mortgage lien as [Defendants] intend to secure a construction loan for the purpose of building a residential dwelling on this property being gifted to them by [Plaintiffs].

¹ The lot was conveyed from Plaintiffs to Defendants for the consideration of \$1.00. *Motion for Summary Judgment*, Exhibit D.

The parties acknowledge their intent to make this memorandum a binding contract subject to the conditions above referenced.

Motion for Summary Judgment, Ex. E; Answer to New Matter and Counterclaim, p. 3. Defendants proceeded to build their new home and install a driveway on the Subject Property. *Id. at ¶ 19; Mellin Depo., pp. 18-19.* Defendants also made improvements to the aforementioned frame dwelling and frame barn (hereinafter "rental unit"), which sat upon the Subject Property.² *Mellin Depo., pp. 49-52.* On March 23, 2006, Plaintiffs notified Defendants they were exercising their rights under the Memorandum, specifically, to have Defendants reconvey eight (8) acres of the Subject Property - including the rental unit. *Motion for Summary Judgment, ¶ 21, 22.* Defendants refused to reconvey the eight (8) acres to Plaintiffs. *Id. at ¶ 23; Defendants Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 2-3.*

On October 9, 2007, Plaintiff filed their Complaint which contained four counts against Defendants: Count I, Breach of Contract; Count II, Unjust Enrichment; Count III, Constructive Trust; and Count IV, Fraud. *Complaint, ¶¶ 20-51.* Defendants filed a Counterclaim on November 20, 2007 alleging at Count I, Promissory Estoppel; and Count II, Unjust Enrichment. *Counterclaim, ¶¶ 1-20.*

On August 5, 2009, Plaintiffs filed their Motion for Summary Judgment along with a Brief in Support thereof.³ *Motion for Summary Judgment, ¶¶ 1-63; Plaintiffs' Brief in Support of Motion for Summary Judgment, pp. 1-14.* Defendants subsequently filed their Brief in Opposition on September 10, 2009, which was followed by Plaintiffs' Reply Brief on September 23, 2009. *Defendants Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 1-17; Plaintiffs' Reply Brief in Response to Defendants' Brief in Opposition to Motion for Summary Judgment, pp. 1-4.*

Analysis of Law

Any party may move for summary judgment, in whole or in part, after the relevant pleadings are closed. *See, Ertel v. The Patriot-News Co., 674 A.2d 1038 (Pa. 1996); cert. denied, 519 U.S. 1008 (1996).* Summary judgment is appropriate when the record either demonstrates: no genuine issue of material fact exists as to a necessary element of the cause of action or defense (that could be established by additional discovery or

² Plaintiffs received monthly rental income from the rental unit prior to the conveyance, and a verbal agreement was contemporaneously made with the conveyance wherein Plaintiffs would continue to receive the income from the rental unit. *Motion for Summary Judgment, ¶¶ 12, 14; Mellin Depo., pp. 15-18, 22-23*

³ Plaintiffs claim summary judgment is appropriate not only in favor of Counts I and II of their Complaint, but also against both of Defendants' counterclaims. *Motion for Summary Judgment, p. 10.*

expert report); or an adverse party, who will bear the burden of proof at trial, has failed to produce evidence of facts essential to their *prima facie* cause of action or defense which would require the issues be submitted to a jury.⁴ *Pa.R.C.P. § 1035.2*.

It is Plaintiffs' burden, as the moving party, to prove summary judgment is appropriate, and all doubts as to such shall be resolved against them. *See, Ertel*, 674 A.2d at 1041. However, this is not to say Defendants, as the nonmoving party, may rest upon the mere allegations or denials of their pleadings, but they must set forth by affidavit, or otherwise, specific facts showing summary judgment is not appropriate. *See, Id.* at 1042; *Burger v. Owens III., Inc.*, 966 A.2d 611, 619-20 (Pa. Super. 2009).

The Court must not only examine the record in a light most favorable to the nonmoving party, but it must also accept as true all well-pled facts in the nonmoving party's pleadings. *Brecher v. Cutler*, 578 A.2d 481, 483-84 (Pa. Super. 1990); *citing, Green v. K & K Ins. Co.*, 566 A.2d 622, 623 (Pa. 1989). To that end, the Court has viewed the record in a light most favorable to Defendants, and has weighed applicable law as it relates to the facts of this case along with the merit of the arguments presented by both Plaintiffs and Defendants in determining whether summary judgment is proper. Though the general issue before the Court is whether Plaintiffs are entitled to summary judgment, the Court, in order to determine such, must specifically address several issues.

