IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JAKE FORNARO, *et al.*	)	CASE NO. CV 07 631035
	)	
Plaintiffs	)	JUDGE JOHN P. O'DONNELL
	)	
vs	)	
	)	
JOHN KNOBLE, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants	)	

I. STATEMENT OF THE CASE

Jake and Tina Fornaro filed this lawsuit against defendants John and Lori Knoble[1] claiming various causes of action including: breach of a commercial property lease, unjust enrichment, conversion, fraudulent misrepresentation, and fraudulent conveyance of property and assets. The defendants then filed a counterclaim alleging breach of contract and unjust enrichment.

The defendants' answer and counterclaim was filed October 2, 2007, and included a claim designated as a counterclaim against new party defendant J. Fornaro Landscaping, Inc., alleging breach of a contract to build a retaining wall. The corporation was served with the pleading by certified mail on November 20, 2007 and thereafter filed a responsive pleading which omitted a defense of lack of jurisdiction over the person.

Since the corporation is not a plaintiff on the complaint it is not a proper object of a Civil Rule 13 counterclaim. Nor is the corporation a proper third-party defendant since it is not a party

[1] Any reference in this entry to the plaintiff in the singular means Jake Fornaro and to the defendant in the singular means John Knoble.

that the defendants' claim is liable to them for all or part of the plaintiffs' claims against them.[2] Instead, the claim against the corporation should have been made as a separate complaint, which the Knobles could have then moved to consolidate with this case pursuant to Civil Rule 42. However, because the corporation was served with the claim against it by certified mail and filed a responsive pleading that waived a defense of lack of personal jurisdiction and did not object to the procedure used to bring the claim, the court will decide the claims against the corporation.

Those parties who made jury demands (*i.e.*, all but J. Fornaro Landscaping, Inc.) withdrew those demands and the case proceeded to a bench trial on June 19, 2008. This decision follows.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commercial Property Lease

On November 20, 2002 John Knoble became the titled owner of property at 5183 Northfield Road, Bedford Heights.[3] The property included a tunnel car wash building in disrepair that Knoble intended to rehabilitate and operate. Knoble and Jake and Tina Fornaro, on January 6, 2003, then entered into a commercial property lease of approximately half of the premises.[4] The parties testified that they anticipated that the Fornaros would build and operate a self-serve car wash on their portion of the land and that Knoble would run the tunnel car wash on his part of the property.[5]

The lease was prepared by Knoble and has only 13 short paragraphs. Its provisions include the following:

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[2] See Civil Rule 14(A).
[3] See plaintiffs' trial exhibit 23, deed from Linhart trust to John Knoble.
[4] See joint trial exhibit A, commercial property lease.
[5] Knoble testified that the two kinds of car washes are complementary businesses; a self-serve attracts more customers in the summer and a full-serve (the tunnel) attracts more customers in inclement weather.

COMMERCIAL PROPERTY LEASE

The State of Ohio, County of Cuyahoga

This lease is made between John Knoble, herein referred to as lessor, and Jake Fornaro and Tina Fornaro, herein referred to as lessees. Lessor hereby leases to lessees and lessees hereby rent the land known as:

see attached drawing designating area of land to be leased on property located at:
5183.5185 Northfield Rd.
Bedford Hts., Ohio 44146

The space is leased for a term of indefinite months, to commence on or about January 1, 2003 and to continue until lessees decide to sell any business and/or building located on above mentioned leased land. . .

The total term rental is the sum of $ ONE HUNDRED TEN THOUSAND DOLLARS ($110,000.00) which is payable upon signing lease agreement. Lessees shall in addition be responsible for:

-1/2 property taxes
-all utilities consumed by lessees and/or their business
-obtaining and providing proof of liability insurance in the amount of at least 3 million dollars
-1/3 cost of main sign

Lessees shall use and occupy the premises as self-serve car wash only. . .

***
In the event that Lessor shall decide to sell property, lessees shall have first option to buy. . .

***
This document represents the entire agreement of the parties and there are no representations not stated herein, and this agreement may only be modified by a writing executed by both parties hereto.

