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480 Mass. 1104

(This disposition is referenced in the North Eastern  
Reporter.)

Supreme Judicial Court of Massachusetts.

George PETERSON

v.

Erin GOLDEN & others

June 29, 2018

Opinion

Appellate review denied.

Commonwealth of Massachusetts  
Appeals Court for the Commonwealth

At Boston

In the case no. 16-P-1258

GEORGE PETERSON

*vs.*

ROBERTA GOLDEN & another.

Pending in the  
Superior  
Court for the County of  
Middlesex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

Order, entered March 5,  
2013, denying motion for  
involuntary dismissal  
and/or new trial,  
affirmed.

Order, entered February 26,  
2014, denying motion for  
approval of  
memorandum of lis  
pendens, affirmed.

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By the Court,

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Clerk  
Date March 6, 2018

NOTICE: Summary decisions issued by the Appeals Court pursuant to rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

16-P-1258

GEORGE PETERSON

vs.

ROBERTA GOLDEN & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO  
RULE 1:28

The defendants, Roberta Golden and Peter Poulos, appeal from a judgment against them, after a

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<sup>1</sup> Peter Poulos, individually and as trustee of the Sunshine Trust.

jury-waived trial, on plaintiff George Peterson's claims for breach of contract, unjust enrichment, and declaratory relief. They also appeal from orders denying two postjudgment orders. The defendants argue that the judge's refusal to recuse himself, denial of their motion for involuntary dismissal or new trial, and denial of their motion for *lis pendens* was error. We affirm.

Briefly, the judge found as follows. In an effort to help his friends, Golden and Poulos, out of financial difficulties, Peterson, in March of 2003, agreed to accept ownership of the defendants' property in Framingham, which at the time was subject to a mortgage requiring monthly payments by the defendants of \$6,000. The conveyance to Peterson would permit him to obtain financing on the property to pay off existing debts on the property. The defendants would continue to live at the property, and Poulos would pay the mortgage obtained by Peterson. The defendants failed to make the payments over the course of many years, and Peterson filed this action for breach of contract and unjust enrichment. He also sought a declaration that he was the outright owner of the Framingham property.

The judge concluded that Poulos, who signed the agreement to transfer the property, had breached the contract by failing to make payments on the mortgage, forcing Peterson to do so over the course of many years. Because Golden was not a party to the contract with Peterson, the judge ruled that Golden could not be in breach, but concluded that she was unjustly enriched by residing at the property rent free for many years. The judge rejected the defendants' counterclaims and requests that the amounts owed Peterson be offset by amounts claimed by Golden, who was an attorney, for legal work done by her in connection with another

coventure the parties had been involved in.

1. Recusal. The defendants claim that the judge abused his discretion when he denied their motion for recusal. During the trial, the judge discovered that Golden had been suspended from the practice of law in 2002. Upon learning this the judge notified the parties that Golden's bar discipline may have occurred during his tenure as vice chair of the Board of Bar Overseers (board). The judge indicated he had no memory of Golden or the proceedings against her. Nonetheless, he offered to recuse himself if the parties requested that he do so. All parties declined the judge's offer to recuse himself and the trial proceeded. The next day, Golden's attorney made a motion for the judge to recuse himself. The motion was denied. This issue arose again in one of the defendants' postjudgment motions. In his order on that motion, the judge indicated, in addition to the reasons stated by him earlier in the proceedings, that he had reviewed Golden's disciplinary proceeding to confirm he had not been involved and found that his term on the board had expired by the time Golden's disciplinary action reached the board.

The judge's decision not to recuse himself is reviewable for abuse of discretion. See Commonwealth v. Adkinson, 442 Mass. 410, 415 (2004). "The determination of recusal is left to the judge's sound discretion." Avelino-Wright v. Wright, 51 Mass. App. Ct. 1, 8(2001). Here, the judge properly determined that he was free of bias or prejudice in the case. The judge informed the parties that he had no knowledge of anything material to Golden's disciplinary matter. Further, the judge's ruling on the defendants' postjudgment motion demonstrated that he also objectively evaluated whether his impartiality might

reasonably be questioned and determined that it could not. See Lena v. Commonwealth, 369 Mass. 571, 575 (1976). We discern no error or abuse of discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

2. Postjudgment motion for involuntary dismissal and/or new trial.<sup>2</sup> Next, the defendants argue that the judge erred in denying their postjudgment motion for involuntary dismissal and/or for a new trial on the ground that the agreement between the parties was an illegal contract and, accordingly, void. We agree with Peterson's argument that the issue was waived, as illegality of the contract was neither pleaded nor raised at the trial. See O'Donnell v. Bane, 385 Mass. 114, 116 (1982). Further, contrary to the assertion in the defendants' brief, the judge did not find that the contract was illegal.<sup>3</sup>

3. Lis pendens. The defendants also filed a separate notice of appeal from the denial of their postjudgment motion for approval of a memorandum of lis pendens. We find the defendants' motion defective for failure to comply with the requirements of the lis pendens statute, G. L. c. 184, § 15. See DeCroteau v.

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<sup>2</sup> The defendants presented no argument on appeal on the issue of recusal as a grounds for allowing their motion for new trial. Therefore that argument is waived. See Mass.R.A.P. 16 (a)(4), as amended, 367 Mass. 921 (1975).

<sup>3</sup> The judge's findings stated: "It could be said that the Agreement was an illegal contract in that its execution required Washington Mutual to be misled into believing that the parties were engaged in a true sale of the Framingham property." The judge then indicated he would not refuse to enforce the agreement. Cf. Gleason v. Mann, 312 Mass. 420, 422 (1942) (consideration of unpleaded claim of illegality allowed when defendant shows contract is "inherently wrongful or which is violative of some fundamental principle of public policy").