The first of these issues deals with the existence of genuine issues of material fact as to whether the Memorandum represents a valid contract between the parties. Plaintiffs must establish the existence of an actual contract, among other things, in order to maintain a cause of action in breach of contract.⁵ *See, Lackner v. Glosser*, 892 A.2d 21, 30 (Pa. Super. 2006). Defendants aver there are genuine issues of material fact as to the validity of the Memorandum; specifically, Plaintiffs failed to give consideration and the Memorandum did not constitute a mutual understanding between the parties rendering it unconscionable. *Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment*, pp. 7, 11.

Defendants argue that, as they had already owned the Subject Property at the moment the Memorandum was signed (due to the fact that delivery of the deed was "already complete" at that time making Plaintiffs "already legally obligated to comply with the transfer"), the Memorandum lacks

⁴ The "record" includes: pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, and reports signed by an expert witness that would, if filed, comply with Civil Rule 4003.5(a)(1), whether the reports have been produced in response to interrogatories. *Pa.R.C.P. 1035.1*.

⁵ "Other things," i.e., a plaintiff must also establish the contract's essential terms, a breach of a duty imposed by the contract; and resulting damages. *Lackner*, 892 A.2d at 30. As Defendants only take issue with whether Plaintiffs' have established that a contract existed, the Court shall limit its analysis accordingly.

consideration. Defendants assert a contract cannot be based on a promise to do something that Plaintiffs were already bound to do, i.e., transfer title of the Subject Property. *See, Malamed v. Sedelsky*, 80 A.2d 853, 856 (Pa. 1951)(holding delivery of a deed is sufficient to pass title to realty); *State Capital Savings & Loan Ass'n v. 221 Shady Ave.*, 420 A.2d 744, 745-46 (Pa. Super. 1980)(holding performance of an act which one is already legally bound to render is not consideration for the plain reason that there is no benefit to the entitled party nor a detriment to the one already legally obligated to perform); *Defendants' Brief in Opposition to Plaintiffs Motion for Summary Judgment*, pp. 10-11.

Parties must normally exchange consideration in order for a contract to exist. *Estate of Beck*, 414 A.2d 65, 68 (Pa. 1980); *Weaverton Transp. Leasing, Inc. v. Moran*, 834 A.2d 1169, 1172 (Pa. Super. 2003). However, under the Uniform Written Obligations Act, lack of consideration is removed as a ground for avoiding a contract where a statement of the parties' intent to be legally bound to it is included therein.⁶ 33 P.S. § 6., *McGuire v. Schneider, Inc.*, 534 A.2d 115, 118 (Pa. Super. 1987); *citing, Kay v. Kay*, 334 A.2d 585, 587 (Pa. 1975). The Memorandum reveals both parties acknowledged "their intent to make [the] Memorandum a binding contract subject to the conditions above referenced," i.e., the reconveyance of eight (8) acres should Plaintiffs have "financial need in their judgment" in return of the initial conveyance. *Motion for Summary Judgment, Ex. E*. Therefore, the Court finds any argument - proffered or otherwise - regarding lack of consideration to be inconsequential to Plaintiffs' Breach of Contract claim due to Defendants' written intent to be legally bound to the Memorandum's conditions pursuant to the Pennsylvania Supreme Court's interpretation and application of Title 33, Section 6 of the Pennsylvania Statutes. *See, Kay*, 334 A.2d 585.

Defendants also argue the Memorandum (to which their signatures denote they intended to be legally bound) is unconscionable as it did not constitute a mutual understanding between the parties in that they were mistaken as to its purpose because: one, the Memorandum and possible re-conveyance was never previously discussed with Defendants; two, Defendants were not involved in the drafting of the Memorandum; three, Defendants did not have any input into the Memorandum's contents; and four, Attorney Devine made several misrepresentations to Defendants regarding the Memorandum's legal effect. *Defendants' Brief in Opposition to Plaintiffs Motion for Summary Judgment*, pp. 9-10.

⁶ Failure of consideration, unlike Defendants' presently averred lack of consideration, goes to the heart of any claim based on an agreement, and is always an available defense to that claim. *See, M.N.C. Corp. v. Mount Lebanon Med. Ctr.*, 509 A.2d 1256, 1259 (Pa. 1986); *see also, Williams v. Katawczuk*, 53 Pa. D. & C.4th 558 (C.P. Allegheny Co. 2001)(holding 33 P.S. § 6 does not apply in an action for breach of contract in which there is a failure of consideration because the case law construes it only to remove lack of consideration as a ground for enforcing a contract).

