Stathis v Karas

2011 NY Slip Op 34212(U) (2011) | Cited 0 times | New York Supreme Court | February 25, 2011

SUPREME OF NEW IAS ONOFRY,

SUPREME COURT

SAM STATHIS,

ESTATE OF KARAS, BLOOM CHARLES KARAS,

ESTATE OF KARAS, BLOOM CHARLES KARAS,

ARIES, ANTZOULIS, (CPLR

4364/2007

2010 2010

CPLR CPLR

Upon

\ COURT-STATE YORK PART-ORANGE COUNTY Present: HON. ROBERT A. A.J.S.C.

: ORANGE COUNTY --------------------------------------x Plaintiffs,

- against -

THE DONALD by and through his heirs, NANCY and et al.

Defendants. --------------------------------------x THE DONALD by and through his heirs, NANCY and

- against- Third-Party Plaintiff,

LLC and CONNIE

Third-Party Defendants --------------------------------------x To commence the statutory time period for appeals as of right 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No.

Motion Date: April 9, & April 28,

The following papers numbered 1 to 8 were read and considered on this motion by plaintiff for an Order, pursuant to §3212, granting him partial summary judgment, and a cross motion by defendants/third party plaintiffs for an order, pursuant to §3212, granting summary judgment dismissing the complaint as against them, and granting them summary judgment on their third-party complaint: Notice of Motion - Catania Affirmation - Stathis Affidavit - memorandum of Law- .... 1-4 Notice of Cross Motion and Opposition to Motion- Duvall Affirmation - Memorandum of Law .... 5-7 Reply Affirmation - Catania- Memorandum of Law .... 8 the foregoing papers, it is hereby,

I [* 1]

',, Sam

"Karpytown."

"JDA")pursuant

Plaintiff

"Karpy").

Stathis ORDERED that the motion and cross motion are decided as follows.

Introduction

decedent Plaintiff, Stathis, alleges that he and the

Donald Karas entered into a series of agreements, the existence,

nature, scope and enforceability of which are now in issue. The

purported agreements, by their terms, related to the development of approximately 168 acres of real property located in Goshen, Orange

County, New York; property known as

Plaintiff contends that the parties' interactions culminated

in a July 11, 1997, joint development agreement (hereinafter the

to which, plaintiff alleges, he agreed to pay the

back taxes on the properties in question and to inject investment

funds into a cash-strapped Karas in exchange for which he was to

receive a significant interest in the subject properties.

contends that his primary interest was in the development

and sale of the natural resources derived from the property itself,

particularly the potable water and dolomite; whereas Karas' primary

interest was the development of the property to establish a

personal legacy (Karas' nickname was The record is clear

that the property was never developed to the extent envisioned.

After Karas died, plaintiff attempted to exercise his right

under the JDA to purchase the property from the Karas' estate; a demand that was rejected. As a result, plaintiff commenced the

2 [* 2] ,/

'.tc ' (1

2007, Stathis instant action seeking, inter alia, the enforcement of his purported purchase option under the JDA and for damages arising

from defendants' breach.

In substance, defendants argue that the plaintiff

to prove the existence of a valid and enforceable agreement with

Karas. Rather, they assert, all of the agreements are

unconscionable, lack consideration, are vague, and are the product

of overreaching. In addition, they assert, the most onerous

provisions of the agreement- the options therein to purchase the

property upon the death of Karas- constitute invalid testamentary

dispositions and violate the rule against perpetuities and the rule

against unreasonable restraints on alienation.

Plaintiff now moves for summary judgment seeking to enforce

the purchase option provided for in the JDA. In response, the

defendants/third-party plaintiffs cross move to dismiss the

complaint and for judgment on their third-party action.

Factual Background/Procedural History

Plaintiff has proffered the following alleged agreements,

which, as noted, the existence, nature, scope and enforceability

remain in dispute and are at issue. Thus, the description of their

purported content, at this juncture, is for background and

informational purposes only. By document dated April 1, executed by and

3 [* 3] Stathis $5,000

'" "Well Project" the',

"understanding" 50/50

2007,

"April 2007- $10,000.00

"Re:

"RO," "binding

11 11 Karas, forwarded a good faith payment

(Motion, Exh 6); a payment that was offered with

that the parties would be entering into a

partnership concerning same. Karas' obligation was to provide the

land and natural resources, and Stathis' obligation was to provide

the funds to pay for the cost of drilling and testing. Finally, it . was mutually agreed that the parties would enter into a more formal

arrangement concerning the well and the development of the

Karpytown property as soon as reasonably possible.

The record further contains a second document also dated April

1, identical in substance to the first document referenced,

and signed by both parties. The two writings differ only in the

respect that the second document has no line for the plaintiff's

signature, is notarized, and contains the following handwritten notation at the bottom: 13, Additional

subject to same terms/agreements. Karpy Donald Karas."

By document dated April 23, 1997, captioned: Joint

Development Project in Goshen, New York", signed by Karas and

plaintiff by the parties entered into a agreement

concerning the development of the Well Project on Lot No.

(Motion Exh. 8) . Pursuant to the purported agreement, it was

agreed that Lot No. 11 would be transferred as soon as possible to

a limited liability company to be established under the name Kasco Enterprises, LLC, or such other name to which they could agree

4 [* 4] had",,,

50%

$2,500.

One

50%

"Re: should that name be taken. Karas was to

and plaintiff the money; money in addition to the money he

already contributed. Each was to be owner of the LLC. It was

further agreed that the plaintiff would pay for the development

costs needed to obtain permits, and for the outstanding taxes,

which Karas represented to be no more than The intention was to develop Lot No. 11 for commercial water sales, or for any

other alternative use to which the parties could agree, should that

use prove impractical. The document further sets forth the

following terms for a buy out of one party by the other- if Karas

died first, either the plaintiff or the estate of Karas could buy

the other out as follows: party would offer to purchase the

properties at a stated price. The other party could then either

accept the of fer or buy the property from the offering party at the

same price. However, the parties agreed, if the estate of Karas

exercised the later option, it would be required to pay the

plaintiff a premium of over the offered price. If the

plaintiff died first, the same methodology was applicable.

However, no premium was payable to the plaintiff's estate.

Finally, it was agreed that the agreement would be binding on the

parties' heirs, successors in interest, and respective estates.

By document dated July 11, 1997, captioned Joint

Development Project," and signed by the plaintiff and Karas, the parties entered into a joint development agreement (hereinafter the

5 [* 5] '"

"", "'" "JDA") ,,, "each

phase/parcel."

''water

''jointly {Motion 14) pursuant to which it was agreed that all tax liens, etc. on the property would be satisfied, and that of the properties [would] be transferred to me [the plaintiff] or my assignee upon permits being issued or commencement of work on each Further, it was agreed that the parties would move expeditiously once a deal'' was signed with the Town of Goshen or with any agreed upon third party and that all entities created by the parties would be and equally'' owned. Karas would be responsible for paying all day-to-day expenses and taxes related to the properties until they were transferred. In return, he was entitled to live rent free in an apartment on the property and retain all rental income from an off ice building on the premises. If any of the properties were sold {pre-development), Karas was to receive 75% of the sale price, net of any investment made by the plaintiff to improve the parcel. Karas was also responsible for the day-to-day operations of the properties and for maintaining the books and records relating to the project. Plaintiff, however, was the managing partner. Unless otherwise agreed, neither was to receive a salary or other compensation. In the event of delays, the plaintiff was not responsible for funding plans, permits, or other associated costs, unless and until there

was an agreed upon contract with a third-party user or developer,

or the properties began realizing income from the water or other

resources extracted from the property.