Dated: 1-6-03

As to the rent, Jake Fornaro testified that on January 3, 2003, he paid Knoble only $105,000. He said he deducted the remaining $5,000 because "I know he owed me five grand," but Fornaro could not recall why Knoble owed him that amount. Knoble testified that the $5,000

deduction was for landscaping materials that Fornaro provided in the spring of 2003 for a retaining wall at his home. Knoble agreed that Fornaro's payment of $105,000 in cash plus the $5,000 in landscaping materials was sufficient to satisfy the contract's rental payment requirement and the parties thereafter conducted themselves as if the lease amount had been paid in cash.[6] Hence, at no time was the plaintiff ever in default of the lease for non-payment of rent.

The lease was supplemented on May 1, 2003.[7] That addendum provided that each party to the lease agreed to hold the other harmless for injuries claimed to have occurred on the other's portion of the property. The addendum also clarified that each party was responsible only for his own business "for tax and legal purposes."

Besides what the contract said, it is worth noting terms that it didn't contain. First, the lease had no language that required Fornaro to actually build a self-serve car wash. Instead, it limited him to a business of that kind only if he chose to use it at all, but the lease does not prevent him from doing nothing with the property. Second, the lease neither specifies a date by which Fornaro had to start operating a self-serve car wash nor a length of time that the construction could last in the event he did build a self-serve. Finally, the contract contains no terms setting forth penalties to the lessee for breach of its terms. For example, the lease provides that the lessee shall not "permit the accumulation of waste or refuse" on the property, but it does not specify a remedy for a breach of that obligation. The lease also does not specify a procedure whereby the lessor will give the lessee notice of, and an opportunity to cure, a breach.

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[6] Even if the failure to pay the entire amount in cash were considered a default by the lessee, the agreement of the parties to substitute the $5,000 in materials for a portion of the rent payment is a novation to the original contract. "Where a second contract replaces the first contract by establishing new rights and obligations, the result is a contract of novation which extinguishes liability under the first contract in favor of the second." ***Kruppa v. All Souls Cemetery of the Diocese of Youngstown***, 2002-Ohio-713, 11th Dist. App. No. 2001-T-0029, p. 13. "In order to effect a valid novation, all parties to the original contract must clearly and definitely intend the second agreement to be a novation and intend to completely disregard the original contract obligation." *Id.*, p. 14. "The discharge of the existing obligation of a party to a contract is sufficient consideration for a contract of novation." *Id.*

[7] See joint trial exhibit B, addendum to commercial property lease.

Construction of the Self-Serve Car Wash

Fornaro began to build a self-serve car wash on the leased portion of the property while Knoble worked to open the full-serve tunnel. The tunnel was open for test washes in October, 2003, and, according to Knoble, operating "full force" by November of that year. In the meantime, construction of the self-serve building proceeded unpredictably. Fornaro testified that "the city was fighting us" over approval of requisite building permits, but that construction was eventually started in June, 2003. Fornaro acted as the general contractor and did some of the work himself while hiring separate contractors for other work. By September 18, 2003, the shell of the self-serve building was substantially finished[8] but the building still needed water service and car-washing equipment. The pace of Fornaro's progress then slowed considerably, to the point that on June 9, 2004, Knoble initiated litigation to remove Fornaro from the property.

Fornaro testified that prior to the first lawsuit he had spent "around $115,000 in materials alone" to construct the self-serve car wash and was 80% complete, with only the floor heaters and washing equipment still to be installed. That figure did not include any consideration for his time and effort. Additionally, Fornaro produced invoices and receipts as trial exhibits 2 through 18[9]. These exhibits document total expenditures in the amount of $33,973.29.[10] Fornaro testified that he still has $4,000 on deposit with the city of Bedford Heights and that he spent $8,000 on architects' fees. The plaintiff noted that he paid some contractors in cash and did not get receipts for those payments.

[8] See joint trial exhibits D and D-1, 9-18-03 photos.

[9] Excluding exhibits 2, 3 and the portion of 12 that relates to Cleveland Plumbing Supply, because they have no amount shown or are illegible.

[10] During trial testimony the plaintiff described these exhibits as amounting to $68,388.50 and that they represented some, but not all, of his expenses, including labor. The court's own review of these exhibits resulted in a calculation of the bills at $33,973.29.

