IN THE COURT OF COMMON PLEAS
Cuyahoga County, Ohio

Raymond A. Erker, et al., Plaintiffs, v. Larry A. Weiser, et al., Defendants	CASE NO. CV 15-847877 JUDGE PAMELA BARKER **Journal Entry**: Decision and Order on Motions for Summary Judgment

Plaintiffs in this matter are Raymond Erker (hereinafter "Erker"), SageGuard LLC (hereinafter "SageGuard"), and Gensource Global, Inc. (hereinafter "Gensource"). The Defendants in this matter are Larry Weiser (hereinafter "Weiser") and Hilliard Building, L.L.C. (hereinafter "Hilliard"). The Plaintiffs filed their Complaint on July 2, 2015, setting forth four causes of action against Defendants: Breach of Option Contract (First Count); Unjust Enrichment/Quantum Meruit (Second Count); Promissory Estoppel (Third Count); and Declaratory Judgment as to the Option Contracts and Lease (Fourth Count).

On September 3, 2015, the Defendants filed a Counterclaim setting forth three causes of actions against Plaintiffs: Breach of Lease (Count One); Breach of Option (Count Two); and Fraud/Misrepresentation (Count Three).

This matter is now before the Court on three separate motions: Defendants' Motion for Summary Judgment on Plaintiffs' Complaint, filed July 15, 2016 ("Defendants' First Motion"); Defendants' Motion for Summary Judgment on the

Counterclaim (Counts One and Two only), filed July 15, 2016 ("Defendants' Second Motion"); and Plaintiffs' Motion for Summary Judgment on Defendants' Counterclaim for Fraudulent Misrepresentation (Count Three only), filed July, 15, 2016 ("Plaintiffs' Motion"). Separate Briefs in Opposition were filed as to all three motions on August 15, 2016. Plaintiffs filed a Reply Brief in support of Plaintiffs' Motion on August 24, 2016.

FACTUAL SUMMARY:

Erker is the sole shareholder of the Plaintiff companies SageGuard and Gensource.[1] Weiser is the sole member of Hilliard.[2] In May of 2014, Gensource entered into three legally binding agreements with Weiser or Hilliard: an option to purchase the Hilliard building captioned "Interest Purchase Agreement" executed on May 7, 2014; a modification of this agreement titled "First Amendment Purchase Agreement" executed on May 12, 2014; and a lease for office space in the Hilliard building executed on May 15, 2014.[3] The first two Gensource options to purchase were superseded by an agreement titled "Interest Option And Purchase Agreement" signed by Weiser as "Seller", signed by Erker on behalf of and as CEO of SageGuard as "Buyer", and signed by Erker and Patrick Metzger ("Metzger") as "Guarantors", on November 3, 2014.[4] Thus, there are two agreements at issue in this matter: the "Interest Option And Purchase Agreement" ("the Option/Purchase Contract"), and

[1] Affidavit of Raymond Erker, attached as Exhibit B to Plaintiffs' Brief in Opposition to Defendants' First Motion, at ¶2.
[2] *See* paragraph A. under Introduction of Option and Purchase Agreement attached as Exhibit 1 to Defendants' First Motion, and page 3 of Plaintiffs' Brief in Opposition thereto.
[3] Defendants' First Motion, Plaintiffs' Brief in Opposition thereto, at page 3, and Exhibit A attached to Plaintiffs' Complaint .
[4] Exhibit 1 attached to Defendants' First Motion; Plaintiffs' Brief in Opposition to Defendants' First Motion, Thompson Affidavit (Ex A) and Exhibit 1 attached thereto.

the lease by and between Gensource and Hilliard for office space in the Hilliard building ("the lease").