DeCroteau, 90 Mass. App. Ct. 903, 906 (2016).<sup>4,5</sup>

Judgment affirmed.

Order, entered March 5, 2013,  
denying motion for  
involuntary dismissal and/or  
new trial, affirmed.

Order, entered February 26,  
2014, denying motion for  
approval of memorandum of  
lis pendens, affirmed.

By the Court (Agnes, Sacks &  
Lemire, JJ.<sup>6</sup>),

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Clerk

Entered: March 6, 2018.

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<sup>4</sup> Even considering the defendants' verified counterclaims as part of the motion for lis pendens, we discern no abuse of discretion in the judge's denial in light of his findings and judgment after trial. See G. L. c. 184, § 16.

<sup>5</sup> Peterson's request for attorney's fees is denied.

<sup>6</sup> The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS

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MIDDLESEX, ss.  
COURT

SUPERIOR  
CIVIL ACTION  
NO.10-3289

GEORGE PETERSON

vs.

ROBERTA GOLDEN and PETER POULOS,  
INDIVIDUALLY, and as TRUSTEE OF THE  
SUNSHINE TRUST

MEMORANDUM OF DECISION AND ORDER  
FOR THE ENTRY OF FINAL JUDGMENT

Introduction

This case arises out of a dispute between former friends. The plaintiff, George Peterson, and the defendants, Peter Poulos and Roberta Golden, who are husband and wife (collectively, the defendants), were friends for some years before the events that give rise to the claims and counterclaims that they have asserted against one another. The parties agreed that Peterson would nominally appear to purchase the defendants' home in Framingham, while they continued to live in it, in order to use his credit to obtain mortgage financing, unavailable to either Golden or Poulos, that the defendants would then use to pay off their creditors. The defendants have been unable to "repurchase" the property from Peterson, who has been paying the debt service on the loan, property taxes and homeowner's

insurance premiums since 2003, for many years without any reimbursement from the defendants, who still live in the home. This transaction, born as an accommodation among friends, although also as a fraud upon the bank making the mortgage loan, gives rise to this litigation.

Peterson's complaint pleads seven counts against the defendants: breach of contract by failing to reimburse Peterson for the costs he incurred as a resulted of this transaction; unjust enrichment; a declaration to the effect that the parties' agreement covers a so-called Lot 1C (which is adjacent to Lot 1B on which the defendants' residence is situated and which the defendants conveyed to Golden22021997 daughter Erin) and that Peterson owns both lots "free and clear" of any claims by the defendants; civil conspiracy; misrepresentation; fraudulent conveyance; and a claim to reach and apply Erin Golden's interest in Lot 1C. Prior to trial, Peterson dismissed all claims asserting an interest in Lot 1C; this also resulted in the dismissal of the counts seeking declaratory relief with respect to Lot 1C, civil conspiracy, fraudulent conveyance, and reach and apply.

Each of the defendants filed separate answers that asserted identical counterclaims. The counterclaims pled eight counts against Peterson: breach of contract by placing a second mortgage on the property; unjust enrichment; misrepresentation; breach of the implied covenant of good faith and fair dealing; fraudulent conveyance; declaratory relief that the agreement does not include Lot 1C; a claim to reach and apply property owned by Peterson in Winchendon Massachusetts; and each of the defendant's loss of consortium with Golden's adult daughter, Erin. Prior to trial, the defendants dismissed their loss of consortium

claims.

The case came before the court for a jury waived trial on December 18, 19, and 20. Six witnesses testified and forty-nine exhibits were entered in evidence. The parties requested and were given leave to file post-trial pleadings. In consideration of the testimony, exhibits and posttrial memoranda, the court makes the following findings of fact and conclusions of law.

## FACTS

Peterson lives in New Hampshire. He received a degree in mechanical engineering from Northeastern University in 1963. Prior to the events at issue in this case, Peterson had been involved in various aspects of real estate related projects both as a developer and a contractor providing professional engineering services. (As Peterson described it: pipes and valves.)

Golden was 76 years old at the time of trial. She had been a paralegal for many years<sup>1</sup> and was admitted to the bar in 1994. In April 2002, her license to practice law was temporarily suspended. Bar counsel's disciplinary charge against Golden was later resolved by a joint recommendation with Bar Counsel, approved by the Board of Bar Overseers (BBO), that her license be indefinitely suspended retroactive to April 2002. It was still suspended at the time of trial, although she was then again working as a paralegal with the approval of the BBO<sup>2</sup>. After her license was suspended,

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<sup>1</sup> No evidence was offered concerning the nature of the paralegal work she performed or for whom.

<sup>2</sup> No evidence was offered concerning the basis for disciplinary action. The judge informed the parties that he had been Vice Chair of the BBO at the time of Golden's temporary suspension, but had no recollection of the matter. He offered to recuse himself; an

Golden earned income by buying and selling antiques.

Poulos was 78 years old at the time of trial. He had been engaged in various aspects of the real estate business for many years. He and Golden were married in 1986. In 1995, Poulos purchased the property that is at the center of this litigation as Trustee of the Sunshine Trust. It consists of Lots 1B and 1C on a Plan of Land in Framingham, Massachusetts. These adjacent lots have addresses of 41 and 35 Pleasant Street, respectively. Lot 1B has a residence on it which became Poulos and Golden's home, and Lot 1C has a barn structure on it.<sup>3</sup> Visually, the lots appear as a single property and will be referred to generally as the Framingham Property, unless it is necessary to distinguish between them.