Knoble acknowledged that the cost to Fornaro to build what was finished through May, 2004, could easily have equaled at least $115,000. He noted that he believes the entire cost to build a six-bay self-serve car wash is ordinarily in the range of $500,000 to $650,000. Based upon all of the available evidence, the court finds by a preponderance of the evidence that the plaintiff expended $115,000 to improve the premises.

Knoble's Forcible Entry and Detainer Action Against Fornaro

Joint trial exhibit G is a notice by Knoble to Tina Fornaro to vacate the premises. The notice is dated May 28, 2004 and was signed on May 31. This was apparently created and served by Knoble in anticipation of filing an action for forcible entry and detainer in the Bedford Municipal Court. The notice lists the following alleged breaches of the lease:

> NOTICE TO VACATE PREMISES
> MAY 28, 2004
>
> I, John Knoble, want you to leave the following described premises now in your possession, control and occupation, situated in the:
>
> City of Bedford
> County of Cuyahoga
> State of Ohio
>
> And further known as the partially completed, but currently non-operating, self-serve car wash that has been placed upon the southerly eighty-seven feet of frontage of the property with lot depth of two hundred feet that I own having the address of 5183 Northfield.
>
> The reasons for serving you with this notice are the following breaches of the terms of your lease:
>
> 1. Failure to timely complete the erection, and initiate the operation of a self-serve car wash.
> 2. The negative impact that the incomplete facility is having on the completed car wash erected and operating on the adjacent portion of the property.
> 3. The committing of waste upon the property by allowing the attachment of mechanic's liens to occur thereby encumbering the property.

4. Failure to pay for insurance, signage and landscaping expenses as required by the lease.
5. Failure to properly maintain said premises free of waste.
6. Allowing a dangerous condition to remain on said property despite notice being given to correct.
7. Allowing conditions to exist that could reasonably be expected to lead to an increase in insurance costs.
8. Failure to observe and comply with reasonable rules, regulations and requests that have been instituted by me including the request to complete the facility and to cure dangerous or wasteful conditions.

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Served this 31 day of May, 2004

These complaints are nearly identical to Knoble's claims at the trial in this case. It is worth noting that Knoble did not assert that Fornaro had failed to pay rent.

The forcible entry and detainer was filed on June 9, 2004 in Bedford Municipal Court. Forcible entry and detainer actions are authorized by Ohio Revised Code §1923.01 *et seq*. A landowner may bring an action against a tenant for the return of possession of premises where, among other things, the tenant has breached an obligation imposed by a written rental agreement.[11] The court sustained the defendant's objection at trial to the introduction of evidence about the outcome of the forcible entry and detainer lawsuit because O.R.C. §1923.03 provides that "judgments under this chapter are not a bar to a later action brought by either party." Nevertheless, it can be inferred by the fact that, once the Bedford Municipal Court case resolved, litigation continued in the Geauga County Court of Common Pleas and then in this court that Knoble did not prevail on his claims in Bedford Municipal Court.

However, it is not the result, but the fact of the Bedford case that is meaningful to this case. The court finds that the date of the notice to vacate is the latest date by which Knoble can claim that Fornaro committed a breach that could only be remedied by a return of possession of

[11] O.R.C. 1923.02(A)(9).

the premises. This conclusion is supported by legal and factual considerations. As for the legal reasons, the Ohio Supreme Court has said that R.C. Chapter 1923 does not limit landlords' remedies upon a breach merely to securing their property through eviction, but lessors may also bring a separate suit for damages brought about by the lessee's breach.[12] Therefore, while Knoble could still bring an action for money damages after the conclusion of the Bedford case based upon a breach that happened before that case, he could not thereafter bring an action for possession of the premises for conduct that occurred before that lawsuit. In the case under consideration here, Knoble has pointed to the same allegations of Fornaro's conduct that he made in the Bedford case to support his breach of contract claim. As for the factual reasons, by the end of May, 2004 Knoble had effectively placed Fornaro on notice that he considered Fornaro to have breached the lease and he wanted him off the property. Under those circumstances, Fornaro had no motivation to continue to build the self-serve wash even if the contract required him to build it because the status of his interest in the premises was unresolved. Fornaro could not reasonably have been expected to spend money and time to comply with a lease that Knoble was challenging in court.