6 [* 6] '',

000 ,,

''first 50%

''Wedge'')

50%

50%

''Will'')

of' to initially contribute $25, to obtain the

necessary plans for the property. Any contributions

in excess of that amount would be paid back to the plaintiff as

money out.'' The parties also agreed to allocate and use

of all profits derived from the property to expedite the project's

development. Karas also agreed to convey that portion of the

residential property that overlapped with the commercial area of

the subject properties (the without consideration. The

parties also agreed to form a separate entity for the purpose of

holding title to the properties, in which each would be vested with a ownership interest. Alternatively, Karas agreed to transfer

to the plaintiff a interest in any entity holding title to the

properties. If Karas predeceased the plaintiff, it was agreed that

his estate would forfeit its right to run the day-to-day operations

of the properties, and that there would be no sale of any property

without the plaintiff's written consent for two years after Karas'

death. It was also agreed that a copy of Karas' Last Will and

Testament (provided to plaintiff) , dated April 21, 1997, (the

was an exact copy of Karas' original will, and that Karas

would not change the Will insofar as it pertained to naming

plaintiff's wife, Connie Atzoulis, as a residuary beneficiary; a

prohibition that was to remain intact until all the subject

properties had been sold or otherwise transferred. Further, it was agreed that, upon Karas' death, the plaintiff would have the right

7 [* 7] $160,000

2007,

_/

"Karpytown.", the to purchase Karas' interest in the subject properties by one of the

following three methods (chosen at his or Antzoulis' sole

discretion) : (1) pay the Karas estate 25% of the fair market

appraisal of any parcel; (2) sell the development rights to the parcels and split the prof its 75% to plaintiff and 25% to the Karas

estate, net of his [plaintiff's] investment; or (3) pay the Karas

estate within two years of his death. If, on the other

hand, plaintiff pre-deceased Karas, plaintiff's estate would enjoy

identical reciprocal rights under the agreement.

The JDA, by its terms, also reflected that it was being

executed in addition to [and presumptively in conjunction with] the

April 1st and April 23rd, 1997 agreements and to the extent that the

language of each was in conflict then the JDA would be deemed

controlling. Finally, the contract contained a severability clause

and further prohibited modification except by mutual agreement of

the parties in writing.

Plaintiff's Causes of Action

By verified complaint dated May 16, plaintiff commenced

the instant action seeking, inter alia, the enforcement of the JDA.

In relevant part, plaintiff alleges that, commencing around April

1997, he and Donald Karas, now deceased, entered into various

agreements to develop certain property owned by Karas in the Town of Goshen sometimes referred to as development of

8 [* 8] 50%

"Aries"); which included the extraction of potable water from the property.

Plaintiff alleges, in substance, that the agreements of the parties culminated in the execution of the July 11, 1997 JOA pursuant to which he was to provide capital for planning and development, and Karas was obligated to either: (1) convey one-half of his interest in each of the lots to plaintiff; or (2) convey all of his interest in the lots to a third entity to be jointly and equally owned by the parties.

Plaintiff further alleges that Karas was entitled to live rent free in an apartment on one of the lots, and was also entitled to retain the rental income from an off ice building located on another lot. As apparent security for the JDA, Karas named plaintiff's wife, Connie Antzoulis, as a residuary beneficiary under his will, and agreed not to change his will until the properties were transferred.

Plaintiff further alleges that the JDA also granted plaintiff a two (2) year option to purchase Karas' interest, which option was effective only if Karas died before the properties were conveyed pursuant to the JDA; a contingency, he alleges was satisfied.

Plaintiff further alleges that on or about May 23, 1997, the parties formed Aries, LLC (hereinafter an entity intending to be equally owned by plaintiff and Karas with plaintiff as managing member. Plaintiff alleges that, on or about October

9 [* 9] $10,000.00]

10 15, 1997, Karas conveyed one parcel (Lot No. 11) to Aries in the furtherance of the JDA and thereafter began to develop Lot No. 11 for use as a water well (the "Well Water" project). In the furtherance thereof, the parties engaged environmental consultants for the purpose of formalizing the necessary plans and securing the requisite approvals, the costs of which [alleged to be were advanced by plaintiff. Although Karas died before the completion of Well Water project, plaintiff nevertheless alleges that additional acts were undertaken, prior to Karas' death, also in the furtherance of the JDA which included: the construction of a road over one lot to allow access to Lot No. 11; the solicitation of proposals and bids for work concerning the development of the property; obtaining a sewage treatment proposal for the property; obtaining an environmental study of the property; and Karas' execution of a will naming the plaintiff's wife (Antzoulis) as a residuary beneficiary.

Plaintiff also alleges, however, that notwithstanding the foregoing, and commencing shortly after the formation of Aries, Karas embarked upon a course of fraudulent and tortious conduct

with the intent of depriving the plaintiff of his rights under the

JDA. Specifically, plaintiff alleges that: Karas passed a

resolution concerning Aries, without plaintiff's knowledge or

consent, naming Natalie Karas (Karas' ex-wife) and Gladys Varney (his longtime bookkeeper) as authorized agents of the LLC; that as [* 10] 2005,

2005,

2005.

2006

agents thereof they were allowed to and did in fact deplete Aries'

bank account without plaintiff's knowledge or consent; and that on

or about March 17, Karas and/or Bloom and Charles Karas

attempted to sell Lot Nos. 2, 3, 4, 6 and 11 to a third party

(Mazel Properties, LLC) without plaintiff's knowledge or consent,

a sale that was ultimately aborted but which resulted in the

commencement of litigation by Mazel Properties, LLC; litigation

that plaintiff was forced to defend.

In addition, and in the furtherance of Karas' fraudulent and

tortious conduct, plaintiff alleges that, just two days prior to

his death, Karas changed his will and removed Antzoulis as a

residuary beneficiary; a removal and amendment allegedly effectuated in concert with Bloom and Charles Karas. Further, and in violation of the JDA, Karas subdivided Lot No. 6 in 1997 and sold a portion of same; sold Lot No. 1 in and sold Lot Nos. 14 and 15 in Moreover, he alleges, after the death of Karas, the defendants, in August of and without his knowledge and consent, conspired and participated in the sale of Lot No. 13 to Hope Assets, changed the locks to the offices for Aries/Karpytown, took possession of all of its books, records, inventory, and business documents, and refused to return same. Plaintiff also alleges that certain of the Karpytown parcels were taken by eminent domain proceedings and that by virtue of same he is entitled to one-half of the compensation paid, together with one-half

11 [* 11] (1/2)of all rental income derived from Lot No. 13.

