

(Cite as: 209 A.D.2d 688, 619 N.Y.S.2d 316)

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Supreme Court, Appellate Division, Second Department,
New York.

Louis L. SPIRT, Respondent,
v.
Diana L. SPIRT, Appellant.

Nov. 28, 1994.

Father sued daughter for specific performance of alleged oral agreement to convey life estate in addition which father constructed to daughter's home. Father's motion for preliminary injunction barring daughter from interfering with his ability to reside in addition was granted by the Supreme Court, Nassau County, Schmidt, J., and daughter appealed. The Supreme Court, Appellate Division, held that: (1) memorandum contained in special use application to zoning board which stated the intended use of the addition was neither a conveyance of an interest in real property nor a contract to convey pursuant to the statute of frauds; (2) nonetheless, father stated sufficient facts to raise triable issue as to whether his acts were unequivocally referable to oral agreement to convey interest in real property, within the part performance exception to statute of frauds, and the memorandum was probative on that issue; and (3) trial court did not improvidently exercise its discretion in granting the preliminary injunction.

Affirmed.

West Headnotes

[1] Vendor and Purchaser -21
[400k21 Most Cited Cases](#)

Memorandum contained in special use application made to zoning board which stated intended use of father's addition to daughter's home, pursuant to alleged agreement for daughter to convey to father life estate in the addition, was not conveyance of interest in real property in that there were no operative words of present intention to convey interest, such as "transfer, sell, release, grant, assign or convey." [McKinney's General Obligations Law § 5-703](#); [McKinney's Real Property Law §§ 240](#), subd. 2, 243, 258, 290, subd. 3.

[2] Frauds, Statute Of -113(2)
[185k113\(2\) Most Cited Cases](#)

[2] Frauds, Statute Of -113(3)
[185k113\(3\) Most Cited Cases](#)

Memorandum contained in special use application made to zoning board which stated intended use of addition constructed by father on daughter's home, pursuant to

alleged agreement that daughter was to convey to father life estate in the premises, did not represent contract to convey interest in real property pursuant to statute of frauds, though it designated parties and identified and described subject matter, where it did not state all of the essential terms of complete agreement such as consideration. [McKinney's General Obligations Law § 5-703](#), subd. 2.

[3] Frauds, Statute Of -158(3)
[185k158\(3\) Most Cited Cases](#)

Parol evidence may not be received to supplement insufficient writing so as to bring it into compliance with requirements of statute of frauds. [McKinney's General Obligations Law § 5-703](#), subd. 2.

[4] Frauds, Statute Of -129(12)
[185k129\(12\) Most Cited Cases](#)

There is exception to writing requirement of statute of frauds where there is part performance that is unequivocally referable to oral agreement. [McKinney's General Obligations Law § 5-703](#), subd. 4.

[5] Frauds, Statute Of -149
[185k149 Most Cited Cases](#)

In action by father against daughter for a specific performance of alleged oral agreement to convey life estate in addition which father constructed to daughter's home, father stated sufficient facts to raise triable issue as to whether his acts in constructing addition were unequivocally referable to oral agreement to convey interest in real property, within part performance exception to statute of frauds, and with respect to demand for imposition of constructive trust on the premises. [McKinney's General Obligations Law § 5-703](#), subd. 4.

[6] Frauds, Statute Of -158(3)
[185k158\(3\) Most Cited Cases](#)

Though memorandum contained in special use application to zoning board which stated intended use of addition constructed by father on daughter's home, pursuant to alleged oral agreement of daughter to convey to father life estate on the premises, did not represent contract to convey interest in real property pursuant to statute of frauds, the memorandum, as well as father's payment of \$150,000 for the addition, were probative on the issue of father's part performance within exception to writing requirement of the statute of frauds. [McKinney's General Obligations Law § 5-703](#), subd. 4.

[7] Specific Performance -108
[358k108 Most Cited Cases](#)

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In action by father against daughter for specific performance of alleged oral agreement to convey life estate in addition which father constructed to daughter's home, trial court did not improvidently exercise its discretion when it granted preliminary injunction barring daughter from interfering with father's ability to reside, together with his wife, in the addition, as father showed probability of success on the merits, danger of irreparable injury in absence of preliminary injunction, and balance of equities in his favor. **317 Murphy, Bartol & O'Brien, Mineola (Thomas J. Duncan and [Kathleen G. Oldak](#), of counsel), for appellant.

Moritt, Hock & Hamroff, Hempstead (Alan S. Hock of counsel, Wendy Axelrod, on the brief), for respondent.

Before [RITTER](#), J.P., and [SANTUCCI](#), [FRIEDMANN](#) and [GOLDSTEIN](#), JJ.

***688 MEMORANDUM BY THE COURT.**

In an action, *inter alia*, for specific performance of an alleged oral agreement to convey a life estate in a portion of improved real property, the defendant appeals from an order of the Supreme Court, Nassau County (Schmidt, J.), dated June 6, 1994, which granted the plaintiff's motion for a preliminary injunction barring the defendant from interfering with the plaintiff's ability to reside, together with his wife, in an addition constructed upon the defendant's property.