At some time prior to 1997, Peterson, Poulos and Golden became friends. When the friendship began and its depth was not explored at trial, although Peterson testified that he had his wedding reception at the Framingham Property.

In 1997, Peterson was introduced to Noreen Hunter by his then business partner Stanton Shifman. Hunter claimed to be the illegitimate daughter of a wealthy Bostonian. Although not described with particular clarity at trial, the putative father had apparently engaged in lengthy litigation with his two legitimate children concerning financial matters, and

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invitation that all parties declined. The following day, Golden's attorney informed the court that Golden had changed her mind (after testifying the previous day) and no longer wanted to proceed with trial before the judge then presiding. The court ruled that the opportunity to have the judge recuse himself had passed.

<sup>3</sup> The evidence includes deeds transferring ownership back and forth between the Sunshine Trust and Golden and Poulos, but those transfers do not seem relevant to any issue in this litigation.

Hunter was then in a dispute with the children over ownership of certain of the late father's properties, in particular a building in the Back Bay, 390 Marlborough Street, which she believed had great value if condominiumized. Hunter then had no money. She and Peterson discussed the possibility that Peterson could assist her in buying out her siblings' interest in 390 Marlborough and renovating it as condominiums. To that end, Shifman, Peterson and Hunter entered into a one page "Partnership Agreement" in which they agreed to share, one third each, in the disputed properties and their development. This agreement stated that: "Peterson and Shifman collectively shall obtain funding for the partnership and shall engage counsel as necessary to accomplish the goals of the partnership."

Soon thereafter, Peterson, Shifman, and Hunter met with Golden, who by then had been a lawyer for three years, at her home in Framingham to discuss Hunter's situation. On September 10, 1997, Golden and Hunter entered into a "Fee Agreement" pursuant to which Golden would represent Hunter "in connection with various matters regarding real estate, probate, Housing Court and potential Superior Court." The Fee Agreement called for Hunter to pay Golden for her services at the rate of \$300 an hour. It made no mention of Peterson or Shifman, although it was well known to all that Hunter was then without any funds.

Golden began to represent Hunter, and Peterson initially made payments to Golden. The record is unclear as to how much Peterson paid, but it was in excess of \$12,000. At about this time Shifman was

embroiled in criminal matters and incarcerated.<sup>4</sup> Golden testified that she also began to represent Shifman regarding these criminal matters, but she provided no description of the work she did for him.<sup>5</sup> In any event, on January 15, 1998, Golden drafted a "Declaration of Trust of Jupiter Trust" (the Trust) which named Peterson as the sole trustee. Its purpose was to protect the "investments made by the Beneficiary." The Trust does not identify what, if any, property was placed in the Trust, although Hunter testified that she contributed her interests in the properties that were the subject of her litigation with her alleged siblings to the Trust. The Declaration of Trust had attached to it a "Schedule of Beneficiaries of the [sic]". The scheduled beneficiaries were: Hunter (60%), Peterson (20%), and Golden (20%). The Schedule went on to state: "Any distribution of the beneficial interests shall be paid only after all costs for legal fees are paid to Roberta Golden and all advanced funds are paid to George Peterson which payments will not be considered part of Roberta Golden and George Peterson's beneficial interest as described above." Neither the Declaration nor the Schedule makes any reference to Shifman.

At or about this time, Peterson ceased to make payments to Golden on account of her work for Hunter. For a six month period Peterson, however, did pay Hunter's rent, provide her with spending money, and

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<sup>4</sup> The nature of Shifman's legal problems was not placed in evidence. There is no evidence that Shifman paid Golden for any legal work done for Hunter.

<sup>5</sup> Golden testified that Peterson promised to pay Golden for her work for Shifman as well. The court does not credit this testimony. Golden did not produce any writing of any sort suggesting such an arrangement or any other corroborating evidence. Peterson denied making such a promise.

give her use of a car. Golden introduced into evidence a legal bill with Hunter's name and address on it, dated December 13, 1999, showing an amount due to her of \$64,895.68. There was no evidence that this bill was sent to Hunter, or anyone else. Golden also introduced a bill dated July 2, 2002, covering services from December 20, 1999 up to the date her license to practice law was suspended in April 2002, in the amount of \$122,190 (including the unpaid sum from the December 1999 bill). This was addressed to Hunter, but also included the notation: "Attn: George Peterson". The bills include very cursory descriptions of the work Golden performed and suggest some manner of probate court proceeding and an appeal. No further evidence was offered concerning the nature of Golden's work for Hunter. In any event, Golden's efforts on behalf of Hunter were unsuccessful; Hunter never gained title to any of the properties in question.

Golden testified that Peterson promised to pay for Golden's legal services on behalf of Hunter. Peterson testified that he agreed to do so initially, but this understanding was superseded by the subsequent agreement in which Golden would receive a twenty percent ownership interest in Hunter's properties and, like Peterson, would be paid for her services out of any funds generated from Hunter's properties. Golden did not offer in evidence any writing in which Peterson promised to pay Golden's bills to Hunter, nor a writing of any kind even suggesting that Golden ever asked him to pay them. The court finds that the parties' agreements concerning Hunter were never clearly stated, but, in any event, by some point in 1998, Golden and Peterson had reached a general understanding that they would each look to the properties they hoped Hunter would secure through litigation to recover the

cash and services that each of them were providing for Hunter's benefit.<sup>6</sup>

By 2002, the defendants were in significant financial difficulty. On August 29, 2002, Poulos, as Trustee of the Sunshine Trust, deeded the Framingham Property to Steven Ross, as Trustee of the GMR Pleasant Street Trust, for \$1 and other valuable consideration. This transaction was, in fact, part of an agreement with Ross pursuant to which Ross lent the defendants \$565,000 and the defendants agreed to pay him \$6000 a month. Thereafter, notwithstanding this conveyance, real estate attachments were placed on the Framingham Property adverse to Poulos in litigation in which Poulos was a party.

