CARLOS VAZQUEZ, Plaintiff, vs. ELBA RIOS, JAREAU ALMEYDA, and MARISSA MORALES, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-636-13 Civil Action

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT IN ITS ENTIRETY

On the brief:
Glenn R. Reiser

LoFaro & Reiser, L.L.P.
55 Hudson Street
Hackensack, New Jersey 07601
(201) 498-0400
Attorneys for Defendants

PRELIMINARY STATEMENT

In lieu of filing an Answer, the defendants Elba Rios ("Rios"), Jareula Almeyda ("Almeyda"), and Marissa Morales move to dismiss plaintiff's Complaint in its entirety by way of summary judgment. In support of the motion, defendants rely upon the within Brief, Affidavit of Elba Rios ("Rios Aff."), and Certification of Glenn R. Reiser ("Reiser Cert.").

The plaintiff Carlos Vazquez ("Vazquez") is a jilted former lover of Rios, and has filed this frivolous lawsuit predicated on the ridiculous theory that Rios breached a real estate sale contract between them which required Rios to pay Vazquez $25,000 over a period of monthly installment payments spread out over five years as consideration for Vazquez transferring his interest in a Weehawken property that they owned together. Vazquez also asserts a thinly veiled claim of fraud and unjust enrichment.

However, the Rios Aff. proves that Rios paid Vazquez the entire $25,000 purchase price, and consequently Rios cannot be found to have breached the contract. The underlying real estate transaction was consummated in September 2006, with the Deed being delivered to Rios at a December 27, 2006 closing at an attorney's office and recorded a few months later with the Hudson County Register of Deeds. The remaining fraud and unjust enrichment claims are barred by the applicable six year statutes of limitations. Additionally, the unjust enrichment claim fails on the merits due to the existence of an express contract between the parties.

PROCEDURAL HISTORY

Vazquez commenced the filing of this lawsuit on February 1, 2013. The case is assigned to Track 2 with 300 days of discovery. After several months of negotiations between the parties for a voluntary dismissal of the Complaint proved unfruitful, the defendants now come

before the Court seeking to dismiss the entire Complaint by way of summary judgment in lieu of filing an Answer.

STATEMENT OF MATERIAL FACTS

1. Rios is the mother of Almeyda and Morales. Rios Aff. at ¶2.

2. By Deed dated June 23, 2006, Almeyda and his former wife Iliana Munzon transferred their interest in the Property to Vazquez and Rios. See Deed annexed as Exhibit 1 to Rios Aff.

3. On September 11, 2006, Vazquez, as seller, and Rios, as purchaser, entered into a contract for the sale of the Property (the "Contract"). See Exhibit 2 to Rios Aff.

4. At the time the Contract was signed, Vazquez and Rios were involved in a personal relationship. Rios Aff. at ¶4.

5. The Contract provided for a $25,000 purchase price to be paid by Rios as follows: $900 deposit paid in September 2006 with the balance of $24,100 to be paid in monthly installments of $400 beginning on October 1, 2001 and continuing each month thereafter until paid in full by September 1, 2011. The Contract incorporates this installment payment schedule under the category **PROMISSORY NOTE** as per paragraph 3(A) of the Contract. See Exhibit 2 to Rios Aff.

6. The Contract was reviewed by Maria Gesualdi, Esq. ("Gesualdi"), an attorney located in Guttenberg, New Jersey. Id.

7. On September 7, 2006, Rios tendered a check to Vazquez in the amount of $900 representing the Contract deposit.

8. Pursuant to paragraph 5 of the Contract, the parties agreed to "accept statutory limitations", which apply to the purchase and sale of said property." Exhibit 2 to Rios Aff.

9. Pursuant to paragraph 8 of the Contract, "[T]he Seller intends to transfer the property to the Buyer, and the Buyer intends to acquire the property from the Seller, on all of the mutual terms, covenants and conditions set forth herein." Id.

10. Pursuant to paragraph 9 of the Contract, the parties agreed that the Contract would be a legal binding agreement. Id.

11. The Contract required Vasquez, as the Seller, to convey title to Rios, as Buyer, by a special warranty deed. Id.

12. The Contract defines the term "Closing" to "mean the delivery of the special warrant deed which conveys title to the property to the Buyer by the Seller in exchange for monthly payments until the balance is paid in full of the . . . purchase price." Id.