Paragraph 1 of the Option/Purchase Contract titled "Option to Purchase Interests" includes the following relevant terms or provisions: SageGuard had until March 31, 2015 ("the Option Deadline") to exercise the option to purchase the Hilliard building for the Purchase Price of $1,200,000 and "upon and subject to the terms and conditions set forth in the Agreement" via written notice to Weiser; SageGuard was required to pay an "Option Fee" of $75,000 to be paid in five (5) equal monthly installments of $15,000 ("Option Payment"), payable on the first of each month beginning on November 1, 2014 and ending on March 1, 2015; and "[s]hould [SageGuard] not provide the Option Notice to [Weiser] by [March 31, 2015], or should [SageGuard] fail to deliver an Option Payment to [Weiser] on the date required, the Option and this Agreement [would] immediately terminate and be of no further force or effect, and [Weiser] [would] be entitled to retain the entirety of the Option Fee due to [Weiser] from [SageGuard] up to the date of said termination."

Paragraph 2 of the Option/Purchase Contract titled "Purchase of Interests" contains the following relevant conditions and provisions: "[s]ubject to the terms and conditions of this Agreement, if [SageGuard] provides the Option Notice to [Weiser] prior to the Option Deadline, and if [SafeGuard] has paid the entire Option Fee to [Weiser], [SageGuard] irrevocably agrees to purchase" the Hilliard building; the $75,000 option fee would be credited to the Purchase Price; a $3500 lease security deposit then held by Weiser would be credited to the Purchase Price; the

balance of the Purchase Price would be paid by SageGuard and SageGuard's members, Erker and Metzger ("Guarantors") executing a cognovit promissory note and mortgage in favor of Weiser; and upon the delivery of the fully executed note and mortgage to Weiser on the closing date, Weiser would assign his membership interests in Hilliard to SageGuard.

The Option/Purchase Contract did not modify the lease[5], and the lease did not reference the May 7, 2014 Interest Purchase Agreement or the May 12, 2014 amendment thereto.[6] Under the lease, Hilliard was to be paid $3,500.00 per month, for a two year period, ending on May 14, 2016.[7] Gensource stopped making payments towards the lease in March of 2015.[8]

In his Affidavit, Erker averred that it was in January and February that Weiser advised him that he was "backing out of the deal".[9]

On February 13, 2015, Erker called Weiser and left a message advising that he had separated from the other guarantor, Metzger, and that Metzger wanted his name removed from the mortgage, but that Erker still intended to purchase the building.[10]

On February 17, 2015, Metzger executed a signed notice "elect[ing] to not exercise his right to purchase the Hilliard Building set forth in the interest option and purchase agreement" and representing he "w[ould] not be a guarantor on any

[5] Exhibit 1 attached to Defendants' First Motion.
[6] Plaintiffs' Brief in Opposition to Defendants' First Motion, Thompson Affidavit (Ex A) and Exhibit 3 attached thereto.
[7] Plaintiffs' Complaint, Exhibit A.
[8] Defendants' First Motion, p. 6.
[9] Erker Affidavit, Exhibit B attached to Plaintiffs' Brief in Opposition, ¶5.,
[10] Exhibit 5, Defendants' First Motion, p.4.

such election".[11] On February 19, 2015, Erker sent an email to Weiser advising that he was dropping a "rent check off" and that "technically, Patrick [Metzger] is still obligated unless Larry releases him". In that email, Erker also represented to Weiser that Gary Pescatrice was a prospective partner for Erker and a possible guarantor to replace Metzger.[12]

In his deposition, Erker testified that it was sometime after the February payment was made but before the March 1 payment was due, that Weiser advised him more than once that "under no circumstance would he in any way, shape or form ever hold a mortgage or hold the note."[13] Erker claims that it was because Weiser had represented to him that he was "backing out of the deal", that he withheld the March 1, 2015 option payment.[14] Erker also asserts that it was not until March 17, 2015 that Weiser informed him that it was because Metzger was no longer a guarantor that he was "backing out of the deal".[15]