The first three of Defendants' four arguments against the existence of mutual assent indicate Defendants believe their lack of participation in the Memorandum's drafting, coupled with their failure to have it explained to them, led to their ignorance of both its contents and legal effect, and consequentially a lack of mutual assent. Literate persons have a duty to read a contract before signing it, and if such persons are unable to understand the terms of the writing, so that they are aware of its contents, they are under a duty to have one who does understand it read and explain it to them; if they do not, they are bound by their signatures and bear the risk of mistake. *Fried v. Feola*, 129 F. Supp. 699, 704 (W.D. Pa. 1954); *Estate of Brant*, 344 A.2d 806 (Pa. 1975); *Restatement (Second) of Contracts 154(b),(c)*. Not only have Defendants admitted to voluntarily signing the Memorandum without question, and with a clear appreciation of all its terms⁷, but Defendants were also duty-bound to seek assistance in understanding the Memorandum if they were at all unclear as to its terms and legal effect. Their failure to do so leads the Court to find they treated their supposed limited knowledge as sufficient. Thus, Defendants' actions invalidate any claim against the existence of mutual assent based on the first three of the four arguments.

Defendants fourth argument relies on the axiom that mutual agreement cannot be realized where one party has been induced to execute a contract through misrepresentation. *See, Degenhardt v. The Dillon Co.*, 669 A.2d 946, 950 (Pa. 1996); *DeJoseph v. Zambelli*, 139 A.2d 644 (Pa. 1958); *Weaverton Transp. Leasing, Inc.*, 834 A.2d at 1172; *see also, McFadden v. American Oil Co.*, 257 A.2d 283 (Pa. Super. 1969) (holding a unilateral mistake due to the negligence of the mistaken party typically affords no basis for relief, unless there is mistake on one side and fraud or misrepresentation on the other). Defendants specifically state Attorney Devine misrepresented that Defendants were required to sign the Memorandum in order to receive the Subject Property, despite his belief that it would be unenforceable in court. *Defendants' Brief in Opposition to Plaintiffs Motion for Summary Judgment*, p. 10.

While extrinsic evidence is generally admissible to contradict the terms of an ambiguous contract when fraud and/or misrepresentation is alleged, extrinsic evidence such as Attorney Devine's alleged statement is not admissible if the terms of the Memorandum are unambiguous. *See, West Conshohocken Rest. Assoc., Inc., v. Flanigan*, 737 A.2d 1245, 1248 (Pa. Super. 1999)(holding extrinsic evidence is admissible to contradict the terms of an ambiguous contract); *McCartney v. Dunn & Conner, Inc.*, 563 A.2d 525, 530 (Pa. Super. 1989)(holding extrinsic evidence is not admissible when it regards advice of counsel that may be contrary to the terms of an unambiguous contract).

⁷ *See, Mellin Depo.*, pp. 29-30, 81-82.

A reading of the Memorandum itself, coupled with Defendants' own admission to understanding its terms, reveals it to be an unambiguous document.⁸ Therefore, any extrinsic evidence regarding the statements of Defendants' legal counsel at closing are inadmissible for Defendants' desired purposes. Even if such alleged statements were admissible, the record before the Court supports a finding that Defendants simply misunderstood Attorney Devine's representations. The record depicts that while he denies stating the Memorandum would not hold up in Court, he is rather forthright that he made several statements to both parties noting the reconveyance, if requested, would be very difficult to obtain due to several "tough hurdles," e.g., paragraphs "A" and "B" of the Memorandum. *Devine Depo.*, pp. 17-18, 20-21, 31-32. Consequentially, just as with their first three arguments, Defendants' fourth argument against the existence of mutual assent does not establish a basis for their desired relief.

The Court finds mutual assent was obtained between the parties, as any misunderstanding on Defendants' behalf was the result of a unilateral mistake born out of their own negligence. Moreover, Defendants admit that they knowingly and willingly signed the Memorandum after the transfer of land was already completed because they didn't believe Plaintiffs were going to attempt to enforce it. *Brief in Opposition to Motion for Summary Judgment*, p. 10; *Richard Mellin Depo.*, p. 28. Therefore, it appears that Defendants understood the effect of the Memorandum when they signed it, they just assumed Plaintiffs would not ask for reconveyance.⁹ This, coupled with the fact that lack of consideration is a non-issue, leads the Court to find there to be no genuine issue of fact as to the Memorandum's validity.

As the Court has also found the valid Memorandum to be unambiguous, it must enforce the plain meaning of the terms contained therein. *See, Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-30 (Pa. 2001). The Memorandum states that "should [Plaintiffs] have the financial need in their judgment, [Defendants] agree to re-convey eight (8) acres of land including the existing frame dwelling and frame barn

⁸ The question of whether the Memorandum is ambiguous is a question of law left to the Court to determine. *See, Kripp v. Kripp*, 843 A.2d 1159, 1164 (Pa. 2004). Defendants' deposed admission to comprehending the Memorandum in its entirety when it was presented to them at closing, along with the Court's own reading of the one-page document, leads it to find ambiguity does not exist among the terms set forth in the Memorandum. *See, Mellin Depo.*, pp. 29-30, 81-82.