13. The parties agreed that the "Contract represents the entire agreement between the parties regarding the purchase and sale of the property, and may not be amended except in writing and signed by the parties or their duly authorized representatives." Id.

14. The parties further agreed that the Contract "shall supersede all other contracts...." Id.

15. The parties further agreed to make the Contract time of the essence. Id.

16. The property sale transaction between Vazquez and Rios closed on December 27, 2006 at Gesualdi's law office in Guttenberg. On that date, Vazquez executed and delivered a Deed transferring his interest in the Property to Rios for $25,000. The Deed was prepared by Gesualdi, who also notarized Vazquez's signature. See Exhibit 3 to Rios Aff.

17. The Deed was recorded with the Hudson County Register of Deeds on May 30, 2007 in Book 08222 at Page 00223, et seq. Id.

18. As part of the closing and to induce the Hudson County Register to record the Deed, on December 27, 2006 Vazquez executed and delivered an Affidavit of Consideration wherein he represented that he was fully exempt from paying the realty transfer fee because the consideration for the transfer was less than $100. Vazquez's signature on the Affidavit of Consideration was notarized by Gesualdi. See Exhibit 4 to Rios Aff.

19. As part of the closing and to induce the Hudson County Register to record the Deed, on December 27, 2006 Vazquez executed and delivered a Seller's Residency Certification/Exemption. See Exhibit 5 to Rios Aff.

20. Beginning on September 7, 2006 and continuing thereafter until October 27, 2011, Rios paid Vazquez a total of $25,050 in installment in connection with the Contract.[1] See payment summary annexed as Exhibit 6 to Rios Aff.

21. Each monthly installment payment that Rios made to Vazquez was issued by check from Rios' bank account, beginning with North Fork Bank and thereafter Capital One Bank. The "memo" portion of every single check issued by Rios to Vazquez contains a reference to the Property; e.g., *"House Pyment 36-49 ST"*, *"36-49 St – House Pyment"*, *"House Payment"*, *"36-49 St,"* etc. See copies of cancelled checks collectively annexed as Exhibit 7 to Rios Aff.

22. Vazquez accepted each and every check by endorsing his name on the reverse side, and depositing each check into his own personal bank account. Id.

23. Prior to this litigation Vazquez never issued Rios a written declaration of default with respect to any of her obligations under the Contract, or the Note encompassed within the Contract.

[1] Rios attributes the $50 overpayment to simple mathematical error on her part.

24. Prior to this litigation Vazquez received the entire $25,000 purchase price set forth in the Contract with the final payments being tendered in October 2011.

25. Rios paid the entire amount of consideration required of her under the Contract, being the sum of $25,000, and thus fulfilled her obligations to Vazquez and was not unjustly enriched.

26. Having received the full purchase price set forth in the Contract, Vazquez has suffered no damages.

LEGAL ARGUMENT

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFF'S FRIVOLOUS COMPLAINT IN ITS ENTIRETY

A. Summary Judgment Standard

Defendants have moved to dismiss the Complaint in lieu of filing an Answer. Normally, such motions are brought as a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e). As in this instance, the Court has the discretion to convert a R. 4:6-2(e) motion into a motion for summary judgment when facts beyond the pleadings are relied upon and limited testimony is required to be taken. See, e.g., Wang v. Allstate Ins. Co., 125 N.J. 2, 9 (1991). Since defendants rely upon facts outside the pleadings, defendants concede that summary judgment is the appropriate standard which should govern the adjudication of their motion.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Under Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529 (1995),

> a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged. That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.

The determination of whether there actually exists a "genuine issue" of material fact that precludes summary judgment requires the judge to consider whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. See also, R. 4:46-2(c). When the evidence "is so one-sided that one party must prevail as a matter of law," the court should not hesitate to grant summary judgment. Id. at 536 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).

The Court in Brill recognized that while a judge ruling on a summary judgment motion should not deprive a deserving litigation from trial, "it is just as important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Brill, 142 N.J. at 540-541. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose'". Id. at 541. Courts are encouraged "not to refrain from granting summary judgment when the proper circumstances present themselves." Id. As exists in the present case, where the facts needed to interpret a contract are not in dispute, there are no genuine issues of fact, and summary judgment is appropriate. Kilarjian v. Vastola, 379 N.J. Super. 277, 283 (Ch. Div. 2004).