ORDERED that the order is affirmed, with costs.

It is undisputed that the plaintiff expended approximately \$150,000 to construct an addition (hereinafter referred to as the premises) upon the home of the defendant, his daughter. He alleges that he did this pursuant to **318 an agreement with the defendant to convey to him a life estate in the premises. Notwithstanding the purported agreement, the defendant allegedly removed the plaintiff and his wife from the premises and relocated them in a nursing home against their will.

[1] Contrary to the plaintiff's contention, the memorandum contained in the special use application made to the Zoning Board of Appeals of the Village of Bayville, which stated the intended use of the addition, is not a conveyance of an interest in real property, among other reasons, because it does not clearly manifest that it is the intent of the parties that an interest in the land is, in fact, being conveyed to the plaintiff (*cf.*, [Willow Tex v. Dimacopoulos](#), 68 N.Y.2d 963, 965, 510 N.Y.S.2d 543, 503 N.E.2d 99; 219 [Broadway Corp. v. Alexander's, Inc.](#), 46 N.Y.2d 506, 512, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Specifically, there are no operative words of present intention to convey an interest in real property in the memorandum, such as "transfer, sell,

release, grant, assign or convey" (*see*, [General Obligations Law § 5-703](#); *see also*, Real Property Law *689 §§ 240[2]; 243; 258; 290[3]; *cf.*, [Stratis v. Doyle](#), 176 A.D.2d 1096, 1097, 575 N.Y.S.2d 400; [Evans v. Taraszkievicz](#), 125 A.D.2d 884, 885-886, 510 N.Y.S.2d 243).

[2][3] Further, contrary to the plaintiff's contention, the memorandum does not represent a contract to convey an interest in real property pursuant to the Statute of Frauds, because, although it designates the parties and identifies and describes the subject matter, it does not state all of the essential terms of a complete agreement, such as the consideration (*see*, [General Obligations Law § 5-703\[2\]](#); *see also*, [Matter of Davis v. Dinkins](#), 206 A.D.2d 365, 613 N.Y.S.2d 933; [Natuzzi v. Rabady](#), 177 A.D.2d 620, 623, 576 N.Y.S.2d 326; [Delfino v. Estate of Parkinson](#), 159 A.D.2d 476, 477, 552 N.Y.S.2d 348; [Aceste v. Wiebusch](#), 74 A.D.2d 810, 425 N.Y.S.2d 369; [Conway v. Maher](#), 185 A.D.2d 570, 570-571, 586 N.Y.S.2d 660). In addition, parol evidence may not be received to supplement an insufficient writing so as to bring it into compliance with the requirements of the Statute of Frauds (*see*, [O'Brien v. West](#), 199 A.D.2d 369, 370, 605 N.Y.S.2d 366).

[4][5][6][7] However, the Statute of Frauds specifically provides an exception to the writing requirement where there is part performance that is "unequivocally referable" to an oral agreement (*see*, [General Obligations Law § 5-703\[4\]](#); *see also*, [Burns v. McCormick](#), 233 N.Y. 230, 231-233, 135 N.E. 273). The plaintiff has stated sufficient facts to raise a triable issue as to whether his acts were unequivocally referable to an oral agreement to convey an interest in real property, and the memorandum, as well as plaintiff's payment of the \$150,000, are probative on the issue of the plaintiff's part performance (*see*, [Spodek v. Riskin](#), 150 A.D.2d 358, 360, 540 N.Y.S.2d 879; *see also*, [Uskokovic v. Radunovich](#), 127 A.D.2d 830, 511 N.Y.S.2d 944; [City Store Gates Mfg. Corp. v. United Steel Prods.](#), 79 A.D.2d 671, 671-672, 433 N.Y.S.2d 876). Furthermore, the plaintiff has shown facts sufficient to raise a triable issue with respect to his demand for the imposition of a constructive trust upon the premises (*see*, [McGrath v. Hilding](#), 41 N.Y.2d 625, 394 N.Y.S.2d 603, 363 N.E.2d 328). In addition, since the plaintiff showed a probability of success on the merits, a danger of irreparable injury in the absence of the preliminary injunction, and a balance of the equities in his favor, the Supreme Court did not improvidently exercise its discretion when it granted the preliminary injunction (*see*, [Aetna Ins. Co. v. Capasso](#), 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918, 552 N.E.2d 166; *see also*, [Moczan v. Moczan](#), 135 A.D.2d 692, 522 N.Y.S.2d 591; [Weissman v. Kubasek](#), 112 A.D.2d 1086, 493 N.Y.S.2d 63; [Poling Trans. Corp. v. A & P Tanker Corp.](#), 84 A.D.2d 796, 797, 443 N.Y.S.2d 895; *cf.*, [Krause v. Krause](#), 112 A.D.2d 862, 864, 493 N.Y.S.2d 142).

There is no merit to the defendant's remaining contention.

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