Did Fornaro breach?

The court therefore first considers whether the plaintiff breached the lease by the end of May, 2004. A lease is said to transfer possession and control of property.[13] Nothing in this lease provided to the contrary and the plaintiff was free to use the land as if it were his but subject to claims for damages for incidental breaches of the lease. The court in this case considers a breach incidental if its occurrence would not justify possession being taken from the plaintiff and returned to the defendant. Since Knoble claims that Fornaro breached the lease to the extent that

[12] ***Dennis v. Morgan*** (2000), 89 Ohio St. 3d 417, at 419.
[13] See, *e.g.*, ***Flint v. Holbrook*** (1992), 80 Ohio App. 3d, 21, at 25.

the defendant was entitled to return of possession of the premises, the court's inquiry is made less complicated by the ability to disregard the alleged breaches that, even if they occurred, could not result in the plaintiff being dispossessed of the premises. These lesser breaches, for which monetary damages would suffice, include: littering the leased property; encumbering the property by allowing a mechanic's lien; not paying expenses of insurance, signage and landscaping; and creating hazardous conditions on the property.

The defendant also claims that he was justified in trying to oust Fornaro because Fornaro committed "waste" to the property. Waste, in this context, means permanent harm by the lessee to the real property to the prejudice of its owner.[14] The commission of economic waste may have supported a conclusion that Fornaro's tenancy should be terminated, but there is no evidence here to support a finding that Fornaro did commit economic waste to the premises.

The only other breach that might have entitled Knoble to the return of the premises was a violation by Fornaro of an affirmative obligation to build a self-serve car wash within an explicit time frame. As noted above, the lease did not contain a provision obligating Fornaro to build a self-serve car wash. Additionally, the lease did not set forth a timeline by which a self-serve wash had to be built in the event Fornaro decided to build one. Because the contract did not impose this obligation, the court finds that Fornaro did not breach the lease either by failing to construct the self-serve car wash or by failing to complete it within a specified time.

The court concludes, by a preponderance of the available evidence, that the plaintiffs did not breach the commercial property lease.

[14] See, *e.g.*, ***Englefield v. Corcoran***, 2007 Ohio 1807, ¶17. In his *pro se* filings Knoble seemed to conflate economic waste and the accumulation of garbage on the property.

Did Knoble breach?

The next question is whether the defendant John Knoble breached the lease.[15] The plaintiffs claim the defendant breached by: giving permission to others to go on the leased premises; interfering with the plaintiffs' quiet enjoyment of the premises; failing to provide water service to the premises; initiating litigation to force the plaintiffs from the property; and transferring the property to his wife without first offering the Fornaros an option to buy.[16]

Since the lease transferred possession and control from Knoble to Fornaro it is true that Knoble did not have the authority to permit others to be on the leased premises, but the evidence at trial of Knoble allowing third parties on the premises was almost non-existent, and the evidence of the plaintiffs having incurred damages because of such conduct is nil.

As to the claim that the defendant breached a covenant of quiet enjoyment, the Cuyahoga County Court of Appeals has defined the extent of that covenant as follows:

> In Ohio, a covenant of quiet enjoyment is implied into every lease contract for realty and protects the tenant's right to a peaceful and undisturbed enjoyment of his leasehold. (Citations omitted.) In discussing the covenant of quiet enjoyment, this court has stated: "The covenant is breached when the landlord '"* * * obstruct[s], interfere[s] with, or take[s] away from the * * * [tenant] in a substantial degree the beneficial use * * *"' of the leasehold." (Citations omitted.) The degree of the impairment required is a question for the finder of fact.[17]

The conduct of Knoble that may conceivably support a finding that the covenant of quiet enjoyment was breached is the serial litigation in Bedford, Geauga County and here. But although the evidence created a feeling that Knoble regretted the lease shortly after it was made and started looking for ways to get out of the lease, that inference does not have enough evidentiary support to allow this court to conclude that the lawsuits were only attempts to obstruct, interfere with or take away from the Fornaros the beneficial use of the property.