Predicated upon the foregoing, plaintiff alleges, as a first cause of action, that Karas breached the JDA by, inter alia: (1) failing and refusing to convey an interest in the properties to the plaintiff as agreed; (2) refusing to honor his right to acquire the properties through a lump sum payment; and (3) conveying and attempting to convey lots to third parties without his knowledge or consent. Plaintiff derivatively asserts, as his second and third causes of action, that Karas violated the implied covenant of good faith and fair dealing implicit in the JDA, and therefore breached

the fiduciary duties and the duty of loyalty owed to plaintiff

Stathis.

As a fourth cause of action, plaintiff alleges that all

conveyances of the lots, other than those conveyed to him, were

done so in derogation of the JDA and thus fraudulent as to him. As

a fifth cause of action, the plaintiff alleges that the conduct of

Bloom and Charles Karas with respect to the sale of the properties,

the amendment of Karas' will and the tampering of Aries internal

operation and its assets, constituted tortious interference with

the JDA and with the plaintiff's prospective economic advantage.

Consistent with the foregoing, plaintiff respectively alleges, as

his sixth and seventh causes of action, that by the foregoing

conduct defendants aided and abetted a civil conspiracy and

converted JDA assets.

12 [* 12] "April

Sam

___ / As an eighth cause of action, plaintiff seeks replevin of all

Aries business records. Finally, as a ninth cause of action,

plaintiff seeks recision of the sale of Lot No. 13, and the

imposition of a constructive trust.

The defendants, in response, have denied the material allegations in the complaint and have asserted multiple affirmative defenses and counterclaims. Specifically, and as a first counterclaim, defendants, while not disputing that Karas executed the April 23, 1997 agreement (hereinafter the Agreement"} nevertheless allege that the Agreement is void and unenforceable on multiple grounds. First, they allege, Stathis did not personally sign the agreement. Rather, it was signed on his behalf. Thus, they argue, he never signed the April Agreement. Second, they allege, the April agreement provided for the development of Lot No. 11 for the sale of water or for any other use upon which the parties might agree and the property was in fact never developed for the sale of water or any other use. Third, they allege, the terms of the April Agreement are so inequitable as to shock the conscience of the court and render the Agreement unenforceable. Finally, they allege, the purchase option embraced within the April Agreement violates the rule against perpetuities and constitutes an unreasonable restraint on alienation.

In conjunction with the main action, defendants Bloom and Charles Karas, in their capacity as executors of Karas' estate,

13 [* 13] Street

_,/ commenced a third-party action against third party defendants, Aries and Antzoulis, alleging the following: as their first cause of action that the April Agreement should be declared null and void and unenforceable for the reasons discussed supra; as their second cause of action that the invalidity of the April Agreement renders the prior property transfer to Aries null and void thus necessitating that such conveyance be set aside and the property re-conveyed to the Karas estate; and as a third cause of action, that the death of Karas resulted in the dissolution of Aries. Thus, they allege, Aries should be dissolved, its assets distributed and its affairs wound up.

At an examination before trial, the plaintiff testified that his home base was on Canal in New York City, and that he was self employed in several business, including, inter alia, property development and electrical contracting (Cross Motion, Exh 2). Stathis testified that he first met Karas in 1995 or 1996, when he was in the Goshen area in search of property to purchase. Stathis further testified that Karas owned property in the area, including the property at issue, and disclosed to Stathis that he was having financial trouble, i.e., he was behind on property taxes. The parties discussed embarking upon a joint venture. Their discussions focused on the development of the subject property as

a residential/commercial/industrial site. Plaintiff testified that

the parties' basic agreement was as follows: The plaintiff would

14 [* 14] $25,000

(water,.:. 106-07) ...

106-07).

106)

"connected" "lonely"

120)

$25,000

"immediate fires" initially invest and the money needed to stop the property

from going into foreclosure, and would bring his financial

resources, efforts and experience to developing the natural

resources of the property dolomite, etc.) (T .

Plaintiff testified that he believed that the natural resources

were the property's chief value (T By contrast, he

testified, Karas' primary interest was in developing Karpytown for

his personal legacy (T . Stathis testified that the

relationship was mutually beneficial because he knew engineers and

consultants to help plan the development of the property, but was

from New York City and a stranger to the area; whereas Karas was well known and in the area, and a man looking

for something of significance in his final years (T 12-15, 115-

. The overall plan was to develop the approximate 168 acre

site in discreet stages (T 16). Initially, the plaintiff was to

contribute and pay certain back taxes. Thereafter, it was

envisioned that the money needed to develop the property would be

derived from the sale of the water extracted and the dolomite mined

from the property, together with the revenue generated from the

sale of certain lots (T 16-17). It was agreed that Karas would

handle the day-to-day operation, and that the plaintiff would

oversee the general project and introduce Karas to financial

people, developers, and potential tenants. In general, Stathis

testified, he was to take care of the back

15 [* 15] •' .

$15,000

30) _/ taxes) and thereafter the parties were to share the future expenses

(T 37-38). Further, it was agreed that Karas would pay the day-to-

day bills, and that the parties would share some of the bills and

the plaintiff alone would pay others (T 49} .

The record reveals that the property was never fully

developed. Rather, only partial development occurred ,i.e., they . . drilled some wells and did some testing (T 38} . Indeed, they "ran

into problems with the neighbors," and a potential deal with the

Town of City of Goshen to supply water caused additional confusion

(T 38). Thus, he testified, the parties' original vision changed

from trying to make the water well into a commercially viable

business, to limiting its use for the subject property itself (T

39) . Plaintiff could not recall the total amount of money he

invested and contributed to the project over the years. However,

he asserted, most expenditures would be reflected in cancelled

checks (T 19-20}. He,did recall that on April 1, 1997, he gave

Karas for drilling; although he had provided funds prior to

that date for "legal and accounting stuff" (25-26) .

Concerning the April Agreement, Stathis testified that it was

signed on his behalf by Anna Rocchio, his "right hand" person (T

24, due to the fact he was out of town at the time (T 31).

Stathis further testified that Aries was formed in 1997, was owned

by Karas and Antzoulis (plaintiff's wife} , and that Karas and

Antzoulis had signed an operating agreement (T 40-42} . Plaintiff

16 [* 16] 75%

25%

"dream"

("family"),

2005, "quite

they

"bulldozers,

-.

Stathis testified that the origin of the uneven split provided for in the JOA in the event Karas predeceased him (i.e., for the plaintiff and for Karas) emanated from Karas' vision of fulfilling his of developing Karpytown and his reliance on Stathis' money, and financial resources to do so (T 53). Stathis further testified that over the course of the project he and Karas became personally very close and when Karas died in June a bit" of his dream to develop the property had been realized, i.e., had built the infrastructure and generated a master plan for the property (T 53-54). They had installed two wells, as well as roads and gardens (T 54) . They also improved the off ice on the property and separated it from the residence (T 55) which the tenant paid for. Concerning the roads, the plaintiff testified that Karas and Aries hired people to cut and excavate, and that he brought in excavators, and people on [his] payroll to fix some of that work for most of those roads" (T 5 6)

Concerning the July 11th, 1997 JOA, testified that he

and Karas both signed it together at the off ices of Karpytown. He

testified that he actually witnessed Karas affix his signature to

the document (T 58)and thereafter they made two copies (T 58).