On March 11, 2015 Hilliard entered into a 15-year lease with Voiers Management Company, Inc., which according to Erker, occurred as a result of time and money that he had expended in January and February, 2015, in anticipation of purchasing the Hilliard building.[16]

On March 17, 2015 at 3:44PM, Weiser sent Erker an email regarding the Option/Purchase Contract. Weiser indicated that because Erker had failed to make the final $15,000 payment and because Metzger had contacted him asking to be

[11] Exhibit 2, Defendants' First Motion.
[12] Exhibit 3, Defendants' First Motion.
[13] Exhibit B, Plaintiffs' Brief in Opposition, ¶5.
[14] Id., ¶6.
[15] .Exhibit A4 attached to Plaintiffs' Brief in Opposition, p. 67, lines 18-23.
[16] Erker Affidavit, Ex. B attached to Plaintiff's Brief in Opposition, Weiser Deposition, at p. 53, and Exhibit 3 attached to Thompson Affidavit.

released as a guarantor, the Plaintiffs had thereby terminated or breached the Option/Purchase Contract.[17] Weiser also advised that Erker had made false representations and had "bounced" two rent checks tendered as lease payments.[18] Included in this e-mail were Weiser's statement that he would not hold the mortgage on the property, and an offer to credit Erker with the Option payments already made and allow him to purchase the property, without Weiser holding the mortgage, and leaving the newly proposed option or offer open until April 2, 2016. On that same date of March 17, 2015, at 5:14PM, Erker replied via email, indicating: "I'd like to move forward with the purchase of the building as agreed" with Weiser holding the mortgage and that he was waiting on Gary Pescatrice ("Pescatrice") "to do his due diligence" before he can close.[19]

On March 18, 2016 at 11:33AM, Weiser responded to Erker's email and stated he wanted to clarify his position that he "will NOT be accepting a mortgage on the property".[20] On the same date at 1:23PM, Erker stated: "Without you holding the mortgage, I'll be unable and would therefore request a full refund of the option money."[21] SageGuard did not provide formal notice to exercise the Option by March 31, 2015, and did not agree to Weiser's proposed modified option whereby Weiser would allow SageGuard to purchase the property, and credit it with payments already made, but without Weiser holding the mortgage, by the April 2, 2015

[17] Exhibit 6, Defendants' First Motion.
[18] Defendants' First Motion, Exhibit 7, copy of rent check returned for not sufficient funds from Gensource dated 2/10/15 and Exhibit 8, copy of rent check returned for not sufficient funds from Erker dated 2/19/15.
[19] Exhibit 5, attachment to the Affidavit of Weiser, Defendants' First Motion.
[20] Id.
[21] Id.

deadline. After the Option was not exercised, Gensource vacated the Hilliard building and stopped making payments due under the lease. This lawsuit ensued.

ARGUMENTS OF THE PARTIES

Plaintiffs argue that Weiser's expressed concerns or doubts and representation that he was backing out of the deal as well as his statement that he would not hold the mortgage on the property constituted an anticipatory breach of the Option/Purchase Contract by Weiser, thereby excusing Plaintiffs from making the final March 1, 2015 Option payment.

Plaintiffs also assert that since Weiser never inquired into the financial status of guarantors Metzger or Erker before executing the Option/Purchase Contract, the guarantors clause was not a material term of the contract, and therefore, Metzger's termination of his role as a guarantor did not constitute a material breach of the Option/Purchase Contract. And, according to Plaintiffs, even if this Court were to construe the guarantors clause as material to the Option/Purchase Contract, Weiser waived it.

Plaintiffs also seek compensation for Erker's securing of the Hilliard building tenant, Aura Smiles, in anticipation of SageGuard's purchase of the building. Finally, Gensource and Erker argue that they should be relieved of any obligations under the lease since it was entered into in anticipation of SageGuard's purchase of the Hilliard building.