In or about March 2003, Peterson agreed to help the defendants out of their financial difficulties. He agreed nominally to accept ownership of the Framingham Property, while allowing the defendants to continue to live there. This conveyance would enable Peterson to obtain a mortgage loan on the Framingham Property; the proceeds of that loan would go to the defendants to pay off Ross and leave the defendants with some cash. This arrangement would also greatly

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<sup>6</sup> Hunter testified that for several years she kept asking Peterson to pay Golden for the legal services rendered. She may well have asked Peterson to pay Golden, but that is not proof that Peterson had made an enforceable promise to Golden to pay these fees. Such a promise would be inconsistent with the Jupiter Trust arrangement in which Golden would be paid in full for her services from the Trust assets and then have a 20% interest in the remaining assets, as would Peterson. Indeed, Peterson's interest in Hunter's putative properties under the Trust was less than under the partnership agreement that he had with Hunter and Shifman, where he and Shifman would fund the partnership, each partner would have a one third interest in the properties, and Golden would have no interest in them.

reduce the defendants' monthly payments below the amount that they were then paying Ross. Golden had another attorney with whom she shared office space prepare an "Agreement" memorializing the arrangement. It was executed by the parties on March 28, 2003. (the Agreement; Trial Exhibit 16)

The Agreement was only a page. Its essential terms are as follows. Poulos, as Trustee, would convey Lot 1B to Peterson,<sup>7</sup> subject to a mortgage in the amount of \$650,000 securing a loan to Peterson. From the proceeds of the mortgage loan, Ross would be paid off, Peterson would receive \$25,000<sup>8</sup> in return for obtaining the loan, and the balance would go to the defendants. Poulos would continue to retain possession of the Framingham Property "and be responsible for

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<sup>7</sup> The Agreement clearly stated that only Lot 1B, on which the defendants' primary residence was located, was being conveyed to Peterson. The Agreement however made reference to an Exhibit A for a description of the property; Exhibit A refers to both Lots 1B and 1C. The court finds that the parties intended that the Agreement only involve Lot 1B and that Exhibit A was erroneously attached, having been prepared for a prior transaction including both Lots. The deed delivered at the closing on this transaction only addressed Lot 1B. It may be noted that Ross reconveyed both Lots to Poulos as Trustee by a deed dated March 24, 2003, but recorded on the same day as Poulos' deed of Lot 1B to Peterson. However, consistent with the poorly documented and confusing agreements that exemplify all of the parties' transactions, the mortgage granted by Peterson to Washington Mutual, the mortgage lender to Peterson, covered both lots. While Peterson's complaint prayed for a declaration that he was the owner of both lots, that prayer was dismissed before trial, as was defendant Erin Golden, Golden's daughter and record owner of Lot 1C, as described *infra*.

<sup>8</sup> Although the Agreement suggests that this \$25,000 was a fee paid to Peterson in return for his role in this transaction, all parties testified that it was a "slush fund" intended to cover any monthly payments that the defendants were unable to make.

paying the first mortgage and other ancillary expenses.” The defendants would have the right to have the Property conveyed back to them by payment of the remaining principal balance on the loan, not in excess of \$650,000. The defendants also continued to have the right to sell the Property, or refinance it, so long as the balance due on the mortgage loan was paid to Peterson, with any profits or excess cash going to them. The Agreement makes no reference to any legal fees or other debts that Peterson owed Golden. It also does not address what happens if the defendants were unable to pay off the loan and take back title to the Framingham Property.

In order to effectuate this agreement, Peterson required a bank loan. Golden arranged for a mortgage broker, John Rife, to find a mortgage lender that would make the loan. Rife arranged for Washington Mutual to provide purchase financing to Peterson. Washington Mutual required a purchase and sale agreement between Poulos, as Trustee, and Peterson to commit to the financing.<sup>9</sup> A purchase and sale agreement was created in which Poulos, as Trustee, agreed to sell the Framingham Property to Peterson; it recited a purchase price of \$850,000, although no purchase in that amount was contemplated by the parties. The closing on the mortgage loan and “sale” occurred on April 2, 2003. The law firm Viera & Digianfilippo represented Washington Mutual and prepared the HUD settlement statement necessary for the bank to fund the closing (trial exhibit 18). The statement showed: a “contract

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<sup>9</sup> Rife never met Peterson until he testified at trial. There was no evidence presented suggesting that Rife knew, or did not know, the truth about the transaction between Peterson and the defendants.

sales price" of \$850,000; \$211,963.42 in cash being provided by the borrower (Peterson) at closing; and \$273,421.56 in cash being distributed to Poulos. Peterson signed the statement. Poulos and the lenders' attorneys dealt with the undisputed fact that Peterson was not actually delivering any cash at closing in the following manner: Viera & Digianfilippo drafted a check on their real estate trust account payable to Poulos, as Trustee of the Sunshine Trust, in the amount of \$211,963.42; and Poulos then endorsed the check: pay to the order of the Viera & Digianfilippo and signed it.<sup>10</sup> On April 4, 2003, Poulos paid \$25,000 to Peterson.<sup>11</sup> Although a complete copy of the \$650,000 note was not offered in evidence, the mortgage was, and it suggests that the loan was an interest only, adjustable interest rate obligation.