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[15] Defendant Lori Knoble is not a party to the lease.
[16] See: complaint, ¶27-29; plaintiffs' post-trial brief, p. 13-14.
[17] ***Dworkin v. Paley*** (1994), 93 Ohio App. 3d 383, at 386.

Knoble had a not unreasonable, if incorrect, argument in the Bedford court that his lessee was in breach of the lease by taking, to that point, almost a year-and-a-half to build a self-serve car wash. Although this court has not seen the allegations in the Geauga County case, they are apparently similar to those made here, and Knoble's allegations of breach here are not completely without any possible basis in law or fact even though they have been decided against Knoble. Therefore, the court cannot find by a preponderance of the evidence that the defendant used litigation to breach the covenant of quiet enjoyment.

The plaintiffs' claim that Knoble breached the lease by failing to provide water is not supportable in law or fact. The contract provides that the lessees "shall be responsible for. . .all utilities." The defendant is not contractually obligated to provide water service and the evidence about the provision of water to the premises is that Knoble did offer Fornaro accommodations to get water to the leased portion of the property in the most practical way available.

The last allegation by Fornaro of a breach by Knoble is that Knoble, before transferring the property to his wife, did not offer the plaintiffs the "first option to buy" required by the lease "in the event that Lessor shall decide to sell" the property. The court agrees that Knoble's August 17, 2006 correspondence to the plaintiffs' counsel[18] is not a first option to Fornaro to buy real property. However, if the property was never sold (as the plaintiffs allege in Count V of their complaint), the failure to offer the property first to Fornaro is immaterial.

The term "sale" is defined in Black's Law Dictionary (5th Ed. Rev. 1979) 1200, as a contract between two parties by which the seller (or vendor) in consideration of payment or promise of payment of a certain price in money, transfers to the buyer (or vendee) the title and possession of property.[19] As discussed in more detail below, there was no consideration from

[18] Defendants' trial exhibit IIIII.
[19] ***Jefferson Local Sch. Dist. Rec. Council v. Roby***, 1986 Ohio App. LEXIS 8340.

Lori Knoble to John Knoble for the transfer of title to the property. Hence, there was no sale, and without a sale there is no "first option" to buy that Knoble must offer Fornaro.

For those reasons, the court concludes, by a preponderance of the available evidence, that the defendants did not breach the commercial property lease.

The alleged fraudulent conveyance and the current status of the lease

By a warranty deed dated October 2, 2006 John Knoble transferred the entire property (the tunnel side and the self-serve side) to his wife Lori.[20] In turn, on that same date, Lori executed a mortgage with a security interest in the property in favor of John as the "lender."[21] No documentary evidence was offered to support Lori Knoble's trial testimony that she put over $50,000 into escrow and executed two promissory notes totaling over $300,000 in favor of John Knoble. Lori Knoble even admitted that the transfer was made because she and her husband "wanted to end the lease." The defendants' claim that the transfer was a sale for consideration is rejected by the court.

But a fraudulent conveyance includes the element of intent by the transferor to defeat the claim of a creditor. Unremarked upon by all parties at trial is whether the effect of the transfer from John to Lori was to terminate the lease. In fact, the transfer had no effect on the Fornaros' lease. The lease was "for a term of indefinite months" to continue "until lessees decide to sell any business and/or building" located on the property. A lease is an encumbrance on property that, in the absence of terms to the contrary, survives a transfer of the fee simple interest in property. Lori Knoble took title with actual notice of the lease and cannot claim that the lease did not survive that transfer for the failure to record it pursuant to O.R.C. §5301.25.[22] Assuming

[20] Joint trial exhibit M.
[21] Joint trial exhibit N.
[22] This issue was not raised at trial, but there is no evidence that the deed was recorded.

the lease was not otherwise deficient or inoperative it remained in effect after the transfer to Lori and until this day.

The plaintiffs claim that the conveyance from John to Lori was made "with the actual intent to hinder or defraud Plaintiff with respect to their interest in the property."[23] The court agrees. The plaintiffs go on to claim that the transfer "deprived Plaintiffs of their right to occupy the property . . .pursuant to the Lease."[24] The court disagrees. At best it was an attempted fraud. The defendants did not – and could not – achieve their stated aim of getting out of the lease by putting the property in Lori's name, so the plaintiffs are not entitled to any remedy, much less the plaintiffs' proposed remedy of ordering Lori Knoble to deed the property back to John Knoble.