Notwithstanding the foregoing testimony, he could not recall making

nor did not know how the various dark lines came to be on his copy

of the JOA, but that they may have been made by a facsimile machine

17 [* 17] 'OS

'06)

Shortly Stathis

Stathis

$100, 000

107).

108). (T 87-88). Plaintiff nevertheless testified that his attorney,

Gerald Jacobowitz, Esq., told him at one point (the winter of

or spring of that he [Jacobowitz] had the original of the JDA

in his possession (T 89). after Karas died, spoke

to Bloom about what should be done with the property "in order to

protect everybody" involved (T 93) . In response, she told him that

Karas did not leave a will (T 96). However, shortly thereafter, she stated that Karas did in fact leave a will, but that neither he

nor Antzoulis were named in it(T 94). After having Karas' Last

Will and Testament examined, plaintiff thereupon contacted his attorney (Jacobowitz) for the purpose of formulating his

prospective course of action.

In attempting to summarize his testimony concerning the

totality of his expenditures for the project, could not

provide a total figure, but testified that he spent at least

on telephone bills, travel and entertainment alone (T

This included time spent with building department personnel,

developers and potential investors (T In general, he

testified, the income generated by the property was sufficient to

pay the taxes (T 115). In concluding his testimony, plaintiff

testified, in substance, that over the course of the project, the

basic agreement concerning the overall development of the property

stayed the same; but the exact manner in which it was to be

implemented evolved (T 132-34).

18 [* 18] 30

1970s, /

10-11) At an examination before trial, Gerald Jacobowitz, Esq.

testified that he practiced in the area of land development and land use (Motion Exh. 16) . Jacobowitz had known Karas, who he described as a real estate investor and developer, for years and had performed legal work for him (T 5-7) . In the late Karas expressed an interest in trying to become a water source for Goshen. Jacobowitz represented Karas before the town (T 7-8). Jacobowitz recalled being present at a meeting between the plaintiff and Karas at which they discussed the feasability of using the well to supply water to both Karpytown and Goshen, and forming an entity to do so (T 11-12). During the course of his deposition testimony, Jacobowitz identified two letters addressed to the plaintiff and Karas concerning the formation of an LLC and the formation of a transportation corporation related to the water well (T . Jacobowitz assisted in forming Aries (T 24-27). He testified that he never heard the plaintiff or Karas discuss a joint development deal for Karpytown (T 26-27) . Concerning the plaintiff's copy of the JDA, Jacobowitz testified, in relevant part, as follows:

Q: Showing you now what was previously marked as plaintiff's exhibit 2 and ask you if you've ever seen that before (handing)?:

A: The one your showing me has a number of kind of lines through the typed portions of it. Are you asking whether I've ever seen it in this particular condition - Q: No. My question-

19 . [* 19] 20

A: - with the lines through the print?

Q: My question does not pertain to the condition of the copy. My question would apply to either a nicer copy of the document or the document in the manner it's depicted in this copy.

A: Yes. I did see this at some point that it was signed.

Q: When, to the best of your knowledge, did you first see that?

A: It would have been after Mr. Karas' passing.

Q: Was it in the same sort of condition with the markings on it or was it a cleaner version, if you understand the question?

A: I think it was a cleaner version.

Q: Who showed it to you?

A: Either Mrs. Bloom or the brother [John Karas].

Q: Did you ever have discussions with [the plaintiff] about Exhibit 2?

A: Not that I recall.

(T 27) . After Karas died, Jacobowitz spoke and/or met with the plaintiff (T 28-29) . The discussions concerned the condemnation of certain of the lots, and the possibility that Jacobowitz would represent the plaintiff against Karas' estate (T 30); representation he declined due to an apparent conflict of interest (T 31).

The Plaintiff's Motion

Plaintiff now moves for summary judgment to admit his copy of the JDA into evidence and to enforce his purchase option contained [* 20] ''confluence

$50,000

"death therein. In so moving, plaintiff argues that the best evidence rule is not applicable because he adequately explained his inability to produce the original, i.e., it was kept at the headquarters of Aries/Karpytown in Goshen, that the defendants changed the locks and blocked his access to same and that he proved the identity of his copy to the original through, inter alia, the testimony of a disinterested witness (Jacobowitz) . Indeed, he asserts, there is a of memoranda" concerning the JDA, including preliminary and draft versions of the JDA, and the well water agreement, and there was partial performance of the JDA, to wit: (1) he paid back taxes on the property and other development costs in excess of (i.e., for roads, temporary electric services, sewage treatment proposals and environmental studies); (2) the parties formed Aries and transferred title to one lot into Aries; and (3) Karas named the plaintiff's wife (Antzoulis) in his Will. Plaintiff also argues that in any event he would not be precluded from presenting evidence of an oral agreement, because joint venture agreements are not subject to the statute of frauds. Finally, he asserts, the defendants clearly breached the agreement: (1) by passing a purported corporate resolution for Aries naming

Karas' ex-wife and bookkeeper as signatories and allowing them to

withdraw money from the business; (2) by subdividing, selling and

attempting to sell certain of the lots to third parties; (3) by

executing a bed'' will in which Karas omitted Antzoulis; and

21 [* 21] ''twilight''

75%

$5,000

''more On

$10,000

000 by excluding him from the offices of Karpytown/Aries.

Plaintiff further submits his own affidavit in which he

asserts that Karas, the plaintiff and the plaintiff's wife bonded

as family, and that they worked together to fulfill Karas' dream of

developing his tax-burdened, vacant properties into Karpytown.

However, given that Karas was in the of his life, they

entered into the JDA to protect plaintiff's investment and

proprietary interest, although Stathis notes that Karas was a

''seasoned local real estate developer'' and protected his own

interests. That is why, plaintiff asserts, Karas was to keep

of the proceeds from the sale of any lot at the pre-development

stage. Stathis further avers that the parties' ultimate agreement progressed in stages. First, he provided Karas with to

develop a water well on the property, a contribution evidenced by

the agreement dated April 1, 1997, which also notes the parties'

intent to enter into a formal arrangement." April 13,

1997, he avers, he forwarded another to Karas for the same

purpose, a contribution evidenced by Karas' handwritten entries on

the second document of the two April 1st, 1997 documents. Indeed,

the plaintiff asserts, a binding agreement concerning the water

well was signed on April 23, 1997, at which point he provided Karas

with an additional $5, for development costs. Thereafter,

Jacobowitz formed Aries to develop and manage the water well and,

on October 15, 1997, Karas conveyed title to Lot No. 11 to Aries.

22 [* 22] JOA.

