

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

590

CA 08-02297

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND GORSKI, JJ.

WILLIAM R. CONGDON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BRITA M. EVERETT AND WILLIAM R. EVERETT,
DEFENDANTS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (DAVID S. WHITTEMORE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered January 22, 2008. The order, *inter alia*, denied that part of defendants' motion to dismiss the claim seeking to enforce an alleged oral agreement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the claim seeking to enforce an alleged oral agreement and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to enforce an alleged oral agreement to sell real property and seeking money damages for unjust enrichment. Supreme Court erred in denying that part of defendants' motion to dismiss the claim seeking to enforce the alleged oral agreement inasmuch as that claim is barred by the statute of frauds (*see* General Obligations Law § 5-703 [1], [2]), and we therefore modify the order accordingly. There are no writings in the record on appeal that "spell out the terms of the alleged agreement" (*Anostario v Vicinanza*, 59 NY2d 662, 663; *see Abbey v Henriquez*, 36 AD3d 724). We further agree with defendants that the doctrine of part performance does not apply to defeat the affirmative defense of the statute of frauds (*see* § 5-703 [4]; CPLR 3211 [a] [5]). Plaintiff resided on defendants' property with defendants' daughter from 1998 through at least 2006, when plaintiff initiated a divorce action. According to plaintiff, he made both monthly payments to defendants and improvements to the property. We conclude, however, that plaintiff's actions in making monthly payments, in helping to build a barn on the property, and in building an addition to the mobile home were not "unequivocally referable" to an agreement to purchase the property to warrant invoking the doctrine of part performance (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d

229, 235; see *Anostario*, 59 NY2d at 664).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court