Plaintiffs' claims for conversion and fraudulent misrepresentation

At Count III of the complaint the plaintiffs allege the defendant converted tools, building materials and other property to his own use. The evidence at trial on this claim was meager, if not absent. The plaintiff claimed he was missing items with a total value of over $52,000. He offered no details, documents or other testimony to substantiate this testimony. More important, he offered no evidence that the defendant took these items, other than an observation that some of the building materials he left at the premises appear to have been incorporated by Knoble into the completed self-serve wash. The evidence was simply insufficient to satisfy the plaintiff's burden of proof on a conversion claim.[25]

As for the fraudulent misrepresentation claim – Fornaro's assertion that Knoble assured him he was getting a one-third ownership interest in the property – it, too, is unsupported by the evidence. Fornaro signed a lease that is conspicuously captioned as such and uses the terms

[23] Plaintiffs' post-trial brief, p. 19.
[24] *Id*.
[25] To the extent that some of the materials Fornaro bought may have been used to complete construction of the self-serve, these items are surely included in the $115,000 that is the subject of the plaintiff's unjust enrichment claim.

lessee and lessor throughout. Fornaro was not given a deed to the property and could never have reasonably considered that the agreement made him an owner of the property.

Defendants' counterclaims for breach of contract to build a retaining wall and unjust enrichment

The defendants allege that J. Fornaro Landscaping, Inc. contracted to build a retaining wall at their home and that the wall was not constructed in a workmanlike manner, causing them damages to repair the wall. The defendants did not meet their burden of proving this claim. The defendants offered no evidence that J. Fornaro Landscaping, Inc. ever entered into a contract to do any work. To the extent that the defendants offered evidence that plaintiff Jake Fornaro negligently designed and built the wall,[26] there was not a preponderance of the evidence sufficient to persuade the court that the collapse of the wall was attributable to the plaintiff.

The defendants further counterclaimed that the plaintiffs and J. Fornaro Landscaping, Inc. have been unjustly enriched by not having paid for – in money or reciprocal services – a pole barn with heaters that Knoble built on Fornaro's property. As with many allegations of both sides in this case this is another claim for which the evidence is lacking.

Fornaro's claim for unjust enrichment

Fornaro's final claim against the defendant is that he conferred a benefit - $110,000 in rent and $115,000 toward the completion of a self-serve car wash now being run by Knoble - upon the defendant and it would be unjust for Knoble to retain that benefit without compensation.

Generally speaking, a claim for unjust enrichment lies whenever a benefit is conferred by a plaintiff upon a defendant with knowledge by the defendant of the benefit and retention of the benefit by the defendant under circumstances where it would be unjust to do so without

[26] Fornaro testified that he only loaned some materials, equipment and his labor and that if the wall had been a project of his company he would have sub-contracted the job.

payment.[27] Civil liability may be imposed where one party retains a benefit from another's labors.[28] In this case, Knoble received rent of $110,000 and all Fornaro got in return was the privilege of spending $115,000 to build a nearly complete self-serve car wash, the profits of which are now going to Knoble. There is no doubt that Knoble has been unjustly enriched. This conclusion is inescapable even if Knoble acted at all times in good faith. The fact is that Fornaro is out of possession and out of $225,000.

The defendant argues that unjust enrichment is not an available claim where a contract exists between the parties. This argument shows a misunderstanding of the nature of an unjust enrichment claim. A claim for unjust enrichment does not arise out of an actual contract but out of a contract implied in law, *i.e.* quasi-contract.[29] A quasi-contract is a legal fiction that does not rest upon the intention of the parties, but rather on equitable principles in order to provide a remedy.[30] The equitable remedy of disgorgement is available even where a contract exists if the contract does not provide a remedy to address an unanticipated eventuality like the one that happened here. The contract simply does not specify what should happen if the lessor regains possession without payment and finishes a structure the lessee spent time and money building. Because the current relation of the parties cannot be decided with reference to the contract a quasi-contractual remedy is necessary. Fornaro is therefore entitled to $225,000 from the defendants.[31]

Since the court has concluded that the lease actually survived the transfer of the property an argument could be made that the court should restore possession of the premises to Fornaro and enter a money judgment against him (for unjust enrichment) in an amount equal to what

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[27] ***Guardian Tech., Inc. v. Chelm Props., Inc.***, 2002 Ohio 4893, Cuyahoga App. No. 80166, at ¶7.
[28] *Id*.
[29] ***Merchs. Advance, L.L.C. v. Boukzam***, 2008 Ohio 4860, Cuyahoga App. No. 90287, at ¶26.
[30] *Id*., at ¶30.
[31] The judgment is against Lori Knoble also since, as the current property owner, she has received a benefit.