Defendants' position is that SageGuard and Erker breached the Option/Purchase Contract when Metzger dropped out as a guarantor and when Plaintiffs failed to make the final option payment on March 1, 2015. Defendants

argue that Plaintiffs have failed to offer any evidence to support the argument that Defendants were intending to breach the purchase option, other than Defendants' requirement that there be a replacement guarantor for Metzger. In fact, the Defendants argue that the record demonstrates that Weiser did not formally advise Plaintiffs that he was terminating the agreement or would not perform until he sent the March 17, 2015 email, well after the purchase option payment was due. According to Defendants, this March 17, 2015 email from Weiser was in response to SageGuard's breach of the Option/Purchase Contract, specifically the loss of Metzger as a guarantor and the failure to make the March 1, 2015 payment. Defendants contend that Plaintiffs' arguments that the guarantors clause was "not material" to the Option/Purchase Contract, or that it was waived, are flawed.

As to the lease, Defendants assert that any intent to lease space as part of the building purchase is not relevant to the terms of the Option/Purchase Contract. Defendants argue that neither the Option Contract nor the lease contain any language discussing the impact of the sale of the building on the terms of the lease. Finally, in support of their counterclaim for Fraud and Misrepresentation, Defendants assert that Erker mislead them regarding his wealth and therefore, his ability to perform under the Option/Purchase Contract.

SUMMARY JUDGMENT STANDARD:

Summary Judgment shall be granted when the moving party can demonstrate that: 1) there is no genuine issue of material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reviewing the evidence most

strongly in the non-moving party's favor, reasonable minds can come to but one conclusion. *Horton v. Harwick Chem. Corp* (1995), 73 Ohio st.3d 679.

Once the moving party has satisfied its burden, the non-moving party must then set forth specific facts showing that there is genuine issue for trial. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385.

ANALYSIS

Count I of Plaintiffs' Complaint and Count Two of Defendants' Counterclaim

The Law regarding Anticipatory Repudiation of a Contract

In *Sunesis Trucking Co. v. Thistledown Racetrack, L.L.C.* (Cuyahoga County No. 100908), 2014-Ohio-3333, 22 N.E.3d 190, ¶¶29-33, the Eighth District Court of Appeals explained the nature and elements of an anticipatory repudiation of a contract, to wit:

> Where one party to a contract refuses to perform under the terms of the contract, an anticipatory repudiation is said to occur. *Blake Homes, Ltd. v. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4606, 877 N.E.2d 1041 (6th Dist.). "An anticipatory breach of contract by a promisor is a repudiation of the promisor's contractual duty before the time fixed for performance has arrived." *McDonald v. Bedford Datsun*, 59 Ohio App.3d 38, 40, 570 N.E.2d 299 (8th Dist. 1989), quoting *Smith v. Sloss Marblehead Lime Co.*, 57 Ohio St. 518, 49 N.E.695 (1898).
>
> To prevail on a claim of anticipatory breach of contract, a plaintiff must establish that there was a contract containing some duty of performance not yet due, and that by word or deed, the defendant refused future performance, causing damage to the plaintiff. *Metz v. Am. Elec. Power Co., Inc.*, 172 Ohio App.3d 800, 2007-Ohio-3520, 877 N.E.2d 316, ¶35 (10th Dist.).
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> However, an anticipatory breach of contract must be an unequivocal repudiation of the contract. *McDonald at paragraph one of the syllabus*; *Sentinel Consumer Prods., Inc. v. Mills, Hall, Walborn & Assocs., Inc.*, 110 Ohio App.3d 211, 673 N.E.2d 967 (11th Dist. 1996). "A mere request for a change of terms or for cancellation does not constitute a

