

MEMORANDUM

TO: John Doe

FROM: Lawfinders, Associates, Inc.

RE: *Assisted Living Group v. Smith*

DATE: August 14, 20xx

This memorandum will address possible causes of action under New York law based on the factual scenario described to us involving the Assisted Living Residence Group's contract with Smith. Our research indicates that Assisted Living Group may have a viable cause of action against Smith and the new purchaser for unjust enrichment, and viable causes of action against Smith for breach of the duty of good faith and fair dealing and breach of fiduciary duty.

FACTUAL BACKGROUND

This situation arose out of a contract between Assisted Living Group and Smith to purchase a parcel of land in Acme, New York on which Assisted Living Group intended to construct an assisted living facility. The contract between the parties was conditioned on obtaining zoning approval for construction and operation of the facility on the piece of property specified in the contract. The parties jointly applied to the town of Acme for the required zoning approval. In support of their application, Assisted Living Group hired architects and engineers to prepare designs for the planned facility. The designs prepared by Assisted Living Group were based on its unique expertise and experience in the industry.

The zoning approval was not obtained within the time specified in the contract, and Smith then terminated the contract. At the time Smith terminated the contract, the submissions for the zoning application were substantially completed.

Shortly after terminating the contract with Assisted Living Group, Smith entered into another contract to sell the property to a third party. As part of this second contract, Smith and the new buyer continued seeking zoning approval from the town, using the same zoning application previously filed by Smith and Assisted Living Group. The town granted zoning approval based on plans and designs that were the same or substantially similar to the drawings and plans prepared by Assisted Living Group.

CAUSES OF ACTION

Based on the facts described above, Assisted Living Group could consider a number of potential causes of action under New York law. This does not appear to be a situation where Assisted Living Group may consider a breach of contract claim based on the real estate contract itself.

Unjust Enrichment

Assisted Living Group should consider a cause of action for unjust enrichment based on the benefit conferred on Smith and the new purchaser by their use of the plans and designs created by Assisted Living Group. “The term 'unjust enrichment' does not signify a single well-defined cause of action.” 22A N.Y. Jur. 2d, Contracts, § 512, at 226. It is an action for

restitution based on a quasi-contract theory. *Estate of Witbeck*, 245 A.D.2d 848, 850, 666 N.Y.S.2d 315 (3d Dep't 1997). The essence of a claim for "unjust enrichment" is based on the fact that one party has received money or a benefit at the expense of another. *Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 694 N.Y.S.2d 424 (2d Dep't 1999). Unjust enrichment is an equitable action subject to equitable defenses such as unclean hands and laches. "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered . . . such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice." *Paramount Film Distributing Corp. v. New York*, 20 N.Y.2d 415, 421, 334 N.Y.S.2d 388 (1972) (citations omitted). Generally, to prevail on a claim of unjust enrichment, a party must establish that (1) the defendant was enriched (2) at plaintiff's expense, and (3) that it would be inequitable to allow the defendant to retain the benefit conferred. *Lake Minnewaska Mountain Houses, Inc. v. Rekis*, 259 A.D.2d 797, 686 N.Y.S.2d 186 (3d Dep't 1999), citing *Paramount Film*, 20 N.Y.2d at 421. A recovery based on unjust enrichment "should appeal to one's sense of equity and good conscience" *Lake Minnewaska*, 259 A.D.2d at 799.

For example, in *Harper Lawrence, Inc. v. Intershoe, Inc.*, 702 N.Y.S.2d 473, 476 (1st Dep.t 2000), a real estate agency abetted a client's breach of an exclusive agency agreement with a team of brokers in favor of substituting one of its brokers, by discounting that broker's commission on property and offering the client indemnification against any anticipated claim

by the team of brokers. The court determined that these facts supported a claim for unjust enrichment against the real estate agency by the brokers. *Id.* Similarly, in *Sharper v. Harlem Teams for Self-Help, Inc.*, 257 A.D.2d 329, 703 N.Y.S.2d 696 (1st Dep't 1999), the transferee of a building under an agreement obligating the transferee to renovate it and then lease it back to the transferor upon completion of the renovation would be unjustly enriched were it allowed to retain the building after the renovation work had gone on for over a decade without significant improvement and where the lease back was to have included an option to purchase at very favorable terms that would have allowed the transferor to realize any appreciation in the value of the building.