⁹ Defendants state the Memorandum was "[a]t most ... a subsequent agreement by the Defendants to reconvey the property to Plaintiffs, which agreement is unenforceable for lack of consideration." *Brief in Opposition to Plaintiffs' Motion for Summary Judgment*, p. 12. The Court agrees with Defendants, the Memorandum was a subsequent agreement between the parties following the transfer, however, because the parties' intent to be legally bound is contained in the signed Memorandum, consideration is unnecessary to make the Memorandum enforceable.

to [Plaintiffs]." *Motion for Summary Judgment, Ex. E.* Defendants' acknowledgement of Plaintiffs' financial need is unnecessary as its existence is based solely on Plaintiffs' own judgment. *Id.* Nevertheless, Plaintiffs expressed to Defendants they were struggling, and Defendants acknowledged such financial difficulties.¹⁰ *Mellin Depo.*, pp. 85-86. Therefore, the Court finds Defendants' breached the contract due to their failure to reconvey the eight (8) acres even after learning of Plaintiffs' financial hardships.

The Court must also determine whether Defendants have produced evidence of facts essential to their prima facie counterclaim of Promissory Estoppel. Defendants contend they have provided sufficient evidence to establish their promissory estoppel claim, and Plaintiffs should therefore be estopped from seeking the reconveyance of the eight (8) acres of the Subject Property. Defendants' claim relies on the alleged: representations made by Plaintiff Axell Gardner; their effect as to the building of Defendants' new home; and the injustice and costs that would arise if Defendants were required to reconvey the eight (8) acres. *Answer; New Matter, and Counterclaim*, pp. 19-20; *Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment*, pp. 13-15. Defendants specifically state Plaintiff Axell Gardner's representations consisted of his "insistence" Defendants "build their home on the rear, western portion of the Subject Property," and his "indicat[ion] that [Defendants] did not need to be concerned about the reconveyance, and that [Plaintiffs] would likely never need the eight (8) acres back."¹¹ *Answer; New Matter, and Counterclaim*, p. 19.

Defendants may only maintain a claim of promissory estoppel where they show each of the following three elements: (1) Plaintiffs *made a promise* they should have reasonably expected would induce action or forbearance on the part of Defendants; (2) Defendants actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. *See, Shoemaker v. Commonwealth Bank*, 700 A.2d 1003, 1006 (Pa. Super. 1997)(*emphasis added*). By Defendants' own pleadings, Plaintiff Axell Gardner "insisted" on a location to build the home and "indicated" Plaintiffs would likely

¹⁰ In fact, Plaintiffs' attorney at the time sent a letter to the Defendants on March 23, 2006 which stated "Although the need for reconveyance only need be in the Gardners' judgment, you should be aware that Axell is in a nursing home, their tenant is gone, and [Plaintiffs' son] won't share any of the benefits of the farms he owns with Axell. In short, the Gardners do not have the means with which to live." *Motion for Summary Judgment, Exhibit F. Defendants admit receiving this letter. Answer*, ¶ 16.

¹¹ Though not included in their initial counterclaim, Defendants later raise the aforementioned representations made by Attorney Devine as a basis for relief via promissory estoppel. *Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment*, pp. 13-15. In addition to the fact Attorney Devine is not a party to this present lawsuit, the Court finds it has already addressed such representations and need not further address them in regards to Defendants' promissory estoppel claim.

never require the reconveyance. *Answer, New Matter, and Counterclaim, p. 19.*

The Court finds a person "insisting" or "indicating" is not tantamount to one "promising." Furthermore, Defendant Cheryl Mellin stated Defendants did not place their new home on the final location due to any inducement by Plaintiff Axell Gardner and his statements, but because they deemed it the best location on the Subject Property to put their new home. *Mellin Depo., pp. 75-76.* Finally, Defendants have not provided the Court with documentation showing even an estimation as to the costs that would be imposed upon them if Defendants would be required to reconvey the eight (8) acres. As such, the Court cannot determine the severity, if any, of the alleged injustices and costs. Therefore, the Court finds Defendants have failed to provide sufficient evidence to their prima facie claim of promissory estoppel.

Finally, the Court must determine whether Defendants have produced evidence of facts essential to their prima facie claim of Unjust Enrichment. Defendants also contend they have provided sufficient evidence to establish a claim of unjust enrichment, and Plaintiffs may not accept the value of the repaired rental unit should Defendants be required to reconvey the eight (8) acres of the Subject Property. Defendants cite the Pennsylvania Superior Court's decision of *Mitchell v. Moore*, which enumerates the elements necessary to prove unjust enrichment as follows: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Mitchell v. Moore*, 729 A.2d 1200, 1203 (Pa. Super. 1999). However, by its nature, the doctrine of unjust enrichment, is inapplicable where a written or express contract exists. *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. 2006); *citing, Mitchell v. Moore*, 729 A.2d 1200 (Pa. Super. 1999). In other words, one may only recover under a quasi-contract theory of unjust enrichment provided no express contract exists between the parties. *See, Northeast Fence & Iron Works, Inc., v. Murphy Quigley Co., Inc.*, 933 A.2d 664, (Pa. Super. 2007).