The material facts of this frivolous case improvidently filed by the plaintiff Vazquez are not in dispute. No rational jury could conclude that defendants breached the Contract with Vazquez, or that any of the defendants were unjustly enriched or committed a fraud against

Vazquez. Regardless of the merits or lack thereof, the claims asserted by Vazquez are legally stale based on the applicable statutes of limitations. Accordingly, the matter is ripe for summary judgment at this early stage.

B. No Breach of Contract Occurred, and Thus Counts I and II of the Complaint Must be Dismissed

Paragraph 25 of Count I of the Complaint alleges that "Rios has failed to make all payments due under the Contract and is in default." See Exhibit 1 to Reiser Cert. Count II of the Complaint is also predicated on Rios' alleged breach of the Contract. For instance, paragraph 27 of Count II alleges that Rios, "[H]aving defaulted on an installment contract of sale as to the Property, Rios is obligated to transfer and convey the Property back to Vazquez." Id. The blatant falsity of these allegations is revealed in the Rios Aff, which unequivocally demonstrates that she paid Vazquez the entire $25,000 purchase price of the Contract in the form of 53 separate checks issued over a five year period. In addition, prior to this litigation Vazquez never declared Rios in default of the Contract such as issuing a written declaration of default.

A contract arises out of an offer and acceptance "supported by valuable consideration which involves a detriment incurred by a promisee or a benefit received by a promisor." Devaney v. L'Esperance, 195 N.J. 247, 261 (2008). The interpretation of the terms of a contract are [sic] decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). When interpreting the terms of a contract, the writing must be interpreted as a whole and the "terms of the contract must be given their 'plain and ordinary meaning.'" Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). The court should interpret contract terms "so as to avoid ambiguities, if the plain language of the contract

permits." Stiefel v. Bayly, Martin and Fay of Conn., Inc., 242 N.J. Super. 643, 651 (App. Div. 1990). The Court's function in interpreting a contract is to seek the intention of the parties, and to such end the writing is to have a reasonable interpretation. Newark Publishers' Ass'n v. Newark Typographical Union, No. 103, 22 N.J. 419 (1956).

Ordinarily, courts will not rewrite contracts to favor a party, for the purpose of giving that party a better bargain. Relief is not available merely because enforcement of the contract causes oppression, improvidence, or unprofitability, or because it produces hardship to one of the parties. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005). A court cannot "'abrogate the terms of a contract unless there is a settled equitable principle, such as fraud, mistake, or accident, allowing for such intervention.'" Id. at 223-24 (quoting Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166, 183-84 (1985)).

New Jersey law requires a plaintiff to establish four elements to sustain a claim for breach of contract; namely (i) the parties entered into a contract containing certain terms, (ii) the plaintiff did what the contract required the plaintiff to do, (iii) the defendant did not do what the contract required the defendant to do, and (iv) the defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff. New Jersey Civil Model Jury Charges, § 4.10a. Accord 1 Weichert Co. Realtors v. Tyan, 128 N.J. 427, 435 (1992) (a contract arises from proper acceptance, and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty.); West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958); Friedman v. Tappan Development Corp., 22 N.J. 523, 531 (1956); Leitner v. Braen, 51 N.J. Super. 31, 38-39 (App. Div. 1958).

The plaintiff Vazquez fails to meet his burden as to the 3rd and 4th elements to sustain a breach of contract claim. As previously noted, the defendant Rios did what the Contract required her to do – she paid Vazquez the entire $25,000 installment purchase. The proofs of payment from Rios appear in the form of cancelled checks attached to the Rios Aff., all of which bear some notation about the "Property" and which Vazquez endorsed and deposited into his own personal bank account. In so doing, Rios cannot be found to have breached the Contract and therefore the Court should grant summary judgment by dismissing Count I and Count II of the Complaint as to all defendants. Under these circumstances no rational jury could conclude that Rios breached the Contract with Vazquez.