> repudiation." *McDonald at paragraph one of the syllabus*, quoting 4 Corbin, *Contracts* (1951), Section 973 at 905-906 (1951). Similarly, "a mere expression of doubt as to willingness or ability to perform is insufficient to constitute repudiation of a contract." *Farmers Comm. Co. v. Burks*, 130 Ohio App.3d 158, 172, 719 N.E.2d 980 (3d Dist. 1998).
>
> If a party has reasonable grounds to believe that the other party will not perform under the contract, that party may demand adequate assurance of performance from the other; the failure to provide such assurance is treated as a repudiation of the contract. *Burke v. Athens*, 123 Ohio App.3d 98, 703 N.E.2d 804 (9th Dist. 1998).
>
> If an anticipatory breach of contract is found to occur, the injured party has the option of (1) terminating the contract and suing the breaching party immediately, or (2) continuing the contract and suing the breaching party for damages after the time for performance has passed. *18 Ohio Jurisprudence 3d Contracts, Section 238; see also S.E. Land Dev. Ltd. v. Primrose Mgmt. L.L.C.*, 193 Ohio App.3d 465, 572-473, 2011-Ohio-2341, 952 N.E.2d 563 (3d Dist.).

See, also, Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. Of Commrs., 152 Ohio App.3d 95, 2003-Ohio-1227, 786 N.E.2d 921 (7th Dist.).

"[I]f one chooses to continue with the contract rather than terminating it, that party must perform all the conditions of the contract to be performed by him or her." *S.E. Land Dev. Ltd. v. Primrose Mgmt. L.L.C.*, 193 Ohio App.3d 465, 570-71. "The repudiation must be expressed in clear and unequivocal terms." *Metz v. Amer. Elec. Power Co., Inc.*, 172 Ohio App.3d 800, 2007-Ohio-*3520*, ¶ 35, 877 N.E.2d 316 (10th Dist.). A "mere expression of doubt as to willingness or ability to perform is insufficient to constitute repudiation of a contract." *Farmers Comm. Co. v. Burks*, 130 Ohio App.3d 158, 172, 719 N.E,2d 980 (3rd Dist. 1998).

The Law regarding a Guaranty

"A guaranty must be interpreted consistent with the expressed intent of the parties under an objective standard. [citations omitted.]" *Wells Fargo Bank, NA v.*

WSW Franchising, Inc. (10th Dist.), Case No. 09AP-26, 2009 Ohio 3845, 2009 Ohio App. LEXIS 3265, ¶15. "'A guaranty is a promise by one person to pay the debts of another or a collateral engagement for the performance of the undertaking of another.' 52 Ohio Jurisprudence 3d (1997) 238, Guaranty and Suretyship, Section 2. Further defined, a contract of guaranty is: "'[a] collateral engagement for the performance of the undertaking of another, and it imports the existence of two different and distinct obligations – one being that of the principal debtor and the other that of the guarantor. The obligation of a guarantor is collateral and secondary to the obligation of the principal debtor.' "'The principal debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral.' 52 Ohio Jurisprudence 3d (1997), 239-240, Guaranty and Suretyship, Section 3." *Cadlerock Joint Venture, L.P.*, (8th Dist. No. 96003), 2011-Ohio-3986, 2011 Ohio App. LEXIS 3332, ¶¶19-21.

The examination of a guaranty begins with reviewing the language used, and "'writings executed as part of the same transaction will be read as a whole, and the intent of each part will be gathered from a consideration of the whole.'" *Hussein v. Rashwan*, (Franklin Cty. CCP, No. 10-CVH-01-526), 2011 Ohio Misc. LEXIS 440, at *25-26, and quoting *Foster Wheeler Enviresponse, Inc, v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519, and cases cited.