The valid and unambiguous Memorandum entered into by the parties on June 17, 2005, reads "[Defendants] agree to re-convey eight (8) acres of land including the existing frame dwelling and frame barn to [Plaintiffs]. *Motion for Summary Judgment, Ex. E.* Due to the existence of the written contract between Plaintiffs and Defendants, the Court is constrained to find Defendants claim of unjust enrichment to be inapplicable. Therefore, a ruling as to whether Defendants have provided sufficient evidence to their prima facie claim of unjust enrichment is unwarranted.

In conclusion, the Court finds that Memorandum entered into on

June 17, 2005 is valid and enforceable. Moreover, Defendants have failed to provide the Court with any sufficient evidence of promises made to them by Plaintiffs that either induced their construction/placement of their new home, or that directly affected any costs that may be associated with reconveyance. The Court also notes that because the Memorandum appears to be valid, Defendant's claim of unjust enrichment is moot.

Consequently, no doubts are raised whether Plaintiffs have successfully shown that summary judgment is appropriate because the provided evidence, even when viewed in a light most favorable to Defendants, reveals the absence of genuine issues of material fact as to the Memorandum's validity, as well as the absence of evidence of facts essential to Defendants' counterclaims. Summary Judgment is therefore granted pursuant to Plaintiffs' Motion.

ORDER

AND NOW, TO-WIT, this 20th day of January 2010, it is hereby **ORDERED, ADJUDGED, and DECREED** that Plaintiffs' Motion for Summary Judgment is **GRANTED** and Defendants' counterclaims are hereby **DISMISSED** for the reasons set forth in the foregoing Opinion.

BY THE COURT:

/s/ **Shad Connelly, Judge**

CHANGE OF NAME NOTICE

In the Court of Common Pleas of Erie County, Pennsylvania
Docket No. 11476-10

In Re: Alesia Huggins on behalf of Logan Patrick Hovis-Latshaw

Notice is hereby given that on the 31st day of March, 2010, a Petition was filed in the above named Court, requesting an order to change the name of Logan Patrick Hovis-Latshaw to Logan Patrick Hovis.

The Court has fixed the 20th day of May, 2010, at 8:45 a.m. in Courtroom No. H on the second floor of the Erie County Court House as the time and place for the hearing on said Petition, when and where all interested persons may appear and show cause, if any, why the prayers of the Petitioner should not be granted.

Apr. 16

INCORPORATION NOTICE

LUCKY LOUIE'S, INC., has been incorporated under the provisions of the Pennsylvania Business Corporation Law of 1988.

John R. Falcone, Esq.

The Gideon Ball House

135 East 6th Street

Erie, Pennsylvania 16501

Apr. 16

LEGAL NOTICE

THE SCHOOL DISTRICT

CITY OF ERIE, PA

Administration Office Building

148 West 21st Street

Erie, PA 16502

NOTICE TO BIDDERS

The School District of the City of Erie, 148 West 21st Street, Erie, PA 16502 will receive SEALED BIDS for Art Supplies, Pencils & Pens, School Paper, Lamps, Regular & Office Supplies, and Rubbish, Trash and Waste Materials up to Thursday, May 6, 2010 at 1:30 p.m., Daylight Savings Times, and will be opened in the Board Room in accordance with the bid forms and specifications to be obtained from the Purchasing Department.

Robin Smith

Secretary

Apr. 16, 23, 30

LEGAL NOTICE

NOTICE OF ACTION IN

MORTGAGE FORECLOSURE

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

No. 14845-09

Citifinancial Services, Inc.
vs.

Estate of Gary Douglas Goodemote

a/k/a Gary D. Goodemote,

Mae D. Ford, Solely as

Administratrix C.T.A. and

Devisee of the Estate of Gary

Douglas Goodemote a/k/a Gary D.

Goodemote, Et Al.

NOTICE

To Unknown Heirs, Successors, Assigns, and All Persons, Firms, or Associations Claiming Right, Title or Interest From or Under Ann Schaller Goodemote a/k/a Ann S. Goodemote, Deceased:

You are hereby notified that on October 27, 2009, Plaintiff, Citifinancial Services, Inc., filed a Mortgage Foreclosure Complaint endorsed with a Notice to Defend, against you in the Court of Common Pleas of Erie County Pennsylvania, docketed to No. 14845-09. Wherein Plaintiff seeks to foreclose on the mortgage secured on your property located at 3602 Scarboro Road, Erie, PA 16506 whereupon your property would be sold by the Sheriff of Erie County.