Over approximately the next year, the defendants did their best to reimburse Peterson for the payments that he was making to Washington Mutual on

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<sup>10</sup> In October 2003, Poulos, as Trustee, conveyed Lot 1C to Erin Golden. Washington Mutual also provided a mortgage loan to Erin Golden and the same attorneys represented Washington Mutual in that transaction, the details of which were not relevant to this case because by the time of trial Erin Golden had been dismissed as a defendant and Peterson had dismissed his claims for ownership of Lot 1C.

<sup>11</sup> Poulos also paid Attorney Robert Hilson \$2500. Hilson had been Peterson's attorney for some time prior to 2003 and thereafter. Hilson was also Peterson's counsel with respect to the closing of Washington Mutual loan, although it is not clear what services, if any, he actually provided in connection with that transaction. Hilson, however, also represented Poulos in efforts to remove real estate attachments from the Framingham Property in order to facilitate the conveyance and the defendants pay off of their obligations to Ross. There is no evidence suggesting that Poulos was paying Hilson for his representation of Peterson rather than services that Hilson provided him.

the mortgage note and for the property taxes and insurance which Washington Mutual required to be paid into escrow. During that period, the following payments were made to Peterson by check signed either by Golden or Poulos:

June 9, 2003	\$2551.42
July 12, 2003	\$2551.42
August 14, 2003	\$2551.42
October 14, 2003	\$5104.84
December 16, 2003	\$2551.42
March 27, 2004	\$5082.84

Thereafter only two more payments were made to Peterson in 2004:

November 24, 2004	\$2500
December 7, 2004	\$ 1400

All payments then ceased until a few were made in 2009.<sup>12</sup>

Golden (but not Poulos) testified that she made additional but sporadic cash payments to Peterson by depositing them directly into Peterson's Bank of America account, until she learned about a second mortgage that Peterson placed on the Framingham Property in May 2007 (discussed below), after which she stopped making these deposits. Peterson denied receiving any such cash payments. The defendants offered no documentary evidence (or any other corroborating evidence) of such cash payments. The court does not credit Golden's testimony. The court

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<sup>12</sup> Golden sent a check in the amount of \$3226.65 directly to Washington Mutual on February 28, 2009. She sent two checks in the aggregate amount of \$1840 to Peterson in June 2009.

finds that the only payments made to Peterson under the Agreement are those set out above.<sup>13</sup>

Golden also testified that at the time of the conveyance of the Framingham Property to Peterson, Peterson owed her legal fees for work done for Hunter, Shifman, and Peterson.<sup>14</sup> The court finds that Golden has not proved that Peterson owed her any sum for legal services performed for his or any other person's benefit in March 2003 or at the time of trial.

Golden also testified that there was some relationship between sums she claimed were due her for legal services and Poulos' commitment under the Agreement that he would "be responsible for payment of the first mortgage and other ancillary expenses for

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<sup>13</sup> Golden testified that after her law license was suspended, she generated a great deal of cash selling antiques at weekend antique fairs and she deposited some of this cash directly into Peterson's bank account. However, she ceased practicing law in April 2002, a year before the Agreement was executed. Nonetheless, the defendants paid Peterson regularly by check into 2004. Golden offered no corroborating evidence whatsoever in support of her testimony concerning these cash payments; not even a running tally sheet on which she kept track of them, let alone bank records reflecting cash deposits. She testified that a hand written note to her from Peterson that computed and documented how much *he* had paid to Washington Mutual as of September 1, 2005, somehow suggested that she had made cash payments in that amount. (Trial exhibit 31) The Peterson note cannot be read in that fashion. The court further notes that Golden called Poulos to testify, but neither her counsel nor Poulos' asked him about the cash payments. Golden's testimony concerning these cash payments is not credible.

<sup>14</sup> Golden introduced copies of pleadings from a matter pending in the Plymouth District Court and a bill addressed to Marcy Karsey, presumably relating to this work, but no testimony as to the relevance of these documents to this case or who Marcy Karsey was. Golden submitted no writing in which Peterson agreed to pay her for legal service or in which she requested payment from Peterson for legal services.

the maintenance of the property.” Poulos, however, testified that he had no discussion with Peterson regarding attorney’s fees in connection with the Agreement (or what would happen if he failed to make the mortgage and expense payments on a timely basis). The court finds that the parties did not agree that any sums due for legal work performed by Golden for anyone would off-set Poulos’ obligation to pay Peterson, on a current basis, for the mortgage and other expenses Peterson would incur as a result of the mortgage granted on the Framingham Property, which continued to be the defendants’ principal residence.<sup>15</sup>

On May 16, 2007, Peterson granted a second mortgage on the Framingham Property to Northeast Capital Group, LLC in the amount of \$234,000. This was not traditional bank financing, but rather was related to other business transactions in which Peterson was involved. The mortgage was unrelated to any matters in which the defendants were involved. Peterson did not advise either of the defendants that he was granting this mortgage. The defendants learned of the mortgage after the fact from Hunter. By 2007,

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<sup>15</sup> It is certainly possible that Peterson was motivated to help the defendants because, by the time of the Agreement, it was apparent that neither he nor Golden would ever benefit from Hunter’s claims to her putative father’s property. However, Peterson never agreed that the value of legal work done for Hunter would offset Poulos’ obligation to pay the debt service and other expenses that Peterson would incur in helping out the defendants by “purchasing” their home, while allowing them to continue to live there. Notably, Golden’s Counterclaim does not allege a connection between the Agreement and the legal fees. The only reference to legal fees is in Golden’s count for unjust enrichment in which she alleges that “Peterson received the benefit of the professional services rendered by golden to Noreen Hunter at Peterson’s request in the amount of no less than \$150,000.