The Law regarding Waiver

As noted by Plaintiffs, waiver by estoppel occurs "when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it";[22] and waiver may be enforced by anyone "who has changed his or her position as a result of the waiver."[23]

Application of the Law to the evidence construed most strongly in Plaintiffs' favor

In his Affidavit, Erker avers that it was "[a]round the same time [January and February], [that] Weiser informed [him] that he was backing out of the deal" and that "[i]t was not until March 17, 2015 that Weiser informed [him] he was backing out of the deal because Metzger was no longer a guarantor."[24] Yet, in his deposition, Erker testified that it was "shortly after the February payment" that "Weiser had communicated to [him] on more than one occasion that under no circumstances would he in any way, shape or form ever hold a mortgage or hold the note."[25]

If, consistent with Erker's Affidavit testimony, Weiser informed him that he was "backing out of the deal" in January and February, 2015, nonetheless, Erker made the $15,000 installment payments on the Option in January and February, 2015. Assuming that it was in January and February of 2015 that Erker interpreted any words or deeds of Weiser as a repudiation as he avers in his Affidavit, the record does not demonstrate that he demanded adequate assurance from Weiser before he

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[22] Plaintiffs' Brief in Opposition, at p. 12, citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 4th Dist. Scioto No. 02CA286, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶57.
[23] *Id.*
[24] Erker Affidavit, Ex. B attached to Plaintiffs' Brief in Opposition, ¶5.
[25] Plaintiffs' Brief in Opposition, Exhibit A4, at page 67, lines 18-23.

made the January and February installment payments. And, whether Weiser advised Erker that he was "backing out of the deal" in January and February as averred by Erker in his Affidavit, or whether consistent with his deposition testimony, it was after Erker had made the January and February installments payments that Weiser advised that under no circumstances would he hold a mortgage or hold a note, nonetheless, Erker called and left a message for Weiser on February 13, 2015 advising that he still intended to purchase the building.[26] Further, Erker continued to expend time and money to secure the tenant for the first floor of the Hilliard building without demanding such assurance.[27] Moreover, he was working to secure another guarantor, Pescatrice, to replace Metzger.[28] According to Erker's affidavit testimony, he and Weiser continued to **negotiate** a sale of the property between late February through early April. This, when coupled with his own statements to Weiser indicating that Weiser would have to release Metzger and suggesting Pescatrice as a replacement guarantor, demonstrates that Erker understood that a second guarantor – if not Metzger, then at least someone else like Pescatrice – was a condition precedent or material to, Weiser holding the mortgage for the sale and purchase of the Hilliard building.

Despite his expressed intentions to Weiser that he wanted to move forward with buying the Hilliard building, Erker he did not submit the March 1, 2015 payment and he did not provide Weiser with the Option Notice due on March 31, 2015. Although Erker averred in his Affidavit that Weiser did not demand the final

[26] Defendants' First Motion, Ex. 5, p. 4.
[27] Erker Affidavit, Ex. 3, Plaintiffs' Brief in Opposition.
[28] Defendants' First Motion, Ex. 3.

option payment and did not ask SageGuard to provide formal written notice of its intention to purchase the property, it is clear that the terms of the Option/Purchase Contract required SageGuard to make the payment and provide notice, and placed no duty upon Weiser to make a demand or submit such notice.

As opposed to supporting the argument that Weiser anticipatorily repudiated the Option/Purchase contract, reasonable minds could only conclude under these facts asserted by Plaintiffs, that Metzger as a guarantor was a material term of the Option/Purchase contract, Erker understood this, and Weiser did not waive this term. Stated differently, the facts construed most strongly in Plaintiffs' favor demonstrate that Weiser did not anticipatorily repudiate the Option/Purchase contract, but sought to enforce the plain and unambiguous terms thereof, or condition precedents thereto.

The language of the Option/Purchase Contract between SageGuard and Weiser makes it clear that the personal guarantees of Erker and Metzger were a requirement to execute the sale with Weiser holding the mortgage.[29] In his Affidavit, Metzger averred that the guarantors were required to finalize this sale as Weiser "would not finance the purchase of the Hilliard building without co-signers".[30] Indeed, Erker's own deposition testimony demonstrates that subsequent to being advised that Metzger was withdrawing as a guarantor, Weiser told Erker that he would not hold the mortgage or the note.

[29] Exhibit 1, Defendant's First Motion, p. 2.
[30] Exhibit 4, Defendant's First Motion.