JOA,

JOA,

JOA, a·secret That same day, the plaintiff avers, Karas provided him with a copy

of his will, which named the plaintiff's wife (Antzoulis) as a

residuary beneficiary. Thereafter, he asserts, he and Karas

exchanged various drafts of the final Plaintiff further avers

that Karas signed the final version of the JDA at the

Aries/Karpytown off ices in Goshen, and that Karas kept the original and placed it in what the plaintiff believed to be the "corporate book." He never contemplated litigation with his "close friend and co-venturer," and believed that he would always have access to the corporate books. Thus, he avers, he kept only a copy of the JDA which he argues should be admitted into evidence for the reasons discussed supra and in particular the disinterested testimony of Jacobowitz, who represented both parties during the course of the negotiations. Indeed, he asserts, he proffered an exact copy of the he witnessed Karas sign the JDA, and Karas' own bookkeeper testified that Karas' signature on his copy was genuine. Moreover, he asserts, for the eight years that followed the JDA, the parties acted on the with him investing time and money in the Karpytown project, including personally "fronting" all solicitation costs, including travel expenses and accommodations for the multitude of builders and developers they sought to bring to the project. However, he argues, Karas and the defendants breached the inter alia, by passing resolution for Aries which allowed Karas' wife Natalie Karas and long-time bookkeeper Gladys

23 [* 23] ;

$160,000. Varney to withdraw money from Aries; and by entering into secret negotiations to sell a large portion of Karpytown, including the lot containing the water well. Plaintiff also notes that although the sale eventually fell through, it was nevertheless preceded by the execution of a six million dollar binder and the exchange of draft contracts all of which was punctuated by the commencement of a lawsuit by the prospective purchaser which he was forced to defend.

Moreover, a subsequent breach of the JDA was revealed only after Karas' death, when the defendants proffered a will executed by Karas just two days before his death that omitted both plaintiff and his wife (Antzoulis). Further, the defendants: (1) tried to sell Lot No. 13 to an LLC; (2) changed the locks on Aries' off ices; and (3) denied him access to Aries' corporate books and records. In addition, he asserts, defendants refused to honor his option to purchase Karpytown pursuant to the terms of the JDA for

In sum, the plaintiff argues, the JDA should be declared valid and binding, and the defendants should be found in breach.

The Defendants' Cross Motion

The defendants cross move to dismiss the complaint, and for summary judgment on their third-party complaint.

In support of their motion, the defendants submit an affirmation from counsel, Richard Duvall, in which Duvall asserts

24 [* 24] 40s. "dramatic"

150%

"equal"

"agreement

"or

"bonus

"which that he intentionally did not proffer affidavits from either Nancy

Bloom or Charles Karas in that each testified that they lacked

personal knowledge of the facts concerning the JOA. Duvall notes

that the April agreement was signed when Karas was 74 years old and

plaintiff was, upon information and belief, in his early to late

The April Agreement, DuVall argues, provides a

bonus to the plaintiff should Karas die first, i.e., it, in effect,

obligates Karas' estate to purchase the property at of any

price offered by the plaintiff. This, DuVall asserts, rendered the

parties' presumptive partnership illusory. Further, he

argues, there was no time limit on when this purchase option needed

to be exercised. Thus, he asserts, the option violated the rule

against perpetuities and against unreasonable restraints on

alienation. In addition, Duvall argues, the April Agreement was

nothing more than an to agree", i.e., it was for the development of the Water Well project any other use" the

parties agreed was appropriate. Thus, Duvall contends, all the

plaintiff needed to do to reap the benefits of the on death"

was to disagree with and refuse to fund any proposal until Karas

died, is exactly what occurred." Indeed, he opines, it is

clear from various statements made by plaintiff at his deposition

that he was aware that Karas was older and would likely die first.

In addition, DuVall asserts, at the plaintiff's examination before

trial, he testified that: (1) he never committed to pay any

25 [* 25] 50% to·

2005,

2009,

Stathis

$10,

$47,600.

_/

$186,000 thus·under particular amount toward the project; (2) the property was never

developed as a well site; and (3) contrary to the understanding

set forth in the April Agreement that the plaintiff would pay all

development costs, Karas paid of such costs, in addition

providing the property. Duvall notes that disclosure failed to reveal a signed operating agreement for Aries. Moreover, he asserts, the plaintiff testified that he transferred his interest in Aries to his wife (Antzoulis) shortly after it was formed. Thus, he argues, the plaintiff undertook no obligation as to Aries. He further asserts that, upon Karas' death in June Aries was dissolved by operation of law. Moreover, he notes, it appears that a law firm in Connecticut filed a certificate of dissolution for Aries on May 15, although it is not clear who, if anyone, authorized such filing.

Duvall further asserts that he determined, from documents submitted by the plaintiff, that contributed $36,734.21 to Aries and Karas contributed 911. 52 (in addition to transferring a 16 acre parcel). DuVall also notes that, although there is no contemporaneous appraisal of the property for 1997, the property was assessed by the town at Thus, he contends, given the equalization rate of 27.16%, the parcel actually had a fair market value of approximately $175,257. Accordingly, DuVall argues, Karas actually contributed approximately to Aries, as compared to the plaintiff's $36,734.21 and the default provisions

26 [* 26] 16%.

to 75%

"clean"

"steal" of the New York Limited Liability Company Law, the property of the LLC, upon dissolution, would be divided based upon the percentages of ownership. Here, he argues, Aries should be dissolved and, based on each party's contributions, Karas should be awarded 84% of the assets, and the plaintiff In sum, Duvall argues, the April agreement should be declared null and and any putative joint venture set forth therein deemed dissolved. Indeed, DuVall asserts, give the plaintiff a windfall based on the April agreement would be unconscionable. Duvall also challenges the existence and validity of the proffered JDA. DuVall notes that the plaintiff has yet to produce a copy of the same, despite a promise to do so, or an original copy. Further, he notes, in a letter from the plaintiff to Karas in 1999 (purportedly discussing the parties' relationship), the plaintiff makes no mention of the JDA. Rather, he mentions only the April 1 st and April 23 rd agreements. In addition, DuVall asserts, looking at the alleged drafts of the JDA, no logical editing process would have resulted in the purported final document. All of the these factors, Duvall argues, raise significant suspicions about the authenticity of the JDA itself. In any event, DuVall asserts, the JDA is not enforceable because it is an effort by the plaintiff to

equity in the Karpytown properties without any commitment on his

part. In support, DuVall notes that on page one of the JDA, it states that a transfer of title to any such lot will occur [only]

27 [* 27] ''water

''explore

''mutually

50%

''manage.'' when a permit is issued or work commenced on such lot. Here, he

asserts, no permit was ever issued nor work ever commenced.

Moreover, he avers, there is no evidence that the plaintiff ever

demanded transfer of title to any lot. Further, the JDA states

that planning and work will proceed expeditiously once a

deal is signed,'' and no water deal was ever signed. Similarly,

Duvall notes, the JDA recognized the potential for delays, and

provided that the parties should be prepared to other

options.'' He nevertheless asserts, plaintiff was not obligated to

expend money unless the parties reached a agreeable

contract with a third-party user'' or income was generated from

water sales, both of which were at the whim of the plaintiff.

Moreover, DuVall notes, if in fact the plaintiff did pay out any development costs, such costs were to be repaid prior to the division of any profits. Thus, the plaintiff would receive both the return of any investment and a windfall without any real risk to his capital. In addition, DuVall avers, the business entities contemplated by the JDA were never formed and, thus, there was never any business for the plaintiff to Conversely, he notes, the JDA precludes Karas from negotiating with any third parties concerning the properties.