Knoble spent to finish the self-serve car wash. That remedy is not appropriate for several reasons. First, the plaintiffs have not sought that remedy. Second, no credible evidence was offered at trial to allow a conclusion by a preponderance of the evidence about how much Knoble spent to finalize preparation of the self-serve wash so that it could open for business. The third, and most important, reason the court declines to order specific performance of the lease with appropriate payment to Knoble for his improvements is the statute of conveyances.

O.R.C. §5301.01 is known as the statute of conveyances. It provides, in pertinent part, as follows:

> A . . . lease of any interest in real property. . . shall be signed by the . . lessor. The signing shall be acknowledged by the . . . lessor. . . before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

Altough no party raised the issue before or during trial, it is obvious that the lease and its addendum were defectively executed in that Knoble's signatures on both contracts were not notarized or otherwise acknowledged as required by the statute. The language contained in the statute is mandatory and expresses the legal requirements necessary to create a valid lease.[32] Since the statute is mandatory in nature, a defectively executed lease is invalid and does not operate to create the term of the leasehold.[33]

However, part performance of an agreement defectively executed under the statute of conveyances may operate to remove that agreement from the operation of the statute when four factors are present: (1) unequivocal acts by the party relying on the agreement; (2) the acts are exclusively referable to the agreement; (3) the acts change the party's position to his detriment;

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[32] ***Haught v. Geissinger***, 2009 Ohio 98, 12th App. Dist. No. CA2008-03-010, at ¶13.

[33] ***Ruben v. S.M. & N. Corp.*** (1993), 83 Ohio App. 3d 80, at 81. Since all the evidence in this case is that the lease was expected to be for more than three years, O.R.C. §5301.08 is not applicable to remove it from the statute of conveyances.

and (4) the acts make it impossible to place the parties in *status quo.*[34] Here all of these factors are present except the fourth: the parties can be restored to the *status quo* by restitution from Knoble to Fornaro of the sums he spent in reliance on the defectively executed lease. As a result, the court will not order specific performance of a defective lease.

IV. CONCLUSION

For the reasons given above, the court orders a judgment as follows:

1) In favor of Jake Fornaro and Tina Fornaro, jointly, and against defendant John Knoble in the total amount of $110,000, plus interest at the statutory rate beginning on the date of this judgment;

2) In favor of Jake Fornaro and against defendants John Knoble and Tina Knoble, jointly and severally, in the total amount of $115,000, plus interest at the statutory rate beginning on the date of this judgment;

3) In favor of the defendants on the plaintiffs' claims for breach of contract, conversion, fraudulent misrepresentation and fraudulent conveyance;

4) In favor of the plaintiffs and third-party defendant J. Fornaro Landscaping, Inc. on the defendants' counterclaims for breach of contract and unjust enrichment; and

5) That Jake Fornaro is entitled to return of the $4,000 on deposit with the city of Bedford Heights.

To the extent that any question remains about the continuing viability of the lease, the court finds that the lease, although it survived the transfer of the property from John Knoble to Lori Knoble, is no longer in effect because it was defectively executed and the satisfaction of this judgment will return the parties to the pre-lease *status quo*.

[34] ***Loveland Properties v. Ten Jays, Inc.*** (1988), 57 Ohio App. 3d 79, at 82-83.

It is further ordered that the costs of this action be paid by the defendants.

IT IS SO ORDERED:

DATE: _____

_____
JOHN P. O'DONNELL, JUDGE

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this ____ day of April, 2009, to the following:

Lou D'Amico, Esq.
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Attorneys for Defendants

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Judge John P. O'Donnell