C. Plaintiff's Fraud Claim Pleaded in Count III is Barred by the 6 Year Statute of Limitations

The elements of a *prima facie* claim of fraud under New Jersey common law include a material representation of a presently existing or past fact made with knowledge of its falsity with the intention that the other party rely, justifiable reliance and damage. Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 624-625 (1981); Nappe v. Anschelewitz, Barr, Ansell, etc., 189 N.J. Super. 347, 354-356 (App. Div. 1983).

In Count III of his Complaint, Vazquez asserts a hodge-podge claim for fraud and misrepresentation, which on the surface appears to be predicated on Rios' alleged failure to pay him the $25,000 purchase price. For example, in paragraph 33 of Count III of his Complaint Vazquez alleges that, "Rios had no intention of paying Vazquez any money for the Property despite the terms of the Contract." See Exhibit 1 to Reiser Cert. However, the Rios Aff. proves the falsity of those allegations by providing copies of numerous checks issued to, endorsed and deposited by, Vazquez over a five year period with the front side of each check clearly bearing

reference to the Property in the "memo" portion, and the checks having a cumulative total of $25,050.[2]

Statutes of limitations are enacted to provide certainty for litigants, and to prevent the litigation of stale claims. See Rivera vs. Prudential Property & Casualty Ins. Co., 104 N.J. 32, 39 (1986)("The purposes of statutes of limitations, oft-repeated by this Court, are two-fold: (1) to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims, and (2) to penalize dilatoriness and serve as a measure of repose.").

New Jersey law says "determination of the accrual of a cause of action is an issue for the court." Baird v. American Medical Optics, 155 N.J. 54, 65 (1988). The plaintiff bears the burden of showing that his or her claim is not barred by the statute of limitations. Silverman v. Lathrop, 168 N.J. Super. 333, 337 (App. Div. 1979).

New Jersey has a six year statute of limitations for fraud. N.J.S.A. 2A:14-1. The claim accrues on the date of the act or omission that gives rise to the fraud claim, or the date on which the act or omission reasonably should have been discovered. Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 413 (3rd Cir. 1999). In the present case, the Contract was signed on September 11, 2006 – that is the operative date upon which the plaintiff's fraud claims accrued.

Vazquez filed his Complaint on February 1, 2013, more than six years after the Contract was signed and approximately 16 months after he received the final installment payment back in October 2011. Meanwhile, over a five year period following his execution of the Contract and delivery of the Deed he conveniently accepted and deposited each and every monthly

[2] As previously mentioned, Rios overpaid Vazquez by $50 due to simple mathematical error.

check tendered by Rios ultimately resulting in him receiving the entire benefit of his bargain under the Contract. Vazquez has suffered no damages flowing from the alleged fraud, and the claim is now stale. Simply stated, the in-artfully plead fraud claims are barred by the applicable six year statute of limitations. Accordingly, the Court should grant summary judgment dismissing Count III of the Complaint as to all defendants.

D. Plaintiff's Unjust Enrichment Claim Plead in Count IV Fails as a Matter of Law Because a Contract Exists Between the Parties, and Rios Fully Paid for the Contractual Benefits she Received

In Count IV of his Complaint, consisting of two paragraphs of allegations, Vazquez claims that the defendants were unjustly enriched and that he suffered damages. See Exhibit 1 to Reiser Cert. That is the entire sum and substance of his unjust enrichment cause of action.

The doctrine of unjust enrichment is well-established in New Jersey. See, e.g., Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009); Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966) ("The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another."). When a person receives a benefit and it would be inequitable to permit that person to retain the benefit without paying fair compensation or consideration for it, the doctrine of unjust enrichment permits courts of equity to fashion a remedy. "A cause of action for unjust enrichment requires proof that 'defendant[s] received a benefit and that retention of that benefit without payment would be unjust.'" County of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 549-50 (App. Div. 2004) (quoting VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994)), aff'd, remanded by 186 N.J. 46 (2006). (Emphasis added). "Unjust enrichment is not an independent theory of liability, but is the basis for a claim of quasi-contractual liability." Nat'l Amusements, Inc. v. New Jersey

Tpk. Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd, 275 N.J. Super. 134 (App. Div.), certif. denied, 138 N.J. 269 (1994).