Accordingly, summary judgment is **GRANTED** in favor of Defendants and against Plaintiffs on Count I of Plaintiffs' Complaint and Count 2 of Defendants' Counterclaim.

Count II of Plaintiffs' Complaint

The law on unjust enrichment (quantum meruit)

To establish a claim for unjust enrichment, a plaintiff most show: a.) a benefit conferred by a plaintiff upon a defendant; b) knowledge by the defendant of the benefit; and c) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Directory Services Group v. Staff Builders International, Inc.*, (8th Dist. No, 78611), 2011 Ohio App LEXIS 3108, *4.

R.C. §4735.21 as a defense to Plaintiffs' Claim for unjust enrichment

Ohio Rev. Code Ann. § 4735.21 limits who may bring an action for commissions or other compensation involving real estate. It states, in part, as follows: No right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in Ohio Rev. Code Ann. § 4735.01, without alleging and proving that such person, partnership, association or corporation was licensed as a real estate broker or foreign real estate dealer". In affirming the trial court's granting of summary judgment on the plaintiff's causes of action, including those for quantum meruit and unjust enrichment, the Court in *Kapel v. Carnegie Management & Dev. Corp.*, 1995 Ohio App. LEXIS 1947, *11, 1995 WL 277118 (Ohio Ct. App., Cuyahoga County May 11, 1995), concluded that since Plaintiff was not a real estate broker and did not

qualify under the regular employee exception, R.C §4735.01 precluded his recovery, and explained in relevant part:

> Having found that appellant is barred from pursuing a claim under R.C. §4735.01, it does not matter that the appellant also claims causes of action under the theories of breach of contract, fraud, quantum meruit and unjust enrichment. If the appellant is barred from pursuing a claim for commissions by statute, then the court could not reach for equitable or other forms of relief in order to defeat the public policy adopted by the legislature.

Application of the Law to the evidence construed most strongly in Plaintiffs' favor

Erker and SageGuard argue that they should be compensated by Defendants to the extent that they located two tenants for the Hilliard building, Weiser was aware of these efforts, and it would be unjust to allow Weiser to benefit from the time and expense that they invested in securing these tenants. Defendants assert, and this Court agrees, that since Erker and SageGuard are not real estate brokers, R.C. §4735.21 precludes their claim for unjust enrichment/quantum meruit. This court rejects Plaintiffs' argument that Erker qualifies as someone exempt from the definition of real estate broker as set forth in R.C. 4735.01(I) since Erker and SageGuard did not "own" the leased premises.

Accordingly, summary judgment in favor of Defendants and against Plaintiffs on Plaintiffs' Count II is **GRANTED**.

Count III of Plaintiffs' Complaint

The Law regarding Promissory Estoppel

The elements of promissory estoppel are: (1) a clear and unambiguous promise (2) upon which it would be reasonable and foreseeable to rely, and (3) actual reliance on the promise (4) to the detriment of the one who relied.

Promissory estoppel is a quasi-contractual concept where a court in equity seeks to prevent injustice by effectively creating a contract where none existed. The doctrine of promissory estoppel aids the enforcement of promises by supplying the element of consideration when necessary to prevent injustice. *Interstate Gas Supply, Inc. v. Calex Corporation*, (10th Dist. No. 04AP-980), 2006-Ohio-638, 2006 Ohio App. LEXIS 575, ¶¶ 103, 105.

Applying the law of promissory estoppel to the facts

Plaintiffs assert that the evidence demonstrates a clear and unambiguous promise by Weiser that "if SageGuard made all option payments, it could purchase the Property."[31] But, the undisputed evidence demonstrates that SageGuard did not make all of the option payments. And, since the Option/Purchase Contract exists, the equitable remedy of promissory estoppel is not available to Plaintiffs to serve as a source of recovery in place of the contract.