You are hereby notified to plead to the above referenced Complaint on or before 20 days from the date of this publication or a Judgment will be entered against you.

NOTICE

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this notice to your lawyer at once. If you do not have a

lawyer, go to or telephone the office set forth below. This office can provide you with information about hiring a lawyer.

If you cannot afford to hire a lawyer, this office may be able to provide you with information about agencies that may offer legal services to eligible persons at a reduced fee or no fee.

Erie County
Lawyer Referral Service
PO Box 1792
Erie, PA 16507
814-459-4411

Apr. 16

Law Day 2010

Friday, May 7

Noon Luncheon
Bayfront Convention Center
\$25/ticket

The Erie County Bar Association

invites you, your family and friends to join us, along with Erie's executive, judicial and legislative leaders, to celebrate Law Day 2010.

Our Keynote Speaker

ARI SHAPIRO

will address

The War on Terror

Legal Issues and Controversial Court Cases

As National Public Radio's Justice correspondent, Ari Shapiro has occupied a front-row seat as the government's approach to fighting terrorism has changed since 9/11. Shapiro will provide behind-the-scenes anecdotes about some of the most timely, most heated debates in Washington, offering a distinctive look at the rarely-seen machinations that shape the way the United States fights terrorism.

The fight against terrorism is closely tied to some of our country's most high-profile court cases. Mr. Shapiro will share his perspective on what really happens in the cases people care the most about.



Reservations are due to the ECBA by Friday, April 23, 2010.

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ESTATE NOTICES

Notice is hereby given that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same and all persons indebted to said estates are requested to make payment without delay to the executors or their attorneys named below.

FIRST PUBLICATION

**CROSBY, GERALD R.,
deceased**

Late of the Township of Conneaut, County of Erie, State of Pennsylvania

Executor: David B. Crosby, 11550 Route 6N, Albion, Pennsylvania 16401

Attorney: James R. Steadman, Esq., 24 Main St. E., Girard, Pennsylvania 16417

**DeGEORGE, ROBERT,
deceased**

Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania

Executor: Gary H. Nash, c/o Yochim & Nash, 345 West Sixth Street, Erie, PA 16507

Attorney: Gary H. Nash, Esquire, Yochim & Nash, 345 West Sixth Street, Erie, PA 16507

**EVANS, LEONARD,
deceased**

Late of the City of Erie, Erie County, Pennsylvania

Executor: Rev. Frank Jurewicz, c/o 307 French Street, Erie, Pennsylvania 16507-1542

Attorney: Raymond A. Pagliari, Esq., 307 French Street, Erie, Pennsylvania 16507-1542

**GRAVES, WILLIAM R.,
deceased**

Late of the Township of Millcreek
Executor: Christopher M. Graves, 2765 Alexandra Drive, Erie, PA 16506

Attorney: Michael A. Fetzner, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**GRYCHOWSKI, MARY, a/k/a
MARYANNA GRYCHOWSKI,
deceased**

Late of the City of Erie, County of Erie and State of Pennsylvania
Executor: Richard A. Grychowski, 1656 Skyline Drive, Erie, PA 16509

Attorney: Ronald J. Susmarski, Esq., 4030-36 West Lake Road, Erie, PA 16505

**JUREWICZ, FRANK P., a/k/a
FRANK PAUL JUREWICZ,
deceased**

Late of Erie City, Erie County, Pennsylvania

Administrators: Peter P. Jurewicz, 130 Howe Street, Norfolk, VA 23503 and Frank M. Jurewicz, 925 West 9th Street, Erie, PA 16502

Attorney: John R. Falcone, Esq., The Gideon Ball House, 135 East 6th Street, Erie, Pennsylvania 16501

**LARSON, PHILIP THEODORE,
a/k/a PHILIP T. LARSON,
deceased**

Late of the Township of Lawrence Park

Administratrix: Patricia S. Larson, c/o James S. Bryan, Esq., 11 Park Street, North East, PA 16428

Attorney: James S. Bryan, Esq., Knox McLaughlin Gornall & Sennett, P.C., 11 Park Street, North East, PA 16428

**LAWRENCE, ANNA LOU, a/k/a
ANNA LAWRENCE, a/k/a
ANNA L. LAWRENCE,
deceased**

Late of Millcreek Township, County of Erie and State of Pennsylvania

Executrix: David R. Lawrence, 1107 Ford Avenue, Erie, PA 16505

Attorney: Ronald J. Susmarski, Esq., 4030-36 West Lake Road, Erie, PA 16505

**RENKIS, ALAN I.,
deceased**

Late of Millcreek Twp., Erie, Pennsylvania

Co-Executors: Laura A. Semple and Martin A. Renkis, c/o Jerome C. Wegley, Esq., 120 West 10th Street, Erie, PA 16501

Attorney: Jerome C. Wegley, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**RULAND, ANN E., a/k/a
ANNA E. RULAND,
deceased**