Concerning Karas' Will, Duvall notes that Antzoulis, not the plaintiff, was named in the earlier will. Further, he asserts, Antzoulis testified at a deposition that she gave no consideration 28 [* 28] for the same, but was named mostly due to the fondness and closeness of the parties. Duvall asserts that Karas signed five wills subsequent to the Will naming Antzoulis, and that none of them named Antzoulis. In addition, he argues, the purchase option of the JDA was an invalid attempt to make a testamentary disposition and its unlimited duration violated the rule against perpetuities and the rule against unreasonable restraints on alienation. In rebuttal to plaintiff's argument that the joint venture agreement was not subject to the statute of frauds, Duvall asserts that plaintiff has demanded real property, not rights in a joint venture, thus bringing it within its purview.

In addition, Duvall asserts that, contrary to the terms of

the JDA, which obligated the plaintiff to pay for the development

costs associated with the property, the parties each paid for one

half of the infrastructure improvements, i.e., for rough roads, two

wells and certain gardens thus rendering the parties' conduct

inconsistent with the explicit terms of the JDA itself. Moreover,

he contends, the JDA was impermissibly vague.

In sum, Duvall argues, the conclusion to be drawn from the

record is that the plaintiff fraudulently prepared the JDA and that

neither the April agreements nor the JDA are enforceable because

they are unconscionable, lack consideration, are vague, and are the

product of overreaching. Further, the purchase options contained therein constitute invalid testamentary dispositions and violate

29 [* 29] $160,000,

80

_/

30 the rule against perpetuities and against unreasonable restraints

on alienation. Indeed, DuVall asserts, the plaintiff is seeking to

purchase approximately $4 million worth of property for

and waited until Karas was dead to exercise such right, thereby precluding Karas from telling his side of the story. Thus, DuVall argues, the plaintiff is guilty of "unconscionable laches."

In reply, plaintiff argues that the defendants' "kitchen sink" attack against plaintiff's action should not be permitted to obscure the basic facts, i.e., that the plaintiff's investment in the vacant and tax-burdened properties saved them from a piece-meal fire sale and allowed the cash strapped Karas to live rent free and develop the property for almost a decade and that Karas was a "shrewd" real estate investor who was willing to mortgage the defendants' inheritance to realize his dream of developing Karpytown. Moreover, the plaintiff argues, although the defendants try to paint Karas as an elderly man who was taken advantage of by a younger, sophisticated investor, the reality of the situation is much different, as is shown by, inter alia, an appended newspaper article on Karas which notes that Karas owned and operated a highly successful cabinet making business that employed workers, and was a pre-eminent real estate developer who first started investing in the 1970s. Otherwise, the plaintiff argues, the defenses raised by the defendants are either inapplicable or invalid. Finally, the plaintiff notes, it appears that a recent fire at the offices of [* 30] JOA. See, York University

York

Shop,

,,.sufficient

See,

320, 508 Karpytown/Aries destroyed the original of the

Discussion and Legal Analysis

It is well settled that a grant of summary judgment is

appropriate only where the Court determines there are no material

or triable issues of fact. Issue identification, not issue

determination is controlling. Therefore, it is incumbent upon the

proponent of a summary judgment motion to make a prima facie

showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to eliminate any material issues of fact from

the case. Failure to do so requires denial of the motion,

regardless of the sufficiency of the opposing papers.

Weingard v. New Center, 64 N.Y.2d 851, 487 N.Y.S.2d

316 [1985]; Zuckerman v. City of New , 49 N. Y. 2d 557, 427

N.Y.S.2d 595 [1980]; Stillman v. Twentieth Century Fox Film

Corporations, 3 N.Y.2d 395, 165 N.Y.S.2d 498 [1957]; Giammarino v.

Angelo's Royal Pastry Inc., 168 A.D.2d 423, 562 N.Y.S.2d 547

[2nd Dept. 1990] . Correspondingly, it is equally well settled that in defeating

a motion for summary judgment, the opposing party must produce

evidentiary proof, in admissible form, to require a

trial of material questions of fact or must demonstrate [an

acceptable] excuse for his or her failure to do so. Alvarez

v. Prospect Hospital , 68 N.Y.2d N.Y.S.2d 923 [1986];

31 [* 31] Brown,

York

570

$160,000.

copy_»f Marine Midland Bank, N.A. v. 115 A.D.2d 523, 496 N.Y.S.2d 53

[2nd Dept. 1985]; City of New v. Grosfeld Realty Company, 173

A.D.2d 436, N.Y.S.2d 61 [2nd Dept. 1991].

Here, application of the above referenced standard when

applied to the substantive elements necessary to be established,

requires denial of the total relief which each party seeks.

The Plaintiff's Motion

The plaintiff argues that he should be granted summary

judgment on the issues that the JOA is valid and enforceable, and

that he validly exercised his option thereunder to purchase the

Karpytown property for The grant of such relief, he asserts, would render all other issues in the action moot. Having

reviewed the record presented, the Court concludes, that although

the plaintiff's copy of the JOA may be admitted into evidence, the

enforcement of the purchase option which he seeks is nevertheless

barred.

The Best Evidence Rule

As a threshold issue, the defendants have challenged the

admissibility of the plaintiff's the JOA as being

presumptively barred by the best evidence rule. This argument

lacks merit.

The Court of Appeals has discussed the best evidence rule as

32 [* 32] "mistakes writing."

"the

Such

"would

right."

pJovided follows:

The oft-mentioned and much misunderstood best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven. At its genesis, the rule was primarily designed to guard against in copying or transcribing the original Given the technological advancements in copying, in modern day practice the rule serves mainly to protect against fraud, perjury and inaccuracies * * * which derive from faulty memory.

Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence, and has not procured its loss or destruction in bad faith. Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original. Indeed, the more important the document to the resolution of the ultimate issue in the case, stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence." In other words, the court should give careful consideration to the possible motivation for the non production of the original in determining whether the foundational proof of loss was sufficient.

a mitigating principle is necessary since a strict requirement of the original writing would serve to extinguish otherwise valid legal claims or defenses where a party has, through no mischief or bad faith, lost or destroyed an original. As stated by one commentator, the failure to excuse the loss of an original in many instances mean a return to the bygone and unlamented days in which to lose one's paper was to lose one's [Now, once the loss of the original is excused], all competent secondary evidence is generally admissible to prove its contents, that its admission does not offend any other exclusionary rule or policy. No categorical limitations are placed on the types of secondary evidence that are admissible. Nonetheless, the proponent of such derivative proof has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the

33 [* 33] "correctly

"substantially

"subject

*.

"less evidence" "an

Penn

620

Since proffered evidence is authentic and reflects the contents of the original" before ruling on its admissibility. For example, when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, and with reasonable accuracy" all of its contents. Once a sufficient foundation for admission is presented, the secondary evidence is to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact. Placement of this heavy foundational burden on the proponent of secondary evidence to prove its accuracy as a derivative source of proof serves to reduce the dangers of fraud and prejudice identified by Judge Simons in his dissent * * Indeed, those same dangers exist any time an original document is lost- even when the writing is a contract or lease- and a witness is called upon to recount its terms. In other words, the opponent is always at a disadvantage when cross examining a witness about a lost document * * * Additionally, the proponent of secondary evidence will naturally be discouraged from introducing convincing secondary because opponent may cause the jury to draw an unfavorable inference from such a strategy."