Accordingly, summary judgment in favor of Defendants and against Plaintiffs on Count III of Plaintiffs' Complaint is **GRANTED**.

Count IV of Plaintiffs' Complaint (for Declaratory Judgment to set aside lease) and Count 1 of Defendants' Counterclaim (Breach of Lease)

Contract law and Frustration of Purpose Claim

As stated in *Yaroma v. Griffiths*, 104 Ohio App. 3d 545, 552, 662 N.E.2d 867, 871, 1995 Ohio App. LEXIS 2089, *11 (Ohio Ct. App., Cuyahoga County 1995): "The interpretation of a written contract is a matter of law for the court. ... The purpose of contract construction is to effectuate the intent of the parties. ... The intent of the parties is presumed to reside in the language they chose to employ in the

[31] Plaintiffs' Brief in Opposition to Defendants' First Motion, at page. 17.

agreement. ... Common words appearing in the instrument will be given their plain and ordinary meaning unless manifest absurdity results or some other meaning is clearly evidenced from the face or overall contents of the contract...."

"Frustration of Purpose is defined, in the Restatement of the Law 2d, Contracts (1981), Section 265, as follows:

> 'Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.'"

Wells v. C.J. Mahan Constr. Co. (10th Dist. No. 05AP-180 & No. 05AP-183), 2006-Ohio-1831, 2006 Ohio App. LEXIS 1655, ¶17, and cases cited therein. "However, the doctrine of frustration of purpose is not widely accepted in Ohio. *Id.*

Application of Contract Law and Frustration of Purpose Claim to Facts

A review of the language of the lease demonstrates that no mention is made regarding the impact of the sale of the Hilliard building on the lease. The lease is also for a term of years beyond the Option Deadline. However, reasonable minds could conclude that the lease was entered into with the assumption that, and because, SageGuard was going to purchase the Hilliard building. And, given Erker's testimony that Weiser informed him more than once before the last option installment payment was due on March 1, 2015 that he would not carry the mortgage or the note because Metzger had indicated he would not act as a guarantor, reasonable minds could conclude that Erker and SageGuard were unable to buy the building through no fault of their own. Therefore, genuine issue of

material fact remain as to whether or not the Frustration of Purpose doctrine defeats Defendants' claim for the breach of the lease.

Accordingly, summary judgment in favor of Defendants and against Plaintiffs on Plaintiffs' Declaratory Judgment for Frustration of Purpose and on Count 1 of Defendants' Counterclaim is **DENIED**.

Count 3 of Defendants' Counterclaim (Fraud/Misrepresentation)

The Court agrees with the Plaintiffs' position set forth in Plaintiffs' Motion that Erker never mislead Defendants. Defendants offer no proof to support any communications between the parties to support this claim other than miscellaneous financial information or citations to unrelated legal matters. The record demonstrates that Defendants also failed to conduct any check into Erker's financial background before the Option/Purchase Contract was executed.

Accordingly, summary judgment in favor of Plaintiffs and against Defendants on Count 3 of Defendants' Counterclaim is **GRANTED.**

COURT'S ORDER:

It is hereby ordered that DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE PLAINIFFS' COMPLAINT is GRANTED AND DENIED IN PART.

The Motion is GRANTED as to Count 1 (Breach of Option Contract), Count 2 (Unjust Enrichment/Quantum Meruit), and Count 3 (Promissory Estoppel). The Motion is DENIED as to Count 4 (Declaratory Judgment).

It is hereby ordered that DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM is GRANTED AND DENIED IN PART.

The Motion is DENIED as to Count 1 (Breach of Gensource lease). The Motion is GRANTED as to Count 2 (Breach of SageGuard Option to Purchase).

It is hereby ordered that PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT 3 of the COUNTERCLAIM (FRAUD and MISREPRESTATION) is GRANTED.

DATED THIS 11th day of October, 2016.

Pamela A. Barker

JUDGE PAMELA A. BARKER