Late of the Township of Millcreek, County of Erie, State of Pennsylvania

Co-Executor: James R. Steadman, 24 Main Street East, Post Office Box 87, Girard, Pennsylvania 16417 and PNC Bank, NA, c/o Vickie L. Harbaugh, 901 State Street, Post Office Box 8480, Erie, PA 16553

Attorney: James R. Steadman, Esq., 24 Main St. E., Girard, Pennsylvania 16417

**SLOAN, BARBARA R.
LAMPREY, a/k/a
BARBARA LAMPREY, a/k/a
BARBARA R. SLOAN,
deceased**

Late of the Borough of North East, Erie County, Pennsylvania
Executrix: Priscilla A. Martin, c/o 307 French Street, Erie, Pennsylvania 16507-1542

Attorney: Raymond A. Pagliari, Esq., 307 French Street, Erie, Pennsylvania 16507-1542

**SUPRYNOWICZ JANE, a/k/a
JEAN SUPRYNOWICZ,
deceased**

Late of the County of Erie and
State of Pennsylvania

Administrator: Cynthia Plizga,
5910 Washington Ave., Erie, PA
16509

Attorney: Ronald J. Susmarski,
Esq., 4030-36 West Lake Road,
Erie, PA 16505

**TEPPER, LOUIS S., a/k/a
LOUIS STANLEY TEPPER,
deceased**

Late of the City of Erie, County
of Erie

Executors: Linda T. Bush,
2217 Union Avenue, Erie,
Pennsylvania 16510 and Dennis J.
Tepper, 3635 East Ridge Run,
Canandaigua, New York 14424

Attorney: W. Richard Cowell,
Esquire, Carney & Good,
254 West Sixth Street, Erie,
Pennsylvania 16507

**TITUS, HELEN L.,
deceased**

Late of the Township of
Greenfield

Executrix: Karen S. Rose, c/o
James S. Bryan, Esq., 11 Park
Street, North East, PA 16428

Attorney: James S. Bryan, Esq.,
Knox McLaughlin Gornall &
Sennett, P.C., 11 Park Street,
North East, PA 16428

**VEONI, ALMERICO,
deceased**

Late of the Township of Millcreek,
Erie County, Pennsylvania

Executor: First National Trust
Company, 711 State Street, Erie,
PA 16501

Attorney: Christine Hall McClure,
Esq., Knox McLaughlin Gornall
& Sennett, P.C., 120 West Tenth
Street, Erie, PA 16501

**ZIERENBERG, GEORGE J.,
deceased**

Late of the Township of Summit
Executrix: Joy Stewart, c/o
James S. Bryan, Esq., 11 Park
Street, North East, PA 16428

Attorney: James S. Bryan, Esq.,
Knox McLaughlin Gornall &
Sennett, P.C., 11 Park Street,
North East, PA 16428

SECOND PUBLICATION

**BUKOWSKI, EMILY B., a/k/a
EMILY BUKOWSKI, a/k/a
EMILIE B. BUKOWSKI,
deceased**

Late of the City of Erie, County
of Erie and Commonwealth of
Pennsylvania

Executor: Ronald G. Bukowski,
c/o Yochim & Nash, 345 West
Sixth Street, Erie, PA 16507

Attorney: Gary H. Nash, Esquire,
Yochim & Nash, 345 West Sixth
Street, Erie, PA 16507

**KENNERKNECHT, HELEN M.,
deceased**

Late of Erie (Greene Township),
Pennsylvania, Erie, Pennsylvania

Executor: Raymond P.
Kennerknecht, c/o Robert C.
Brabender, Esquire, 2741 West
8th Street, Suite No. 16, Erie, PA
16505

Attorney: Robert C. Brabender,
Esquire, 2741 West 8th Street,
Suite No. 16, Erie, PA 16505

**LECHNER, MARTHA M.,
deceased**

Late of the City of Erie, County
of Erie, and Commonwealth of
Pennsylvania

Executor: Robert A. Wallace, c/o
The McDonald Group, L.L.P.,
Thomas J. Buseck, P.O. Box
1757, Erie, PA 16507-1757

Attorney: Thomas J. Buseck,
Esq., The McDonald Group,
L.L.P., PO Box 1757, Erie, PA
16507-1757

**LUCORE, HENRIETTA R.,
deceased**

Late of Lawrence Park, Erie, PA

Executor: George R. Lucore, c/o
Jeffrey D. Scibetta, Esq., 120
West 10th Street, Erie, PA 16501

Attorney: Jeffrey D. Scibetta,
Esq., Knox McLaughlin Gornall
& Sennett, P.C., 120 West Tenth
Street, Erie, PA 16501