Hunter had become a real estate agent. Hunter had been looking into a possible refinancing or repurchase of the Framingham Property for the defendants. She had the title reviewed and discovered this second mortgage. She told Poulos of its existence. He promptly called Peterson to complain. Peterson said that he would remove the mortgage, but never did. By the time of trial, approximately \$20,000 remained outstanding on this second mortgage.

In 2009, Hunter looked into a possible short sale of the Framingham Property, apparently on behalf of the defendants. Peterson at first expressed some interest in a short sale, but a few days later changed his mind. No admissible evidence was offered at trial as to the fair market value of the Framingham Property from the date of its conveyance to Peterson through the date of trial. An inference may be drawn from Hunter's testimony concerning her efforts to convince Peterson to engage in a short sale, that it's value was less than the amount outstanding on the Washington Mutual mortgage, which was at the time of trial \$630,000.<sup>16</sup>

Golden testified generally that she wanted to repurchase the Framingham Property and obtain a so-called reverse mortgage on it which would generate cash to the defendants. Golden however offered no evidence that she ever had the funds with which to repurchase the Framingham Property or a commitment from any lender to loan her any funds to do so. As noted

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<sup>16</sup> There was no evidence offered at trial as to when or why the amount of the mortgage debt was reduced from \$650,000 to \$630,000. At some point, Peterson converted the ARM mortgage to a fixed rate of 6 and 1/8 percent. He did this at a time when interest rates were increasing. No evidence was offered at trial as to why Peterson did not refinance the mortgage within the last few years when rates had substantially decreased.

above, the defendants offered no evidence suggesting that the Framingham Property had a value in excess of the Washington Mutual mortgage at any time after April 2003. To the contrary, the only evidence of value was Hunter's testimony that she was recommending that Peterson attempt a short sale, which would require Washington Mutual's agreement.<sup>17</sup> Golden's testimony that the existence of the second mortgage thwarted her efforts to repurchase or refinance is opinion not fact testimony. There is no credible testimony, nor any other evidence, that the second mortgage prevented the defendants from consummating any transaction concerning the Framingham Property from which they otherwise could have benefitted. In particular, there is no evidence that the defendants ever told Peterson that they were ready to reacquire title and the second mortgage had to be discharged.<sup>18</sup>

On July 28, 2009, Golden recorded the Agreement in the Middlesex Registry of Deeds. Golden testified that she did this because Peterson had not removed the second mortgage. The court does not credit that testimony, as the defendants had known about the second mortgage for at least two years by

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<sup>17</sup> Hunter acknowledged that Washington Mutual's willingness to permit a short sale could be affected by the fact that Peterson had been making payments on the loan on a current basis and had other assets.

<sup>18</sup> Indeed, the court credits Peterson's testimony that he would gladly have discharged the second mortgage if the defendants had presented an opportunity to rid himself of his obligations under the Washington Mutual loan without suffering a loss. Indeed, that is the only inference that can reasonably be drawn from the evidence adduced at trial.

that point.<sup>19</sup> Peterson responded to Golden's act of recording the Agreement, by serving the defendants with a notice to quit the Framingham Property in August, 2009. Peterson, however, did not initiate legal process to recover possession in reliance on the notice to quit. He filed this action on September 1, 2010.

To the time of trial, Peterson had paid approximately \$390,000 in principal, interest, property taxes and insurance as a consequence of the Agreement. The defendants had paid him only \$51,131.36.

## CONCLUSIONS OF LAW

### PETERSON'S CLAIMS

After the close of Peterson's case, Peterson agreed that only his claims for breach of contract, unjust enrichment and a declaration that he owned Lot 1B free and clear of the defendants' claims remained.

#### *Breach of Contract and Declaratory Relief*

On its face, the Agreement is a contract between the parties. Curiously, the only consideration that Peterson received under the Agreement was the \$25,000 payment "for his participation in securing" the \$650,000 mortgage. However, both Golden and Peterson testified that this \$25,000 was meant as a "buffer" or "slush fund" in case the defendants were unable to stay current on the debt service payments.

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<sup>19</sup> Inferences could be drawn as to the reason that Golden recorded the Agreement at that time, but they would be in the nature of speculation.

This testimony therefore suggests that Peterson received no consideration for his participation in this transaction, in which he personally obligated himself on a \$650,000 note to Washington Mutual at a variable interest rate, a rate that apparently could increase, *each month*, subject to some limitations, and each five years without any cap. (“On the fifth anniversary of the due date ... and, every fifth year thereafter, the monthly payment will be adjusted without regard to the cap limitation...”) Nonetheless, as the Agreement, on its face, is an enforceable contract, the court will treat it as such.

The Agreement states that title to the Framingham Property will be conveyed to Peterson subject to a first mortgage in the amount of \$650,000. It then goes on to state that “Poulos will retain possession of the premises,” and he will “be responsible for payment of the first mortgage and other ancillary expenses for the maintenance of the property.” Poulos has argued that because the Agreement does not state when Poulos must make these payments, his failure to make virtually any of them since 2004 does not constitute a breach of contract. The court does not find that argument convincing. The only reasonable reading of this contract provision is that Poulos must make the payments as they become due under the \$650,000 mortgage note. In consequence, even if one credits Poulos with the \$25,000 paid to Peterson immediately following the closing, Poulos has been in breach of contract since late 2005.