In this case, there is an issue of whether Smith and/or the new purchaser obtained a benefit based on Assisted Living Group's work. They used Assisted Living Group's materials to gain zoning approval, and that zoning approval arguably increased the potential value of the property because the property is now approved for additional uses. Assisted Living Group will need to establish that, by using their materials, Smith and the new purchaser made the property more valuable by showing, for example, that the property was sold for a higher price. It is our understanding that the property has not been used to construct a assisted living facility, so Assisted Living Group will need to find evidence of changed property values or sales prices to establish this damages element. There is evidence that whatever benefit Smith and the new purchaser received came at Assisted Living Group's expense. Assisted Living Group created most, if not all, of the designs and schematics

necessary to obtain zoning approval. The zoning application was based on Assisted Living Group's work, while it received nothing in return for its efforts. In such a situation, the equities appear to balance in favor of Assisted Living Group.

Breach of Implied Covenant of Good Faith and Fair Dealing

Assisted Living Group may also consider a cause of action against Smith in connection with the parties' contract for breach of the implied covenant of good faith and fair dealing. An obligation of good faith and fair dealing is implied in every contract. *See Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827 (1978). Such a covenant may be enforced unless that obligation is inconsistent with other terms of the contract between the parties. *Chrysler Credit Corp. v. Diguardi Jeep Eagle, inc.*, 192 A.D.2d 1066, 596 N.Y.S.2d 230 (4th Dep't 1993); *see also Gordon v. Nationwide Mut. Ins. Co.*, 20 N.Y.2d 427, 334 N.Y.S.2d 601 (1972). The implied covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. *See Jaffe v. Paramount Communications*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43 (1st Dep't 1996). To state a cause of action alleging breach of an implied covenant of good faith and fair dealing, a plaintiff must allege facts tending to demonstrate that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff. *See Dvoskin v. Prinz*, 205 A.D.2d 661, 662, 613 N.Y.S.2d 654 (2d Dep't 1994);

Holmes Protection of N.Y. v. Provident Loan Soc. of N.Y., 179 A.D.2d 400, 577 N.Y.S.2d 850 (1st Dep't 1992); *see also Aventine Inv. Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 697 N.Y.S.2d 128 (2d Dep't 1999). For example, in *Halpern Development Venture, Inc. v. Board of Trustees of the Village of North Tarrytown*, 222 A.D.2d 652, 635 N.Y.S.2d 679 (2d Dep't 1995), an agreement that called for a development company to study and propose a revitalization project to a village and that called for village approval at various stages imposed an implied covenant of good faith and fair dealing. *Halpern*, 222 A.D.2d at 653.

In this case, two issues would need to be considered with respect to an implied covenant of good faith and fair dealing. Did the covenant obligate Smith to continue efforts to obtain zoning approval with Assisted Living Group beyond the time periods specified in the contract, and did the covenant obligate Smith to use the materials generated by Assisted Living Group only in pursuit of zoning in connection with the sale of the property to Assisted Living Group? Because the contract allowed either party to cancel the contract if the zoning approval was not obtained during the specified time period, it is arguable that an implied covenant obligating Smith to continue working with Assisted Living Group beyond the specified time period would be inconsistent with the contract. *See Chrysler Credit Corp. v. Diguardi Jeep Eagle, inc.*, 192 A.D.2d 1066, 596 N.Y.S.2d 230 (4th Dep't 1993). There does not appear to be any provision in the contract that would be inconsistent with an

obligation to use materials generated by Assisted Living Group only in connection with the parties' joint efforts to obtain zoning approval.

Breach of Fiduciary Duty

It will be difficult to establish that Smith breached a fiduciary duty owed to Assisted Living Group. The existence of a contractual relationship between parties does not by itself create a fiduciary relationship. *Chrysler Credit Corp. v. Diguardi Jeep Eagle, Inc.*, 192 A.D.2d 1066, 1068, 596 N.Y.S.2d 230 (4th Dep't 1993). Clearly "it is not mandatory that a fiduciary relationship be formalized in writing" and "the ongoing conduct between the parties may give rise to a fiduciary relationship that will be recognized by the courts." *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122, 672 N.Y.S.2d 8 (1st Dep't 1998).