**PIAZZA, COLUMBUS J.,
deceased**

Late of the Township of Millcreek,
Erie County, Pennsylvania

Executor: Thomas Zakovitch,
5 Center Street, Union City, PA
16438

Attorney: Christine Hall McClure,
Esq., Knox McLaughlin Gornall
& Sennett, P.C., 120 West Tenth
Street, Erie, PA 16501

**TAYLOR, EVELYN F.,
deceased**

Late of Waterford Borough

Administrator CTA: Dennis C.
Taylor, 6732 Richardson Circle,
Fairview, PA 16415

Attorney: Jerome C. Wegley,
Esq., Knox McLaughlin Gornall
& Sennett, P.C., 120 West Tenth
Street, Erie, PA 16501

**WOODSIDE, BERNADETTE G.,
a/k/a BERNADETTE L.
WOODSIDE,
deceased**

Late of the City of Erie, County
of Erie and Commonwealth of
Pennsylvania

Executor: Karl W. Woodside, c/o
504 State Street, Suite 300, Erie,
PA 16501

Attorney: Damon C. Hopkins,
Esquire, 504 State Street, Suite
300, Erie, PA 16501

THIRD PUBLICATION

**BALL, IRMA M.,
deceased**

Late of the City of Corry, County
of Erie, Commonwealth of
Pennsylvania

Administrator: Raymond L. Ball,
c/o Paul J. Carney, Jr., Esq., 224
Maple Avenue, Corry, PA 16407

Attorney: Paul J. Carney, Jr.,
Esq., 224 Maple Avenue, Corry,
PA 16407

**CRITTENDEN, MICHAEL J.,
deceased**

Late of the City of Erie
Executrix: Diane C. Halmi, 143
Stonegate Drive, Erie, PA 16505
Attorney: Jack M. Gornall, Esq.,
Knox McLaughlin Gornall &
Sennett, P.C., 120 West Tenth
Street, Erie, PA 16501

**HAIN, CATHERINE R., a/k/a
CATHERINE HAIN,
deceased**

Late of the City of Erie, County
of Erie and State of Pennsylvania
Executrix: Thomas E. Hain, 2917
Zuck Rd., Erie, PA 16505
Attorney: Howard A. Hain,
Esquire, 1001 State Street, Suite
1220, Erie, PA 16501

**OLEKSAS, PAUL J., JR.,
deceased**

Late of the City of Erie, County
of Erie, and State of Pennsylvania
Administrator: Paul D. Oleksak,
3715 Greengarden Blvd., Erie,
PA 16508
Attorney: Richard T. Ruth, Esq.,
1026 West 26th St., Erie, PA
16508

**SMOLLEK, JOHN LUDWICK,
a/k/a JOHN SMOLLEK, JR.,
deceased**

Late of the City of California,
Saint Mary's County, Maryland
Administrator: Melvin L.
Smollek, 339 Market Street,
Lewistown, PA 17837
Attorney: None

**SPANO, LINDA M., a/k/a
LINDA SPANO,
deceased**

Late of the City of Erie, County
of Erie, Commonwealth of
Pennsylvania
Administratrix: Janiece M. Peck,
c/o 3820 Liberty Street, Erie, PA
16509
Attorney: James J. Bruno, Esq.,
3820 Liberty Street, Erie, PA
16509

**SWEENEY, KENNETH,
deceased**

Late of the City of Erie, County
of Erie and State of Pennsylvania
Executrix: Janice M. Sweeney,
c/o Howard A. Hain, Esq., 1001
State St., Suite 1220, Erie, PA
16501
Attorney: Howard A. Hain,
Esquire, 1001 State Street, Suite
1220, Erie, PA 16501

**WEINER, HAROLD, a/k/a
HAROLD JOHN WEINER,
deceased**

Late of the Township of
Waterford, County of Erie, and
Commonwealth of Pennsylvania
Executrix: Nancy J. Konieczki,
533 East 33rd Street, Erie,
Pennsylvania 16504
Attorney: Robert E. McBride,
Esquire, 32 West Eighth Street,
Suite 600, Erie, Pennsylvania
16501

**WOLFE, ELLEN K.,
deceased**

Late of the City of Erie, County
of Erie and Commonwealth of
Pennsylvania
Executrix: Darlene M. Vlahos,
Esquire, c/o 3305 Pittsburgh
Avenue, Erie, Pennsylvania
16508
Attorney: Darlene M. Vlahos,
Esquire, 3305 Pittsburgh Avenue,
Erie, Pennsylvania 16508

**YEAST, STANLEY,
deceased**

Late of the City of Erie,
Commonwealth of Pennsylvania
Administratrix: Pauline Yeast,
c/o Anthony Angelone, Esquire,
3820 Liberty Street, Erie, PA
16509
Attorney: Anthony Angelone,
Esquire, Vendetti & Vendetti,
3820 Liberty Street, Erie, PA
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