The defendants also argue that they can only be held responsible to pay Peterson his monthly payments due on the mortgage note in the amount originally due each month when the note was executed. That argument makes no sense. The defendants knew full

well that the note had an adjustable rate. As it was Poulos that benefitted from the initially low rate, it was Poulos who risked rate increases from this dangerous financial instrument. There was nothing unreasonable about Peterson fixing an interest rate at a time when rates were increasing, although it is not clear why Peterson has not refinanced the note now that rates are lower.<sup>20</sup>

The Agreement does not require that Golden and/or Poulos to pay off the mortgage note and take title to the Framingham Property; rather, it gives them the option to do that. Although, in theory, if Poulos remained current on his obligations to pay the mortgage payments throughout the term of the note, including any balloon payment, eventually the note would be paid off. Clearly, the parties to the Agreement never contemplated that. It seems apparent that this Agreement among friends was based on the unstated understanding that this was a temporary arrangement to get the defendants through a difficult financial period, and they simply did not include in the Agreement terms to cover the events as they came to pass, where the defendants were never able to refinance and relieve Peterson of his obligations under the mortgage note.

It could be argued that the Agreement is a contract for an option to purchase real estate, i.e., the Framingham Property, in which case it would be subject to the Statute of Frauds. See G.L. c. 259, §1, Fourth; *Schwanbeck v. Federal-Mogul Corp.*, 412 Mass. 703, 709 (1992) (“any promise involving real property is enforceable only if that promise meets the

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<sup>20</sup> Although Golden’s having recorded the Agreement in 2009 could make that difficult.

requirements of the Statute of Frauds"). In that case, to satisfy the Statute of Frauds, the Agreement would have "to ... contain directly, or by implication, all of the essential terms of the parties' agreement." *Simon v. Simon*, 35 Mass. App. Ct. 705, 709 (1994). The question would then arise: Is the length of the option period a missing essential contract term or a term that could be supplied by implication? For example, when an agreement for the sale of land does not reference a time period in which the sale is to occur, "a reasonable time will be implied." Id. at 710. By contrast, "where the contract is for a term of years but fails to define the term, no implication can be made in its favor." Id. (internal citations and quotations omitted). In any event, if a reasonable period of time for the defendants to demand reconveyance of the Framingham Property is implied, that period would clearly be less than the nearly ten year period that has elapsed since Peterson signed the mortgage loan. Moreover, Poulos' material breach of the Agreement by failing to pay the sums due Washington Mutual, would prevent him from enforcing Peterson's obligations. See *Ward v. American Mut. Liab. Ins. Co.*, 15 Mass. App. Ct. 98, 100 (1983) ("It is well established that a material breach by one party excuses the other party from further performance under the contract"). The court rules that the Agreement is an enforceable contract that Poulos breached by failing to pay Peterson the amounts due Washington Mutual on a current basis.

In fashioning the appropriate relief, however, the court simply cannot declare that Peterson owns the Framingham Property (more precisely Lot 1B) free and clear of any claim by the defendants, because he never actually purchased it. The purchase and sale agreement that the parties executed and the purchase price were

both a fiction. The closing was not a true conveyance, but a means to obtain a \$650,000 loan from Washington Mutual that the defendants could not obtain in their own names. In effect, Peterson lent the defendants his credit.

The court notes that Peterson, for reasons never fully explained at trial, was a participant in the misrepresentations made to Washington Mutual<sup>21</sup> It believes that the following relief best takes into account the equities that should be considered.<sup>22</sup> Peterson shall convey the Framingham Property to Poulos upon payment of \$968,868.64, which sum represents the balance due on the first mortgage to Washington Mutual (\$630,000) and the aggregate sum of the amount Peterson has paid to Washington Mutual on the mortgage note with its attendant obligations to pay insurance and real estate taxes on the Framingham Property less the amount reimbursed by the defendants (\$390,000 minus \$51,131.36 = \$338,868.64). If that amount is not paid within thirty days of the entry of Final Judgment, the property shall be sold by a

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<sup>21</sup> It could be said that the Agreement was an illegal contract in that its execution required Washington Mutual to be misled into believing that the parties were engaged in a true sale of the Framingham Property; in which case the court might leave the parties where they are and decline to order any relief. See *Arcidi v. Nat'l Assoc. of Government Emp., Inc.*, 447 Mass. 616, 619-620 (2006). The court, however, concludes that in this situation a refusal to enforce Poulos' obligation would leave Peterson severely disadvantaged while the defendants lived rent free for nearly a decade. See *Berman v. Coakley*, 243 Mass. 348, 351 (1923).

<sup>22</sup> This does not compensate Peterson for the time value of money, but under the circumstances this seems equitable. In particular, because the interest rate has been in excess of market for at least a few years. Further, the court notes that Peterson has not submitted what would be a very complicated calculation.

licensed real estate agent after it is exposed to the market for a reasonable time and Poulos shall remain liable to Peterson for the difference, if any, between the sale price and \$968,868.64. If the parties cannot agree on an agent to conduct the sale, the court will appoint a master to do so.<sup>23</sup>

The it is Poulos' obligation to make this payment to Peterson, as the Agreement requires Poulos (but not Golden) to pay Peterson the amounts due under the Washington Mutual mortgage note. Similarly, Poulos is liable for any shortfall.