(Schozer v William Life Ins. Co. of New York, 84 N.Y.2d 639,

N.Y.S.2d 797 (1994) [internal citations omitted]).

Here, plaintiff has met his threshold burden of sufficiently

explaining the unavailability of the primary evidence (the original

copy of the JDA), and demonstrating that he neither procured its

loss nor its destruction in bad faith. plaintiff has met his

threshold burden, it then became incumbent upon the defendants to

rebut the same, which they have failed to do. Indeed, they have

offered no testimony or any other evidence, from a party with

personal knowledge of the facts, which would establish that a

diligent search was made of the off ices of Karpytown/Aries (or any

other location) and that the original copy of the JDA was not

34 [* 34] Statute CPLR

N.Y.S.2d

N.Y.S.

690 N.Y.S.2d Berger

203 502, N.Y.S.2d I

11 l found. Significantly, none of the defendants submitted an affidavit in opposition to plaintiff's motion, although presumptively having personal knowledge of plaintiff's contentions, including plaintiff's apparent lock out from the Karptown/Aries offices. Nor do defendants offer or identify any possible motivation for the plaintiff's non-production of the original copy. Accordingly, the plaintiff has met his threshold burden of demonstrating the unavailability of the primary evidence (the original copy of the JDA).

Plaintiff has likewise met the additional heavy burden of establishing that his copy of the JDA is an accurate copy of the original. Although plaintiff testified that his copy was an exact copy of the original document signed, such testimony is nevertheless precluded, as defendants' correctly point out, by the application of the Dead Man's 4519; Glatter v. Borten, 233 A.D.2d 166, 649 677 [lstoept.1996]; cf., In re Carrington, 163 A.D. 544, 148 952 [2ndDept.1914]}. However, such preclusion may be overcome where plaintiff produces other competent evidence establishing that his copy of the JDA is an accurate copy of the original Johnson v. Pollack, 261 A.D.2d

585, 691 [2ndDept.1999]; v. Estate of Berger,

A.D.2d 611 246 [2ndDept.1994]}; a requirement

satisfied by plaintiff's introduction of the disinterested

testimony of attorney Jacobowitz, who testified that he saw a

35 [* 35] ''interlineations''

s:i,gnature clean, signed JDA, which was provided by Bloom or Karas' brother.

Moreover, the JDA is consistent with prior agreements between the

parties, and there is some evidence of partial performance. In

sum, plaintiff demonstrated, prima facie, the admissibility of his

copy of the JDA.

In opposition, defendants argue that the plaintiff failed to

adequately explain the throughout the JDA.

However, the black line-like markings on the JDA cannot be

accurately described as interlineations. Rather, the systemic and

mechanical nature of the markings, which permeate every line of the

document, are more consistent with the manner in which the document

was reproduced. Indeed, there has been no foundational testimony

from which the Court could reasonably conclude that the parties

mutually struck out every single line on the document, including

the signatures, rather than, for example, destroying the document

or merely refusing to sign it.

Secondly, the defendants argue, the plaintiff failed to

explain discrepancies between initial drafts and the final JDA.

However, none of the discrepancies identified concern substantive

provisions of the agreement itself. For example, defendants note

that a prior draft of the JDA had a line for Karas,

whereas the final version did not; and that a prior draft had a

signature line for a witness, whereas the final did not; issues

that relate to the document's form not substance.

36 [* 36] "is

business--practices

terms" Third, the defendants argue, the plaintiff testified that he

left the signing with a clean copy of the document, but never

produced such a

establishes that copy. However, given that the testimony

the copy proffered is an exact copy of the

original, coupled with the absence of any forensic or other

evidence suggesting alteration, such argument is unpersuasive and

fails to raise significant issues concerning the authenticity of

the JDA.

Fourth, the defendants argue, even if the JDA is authentic, it

is unenforceable by its terms because the conditions precedent to the transfer of property set forth in the JDA never occurred, i.e., the issuance of permits, the commencement of construction on each parcel, the signing of a water deal or the demand for the conveyance of the properties. However, whether such events were conditions precedent to its enforcement, and whether the JDA was substantially complied with, are issues of fact best left for trial.

Finally, the defendants argue that the agreement is unconscionable; an argument that lacks merit. An unconscionable contract is one which so grossly unreasonable or unconscionable in the light of the mores and of the time and place as to be unenforceable according to its literal (Gillman v. Chase Manhattan Bank, N.A., 73 N. Y. 2d 1, 10, 537 N.Y.S.2d 789 (1988}, quoting 1 Corbin on Contracts, § 128, p. 400).

37 [* 37]

The doctrine of unconscionability, which is rooted in equitable principles, is a flexible one and a concept intended to be sensitive to the realities and nuances of the bargaining process itself (see, Gillman v. Chase Manhattan Bank, supra) and as such requires a showing that the contract was both procedurally and substantively unconscionable when made- i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus therefore is on such matters as the size and commercial setting of the transaction itself, whether deceptive or high-pressure tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power (Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 537 N.Y.S.2d 789 [1988]). Here, defendants have failed to show any demonstrable basis from which the Court could reasonably conclude, either directly or inferentially, that the JDA was procedurally or substantively when made.

Indeed, the uncontradicted testimony suggests that plaintiff rescued the property from almost certain foreclosure, and the plan as set forth in the JDA was for joint ownership of the property once developed. Conspicuously absent from defendants' submissions

38 [* 38]

any evidence which suggests that the conditions that existed at the time the agreements were forged were anything but that which plaintiff purports them to be (e.g., the introduction of business

and tax records) . Nor did the defendants present any detailed

evidence as to exactly what development occurred on the property

itself. Rather, the defendants' arguments, in the main, focus on

the purchase option of the JDA which, as discussed infra, is not

enforceable. Finally, there is no support in the record for the

suggestion, implicit throughout the defendants' pleadings, that

Karas was somehow physically and/or mentally infirm (presumably

based solely on his age), or that he was naive and inexperienced in

business and

The Rule Against Perpetuities and the Rule Against Unreasonable Restraints on Alienation

Defendants further argue, even if the plaintiff's copy of the

JDA is found admissible, the purchase option contained therein

violates the Rule Against Perpetuities and the rule against

unreasonable restraints on alienation and, therefore, is not

enforceable. In evaluating defendants' contentions, the Court

concludes, and so finds, that defendants' contentions have merit.

In so finding, the Court is guided by the Court of Appeals

holdings in which it has stated: The Rule against Perpetuities evolved from judicial efforts during the 17th century to limit control of title to real property by the dead hand of landowners reaching into

39 [* 39] "to

''No

''[n]o

''a ''capricious

State

Space,

N.Y.S.2d

N.Y.S.2d

_/ Space, future generations. Underlying both early and modern rules restricting future dispositions of property is the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time. These rules thus seek ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing from unknown or embarrassing impediments to alienability.''