As a general proposition, "a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another" that exists where (1) there is vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) employment has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself. *Penato v. George*, 52 A.D.2d 939, 943, 383 N.Y.S.2d 900 (2d De'pt 1976). The *Penato* court noted that a fiduciary relationship has been found to exist, under appropriate circumstances, between close friends or based on prior business dealings, where confidence is reposed. *Id.*

Assisted Living Group will need to come forward with evidence that a relationship of trust and confidence beyond that involving merely a buyer and seller of property was created in this case. A parties' business relationship may give rise to fiduciary duties. In *Fyrdman & Co. v. Credit Suisse First Boston Corp.*, 708 N.Y.S.2d 77, 79-80 (1st Dep't 2000), allegations that a bank furnished investment banking advice and negotiating services to the potential acquirers of a corporation in connection with the contemplated acquisition and then financed the acquisition of the corporation by a rival potential acquirer were sufficient to state a claim against the bank for breach of fiduciary duty, even though the parties did not enter into a written agreement for the provision of investment-banking services and none of their written agreements provided that a fiduciary relationship would exist. Here, the parties are jointly involved in gaining approval of the necessary zoning changes from the town. Indeed, the transaction itself may only proceed if that approval is secured, and the parties pledge in the contract to work together to obtain such an approval. Arguably, the agreement here created a relationship of trust between the parties, "producing a fiduciary-like obligation." *Northeast General Corp. v. Wellington Advertising, Inc.*, 82 N.Y.2d 158, 160, 604 N.Y.S.2d 1 (1993). As the *Wellington* court noted, "courts look to the parties' agreements to discover, not generate, the nexus of relationship and the particular contractual expression establishing the parties' interdependency." *Wellington*, 82 N.Y.2d at 160. This joint involvement in securing zoning changes arguably makes the relationship

between Smith and Assisted Living Group more than a mere arms-length buyer/seller transaction.

Smith may assert in response to a claim for breach of fiduciary duty that the relationship between Smith and Assisted Living Group was an arms-length business transaction where Assisted Living Group assumed the risk that the transaction would not be completed if the town did not approve the requested zoning changes. *See Insilco Corp. v. Star Serv. Inc. of Delaware*, 700 N.Y.S.2d 182 (1st Dep't 1999) (seller of assets that sued buyer on a promissory note could not recover for negligent misrepresentation because no fiduciary relationship existed); *Iglesias v. Dazi*, 253 A.D.2d 515, 516, 677 N.Y.S.2d 158 (2d Dep't 1998) (home buyer and seller did not have fiduciary or confidential relationship).

It is unclear whether or not Assisted Living Group will be able to establish the existence of an actual joint venture or partnership relationship with Smith. Where parties are engaged in a joint venture or partnership, a fiduciary relationship exists. *See Mendolson v. Feinman*, 143 A.D.2d 76, 531 N.Y.S.2d 326 (2d Dep't 1988). In determining whether a joint venture exists, a court will consider (1) the intent of the parties, express or implied, (2) whether there was joint control and management of the enterprise, (3) whether there was a sharing of the profits as well as a sharing of the losses, and (4) whether there was a combination of property, skill or knowledge. *Ramirez v. Goldberg*, 82 A.D.2d 850, 439 N.Y.S.2d 959 (2d Dep't 1981). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective

contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that would act for their joint benefit . . . ” *Mendolson*, 143 A.D.2d at 77, *citing Hasday v. Barocas*, 10 Misc.2d 22, 28, 115 N.Y.S.2d 209. There is no indication, based on the facts provided, that the parties agreed to share profits or losses, which is an indispensable element of establishing the existence of a joint venture or partnership. *Chipman v. Steinberg*, 106 A.D.2d 343, 344, 483 N.Y.S.2d 256 (1st Dep’t 1984) (citations omitted); *see also Penato*, 52 A.D.2d at 942 (not necessary to plead agreement to share losses where other elements of joint venture are present).

CONCLUSION

Under New York law, Assisted Living Group should be able to proceed against both Smith and the new purchaser for unjust enrichment. In addition, it should be possible to make a claim against Smith based on failure to act in good faith and deal fairly in connection with the contract of sale. In light of the difficulty of establishing that Smith and Assisted Living Group are joint venturers, it is likely that the court may conclude that the provision in the contract regarding gaining zoning approval does not alter the fact that this is an arms-length business transaction with no resulting fiduciary duty.