#### *Unjust Enrichment*

No claim for unjust enrichment will lie against Poulos, as the relationship between Poulos and Peterson is contractual. See *Finard & Co. LLC v. Sitt Asset Mgt.*, 79 Mass. app. Ct. 226, 230 (2011) (no claim for quasi contract recovery where a contract covers the subject matter of the dispute). Such a claim will however lie against Golden. Golden has lived in the Framingham Property continuously since April 2003. Since late 2005, Peterson has paid essentially all of the debt service, real estate taxes, and property insurance without reimbursement by either Golden or Poulos. The parties never contemplated that Peterson was going to make a gift to the defendants of these sums, but rather their understanding was that he would be reimbursed for any costs that he incurred in lending the defendants his credit. In consequence, Peterson conferred a measurable benefit on Golden, reasonably

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<sup>23</sup> The parties can of course agree that the defendants will relinquish any claim to Lot 1C in return for a credit in an agreed amount extinguishing all or part of their liability to Peterson. The court, however, does not order that.

expected that Golden would pay for it (if Poulos did not), and Golden accepted that benefit fully understanding that Peterson expected that both Poulos and Golden would be responsible for any costs he incurred in consequence of the Washington Mutual mortgage note. See *Albert v. Boston Mortgage Bond Co.*, 237 Mass. 118, 121 (1921). In determining the amount of damages due Peterson, the court can look to the Agreement. See *Finard*, 79 Mass. App. Ct. at 229. Accordingly, the court finds Golden liable to Peterson in the amount of \$338,868.64. This sum is duplicative of, and not in addition to, Poulos' liability to Peterson.

#### THE DEFENDANTS' COUNTERCLAIMS

Quite frankly, the defendants' contention that Peterson is liable to them for a large sum of money under these circumstances is quite extraordinary. Summarily stated, Peterson lent the defendants his credit so they could pay off their creditors and, as a result, has been saddled with a debt to Washington Mutual and the obligation to pay debt service on that debt, including property insurance and property taxes on the Framingham Property, since April 2003. The suggestion that these acts could give rise to liability on the part of Peterson to the defendants is difficult to parse.

In any event, Counts I - V and VII are all principally based on the defendants' contention that that Peterson committed various wrongs against them when he placed the second mortgage on the Framingham Property in 2007.<sup>24</sup> The court agrees with

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<sup>24</sup> There is the claim that Peterson was unjustly enriched in the amount of the unpaid legal fees for the legal services that Golden

the defendants that, if there had been evidence that the second mortgage prevented them from paying off the Washington Mutual mortgage note and repaying Peterson for any unreimbursed expense, that could, in theory, have given rise to a claim of breach of the covenant of good faith and fair dealing implied in the Agreement, even though the subject of a second mortgage was not expressly addressed in the Agreement. See *Druker v. Roland Wm. Jutras Assocs.*, Inc. 370 Mass. 383, 385 (1976). However, in this case, the defendants offered no evidence that the existence of the second mortgage thwarted their ability to pay off the Washington Mutual loan, reimburse Peterson for his costs, and take back title to the Framingham Property. Indeed, the defendants offered no evidence whatsoever that they ever had the financial resources to do that or that some person or institution was prepared to lend them the necessary funds. They did not even offer evidence as to the fair value of the property after 2003. The defendants did testify that they asked Peterson to remove the second mortgage, but not that they ever told him that they were ready and able undertake any transaction but for the second mortgage. As noted above, Peterson testified that he would have discharged that mortgage, if the defendants had presented such an opportunity to him. Indeed, it is evident that Peterson would have been only too glad to rid himself of the monthly obligations to Washington Mutual which he had been paying since April 2003, while the defendants continued their uninterrupted

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rendered Hunter. However, as noted above, the court has found that Golden had no expectation that Peterson would pay for these services after Golden drafted the Trust giving her an interest in the disputed properties. Moreover, Peterson received no benefit from those services.

occupancy of the residence on the Framingham Property. Counts I - V and VII are dismissed.

Count VI seeks declaratory relief that Peterson has no interest in Lot 1C. As Peterson has disclaimed any interest in that lot, and the court has found that the parties never intended the Agreement to cover Lot 1C, such a declaration shall enter.

The defendants dismissed Count VIII prior to trial.

## ORDER

Final Judgment shall enter as follows:

A. The Plaintiff's Claims:

1. As to Count I: defendant Poulos is ordered to pay Peterson \$968,868.64 within thirty days of the entry of this judgment. Upon receipt of such funds Peterson shall convey Lot 1B of the Framingham Property (Lot 1B) to Poulos free of any liens or encumbrances. If Poulos fails to make payment, Poulos and Peterson shall agree upon a licensed real estate agent to market and sell Lot 1B. If they cannot agree on an agent, listing price, or sale price, the court will appoint a master on Peterson's application to complete the transaction, the master's fee to be paid out of the proceeds of the sale. Poulos and Peterson shall vacate Lot 1B, remove their property, and leave it broom clean one week prior to the date of sale. Failure to do so will be treated as a contempt of this order. Poulos shall be liable to Peterson for the difference if any between \$968,868.64 and the net sales price. Interest

shall accrue on any net liability at the post-judgment rate from the date of the sale.

2. As to Count II: defendant Golden is liable to Peterson in the amount of \$338,868.64 plus interest. This amount is duplicative of and not additional to any amount due Peterson under Count I. Interest shall accrue from the date of the sale described in paragraph 1 above.
3. As to Count III: the court orders that Golden and Peterson execute such documents as may be necessary, by virtue of the recording of the Agreement, to enable the sale described in paragraph 1 above to be consummated. All claims for additional declaratory relief are dismissed.
4. Counts IV through VII are dismissed with prejudice.
5. Each party to bear its own costs.

B. The Defendants' Counterclaims:

1. Counts I through V, VII and VIII are dismissed with prejudice.
2. As to Count VI: the court declares that Peterson has no interest in Lot 1C of the Framingham Property.
3. Each party to bear its own costs.

So ordered.

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Mitchell H. Kaplan  
Justice of the Superior  
Court

Dated: January 23, 2013