Under New Jersey law, a claim under the quasi-contractual theory of unjust enrichment has two essential elements: "(1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable." Wanaque Borough Sewerage Auth. v. West Milford, 144 N.J. 564, 575 (1996). "Furthermore, it is generally the case that when a valid, express contract covers the subject matter of the parties' dispute, a plaintiff cannot recover under a quasi-contract theory such as unjust enrichment." Ramon v. Budget Rent-A-Car Sys., 2007 U.S. Dist. LEXIS 11665 (D.N.J. February 20, 2007). See also Moser v. Milner Hotels, Inc., 6 N.J. 278 (1951); Winslow v. Corporate Express, Inc., 364 N.J. Super. 128 (App. Div. 2003)(Court held there was no basis or need to pursue a claim of unjust enrichment based on the existence of an express contract).

Here, plaintiff concedes the existence of a Contract. "...Vazquez and Rios entered into a 'Contract for the Sale of Real Property'...." Complaint, at ¶ 14 annexed as Exhibit 1 to Reiser Cert. Further, in his Complaint Vazquez accuses defendants of breaching the parties' Contract. Consequently, Vazquez cannot simultaneously maintain a quasi-contractual claim of unjust enrichment against the defendants. Regardless, defendants cannot be found to be unjustly enriched as Vazquez received the entire $25,000 of consideration paid by Rios pursuant to their Contract. In other words, Rios dutifully paid for the benefits that she received under the Contract and therefore cannot be said to be unjustly enriched. Therefore, the Court should dismiss Count IV of the Complaint as a matter of law.

E. Plaintiff's Unjust Enrichment Claim is Barred by the 6 Year Statute of Limitations

Independent from deciding the merits of Vazquez's unjust enrichment claim, it is nevertheless time barred by New Jersey's six year statute of limitations. See e.g., Jacobson v. Celgene Corp., 2010 WL 1492869, at *3 (D.N.J. Apr. 14, 2010). Generally, the statute of limitations period for unjust enrichment accrues when the plaintiff last rendered services to the defendant. Jacobson, at 4. The unjust enrichment statute of limitations may be tolled by the discovery rule. Component Hardware Group, Inc. v. Trine Rolled Moulding Corp., 2007 WL 2177667, at *8 (D.N.J. Jul. 27, 2007)). Therefore, the cause of action will not accrue until the injured party discovers, or reasonably should have discovered, facts that form the basis of a cause of action. Component, at 8.

In the case at bar, the accrual date of the plaintiff's unjust enrichment claim is September 11, 2006 – the date the Contract was signed. Alternatively, the Court could conclude that the accrual date was December 27, 2006 when the parties consummated the closing and Vazquez executed and delivered the Deed transferring his ownership interest to Rios. Regardless which date the Court deems controlling, both dates are well beyond the six year statute of limitations. Therefore, as a matter of law defendants are entitled to summary judgment dismissing plaintiff's untimely and defective unjust enrichment claim plead in Count IV of the Complaint.

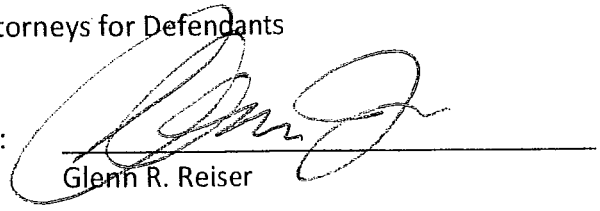
CONCLUSION

For the foregoing reasons and authorities cited, defendants respectfully submit that this case is ripe for summary judgment. Defendants have met their burden of establishing the absence of any genuine issues of material fact that would preclude the granting of summary judgment dismissing plaintiff's Complaint in its entirety.

This case represents nothing more than a frivolous lawsuit brought for an improper purpose. There is no breach of contract by defendants as a matter of law. As to plaintiff's remaining claims for fraud and unjust enrichment, both are barred by the applicable statutes of limitations. Further, the unjust enrichment claim fails on the merits because of the existence of an express contract, the benefits of which defendant Rios paid for in full. Accordingly, the Court should grant defendants' motion and enter the form of Order submitted herewith.

Respectfully submitted,

LOFARO & REISER, L.L.P.
Attorneys for Defendants

By: 
Glenn R. Reiser

Dated: June 12 2013