The traditional statement of the common-law Rule against Perpetuities was set forth by Professor John Chipman Gray: interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest'' (Gray, The Rule Against Perpetuities § 201, at 191 [4th ed. 1942]) . * * * The New York's Rule against Perpetuities is to be found in EPTL 9-1.1 (a) which declares void . . any estate in which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years. The prohibition against remote vesting is contained in subdivision (b), which states that estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved.'' This Court has described subdivision (b) as rigid formula that invalidates any interest that may not vest within the prescribed time period'' and has consequences.'' Indeed, these rules are predicated upon the public policy of the and constitute non-waivable, legal prohibitions.

(Symphony Inc. V. Pergola Properties, Inc., 88 N.Y.2d 466,

646 641 (1996) [internal citation omitted]; see also

Buffalo Seminary v. McCarthy, 86 A.D.2d 435, 451 457 (4th

Dept.1982) affd. 58 N.Y.2d 867). In general, the Rule is applicable to option and preemptive (right of first refusal) contracts

(Symphony Inc. V. Pergola Properties, Inc., supra; Buffalo

Seminary v. McCarthy, supra) .

In addition to the Rule Against Perpetuities, New York also

40 [* 40] Unlike

&

N.Y.S.2d

501

N.Y.S.2d 306

& V.

--- retains the more flexible common-law rule against unreasonable

restraints on alienation. the statutory Rule against

Perpetuities, which is strictly applied and measured exclusively by

the passage of time, the common-law rule against unreasonable

restraints evaluates the reasonableness of the restraint based on

its duration, purpose and designated method for fixing the purchase

price (see Symphony Space, Inc. v. Pergola Properties, Inc., supra;

Buffalo Seminary v. McCarthy, supra; Wildenstein Co., Inc. v.

Wallis, 79 N.Y.2d 641, 584 753 (1992); Metropolitan

Transp. Authority v. Bruken Realty Corp. 67 N. Y. 2d 156,

[1986]). It is generally said that the reason for the common-law rule is that ownership of property cannot exist in one person and the right of alienation in another (see Metropolitan Transp. Authority v. Bruken Realty Corp., supra). Despite their differences, both the statutory and common-law rules strive to strike a balance between society's interest in the free alienability of property and the rights of owners to direct future transfers (see Wildenstein Co., Inc. Wallis, supar). In applying the common-law rule to preemptive rights (i.e., rights of first refusal) and option rights, the courts have found the method by which the price is set can be critical in determining whether a preemptive right unlawfully restrains transfers. When the holder has a right to purchase at a fixed price, or at a price less than that offered in the market, it is likely to involve a sacrifice by 41 [* 41] the owner if he wishes to transfer the property, thus becoming a far more serious interference with alienability. A preemptive right, however, will typically not be deemed unlawful when conditioned on payment of market value or a sum equal to a third-party offer. Market value, in some instances, may be less than sale price, but a market value fixed by arbitrators compelled to consider the price a willing seller would accept from a willing buyer at the time of sale can hardly be unreasonable (see

Metropolitan Transp. Authority v. Bruken Realty Corp., supra

Herrmann v. AMD Realty Inc.,8 A.D.3d 619, 779 N.Y.S.2d 560 [2ndDept. 2004]) .

In asserting the applicability of the Rule Against

Perpetuities, defendants note that the JDA purports to be binding

upon the parties, their heirs, successors and respective estates.

Further, there is no time specified for the exercise of the

purchase option right. Thus, the defendants argue, the option need

not necessarily be exercised within a life in being plus 21 years,

i.e., it may be exercised by the parties' estates more than 21

years after both parties have died (see, e.g., Buffalo Seminary v.

McCarthy, supra) ; an argument that has merit with respect to the

first two options afforded under the JDA- i.e. , obtaining an

appraisal and paying the estate 25% of the same; and (2) selling

the parcels and dividing the parcels 75%/25% net of the plaintiff's investments. Indeed, the plaintiff does not dispute such. However,

42 [* 42] $160,000)

On

$160, 000 Stathis

$160,000

$100 the third provision/option, the option which plaintiff seeks to

exercise (i.e., the right to purchase the property for is not similarly infirm. the contrary, this option must be exercised within two (2) years of Karas' death, and thus, by its terms, within 21 years after the measuring life in being at the time of its creation (i.e., Karas') . Accordingly, the Court concludes, and so finds, that the purchase option at issue does not violate the Rule Against Perpetuities.

However, enforcement of the option is nevertheless precluded as an unreasonable restraint on alienation. In availing himself of the two (2) year option to purchase the Karpytown property for could, in effect, restrain the sale of the property for a full 2 years, and the estate would be powerless to accelerate such election, even if a prospective buyer were available. Neither the terms of the JDA nor the evidentiary record presented adequately explain the ostensible purpose purportedly served by the inclusion of the two year option; an option that brought the development of the property to a complete halt. Moreover, it is unclear how allowing the plaintiff to purchase the property for the apparently nominal sum of (i.e., approximately per acre) for up to two years after Karas' death would protect this investment. For example, the purchase price [as expressly provided for in the JDA] is neither tied to plaintiff's expected investment nor his anticipated profits. Nor does the

43 [* 43] "method"

50%.

"April

"A record support such a finding. Rather, the potential profit to plaintiff from the purchase would appear to far exceed the same, i.e., there is some evidence in the record [including the Surrogate Court records which the Court takes judicial notice of] that the property is currently worth millions. Thus, there was, in effect, no for fixing the purchase option price. Finally, it is noted, had the property been developed as planned, the plaintiff's ownership interest would have been limited to Thus, in a very real sense, the purchase option operated as a disincentive for not only the sale of the property but for the plaintiff [and correspondingly a prohibition imposed upon the Estate] to pursue development. In.sum, based on all of the facts and circumstances, the purchase option at issue constituted an unreasonable restraint on alienation and is therefore unenforceable.

In so determining the first two purchase options afforded under the JDA violate the Rule Against Perpetuities [which plaintiff concedes] and the third purchase option constitutes an unreasonable restraint on alienation, any argument regarding the

April 23rd, 1997 Agreement (the Agreement") and the purported

post death purchase options afforded thereunder have been rendered

moot due to the integrated nature of the April 1st, April 23rd and

July 11th, 1997 writings themselves.

fundamental tenet of contract law is that agreements are to be construed in accordance with the intent of the parties and the

44 [* 44] See, Center

N.Y.S.2d (2008);

S.A., 10 N.Y.S.2d 820 (2008).

"This

JOA,

_/ best evidence of that intent is what they express in their written

contract". Goldman v. White Plains for Nursing, 11

N.Y.3d 173,176, 867 27 Innophos, Inc. v. Rhodia,

N.Y.3d 25,29, 852 Accordingly, a

written agreement that is otherwise complete, clear and unambiguous

on its face is entitled to be enforced, according to its terms, and

the language contained therein is to be accorded its plain meaning.

Here, the parties evinced a clear intent [as expressed in the JDA]

that the April 1st, April 23rd and the July 11th, 1997 JDA [and all rights afforded thereunder] were to be viewed and interpreted as

one integrated document. In relevant part, the JDA provided for the following:

agreement is in addition to our agreement of April 1, 1997 and April 23, 1997 [sic] if any language or provision conflict, the language in this agreement hereby supersedes."

The by its terms, provided for three post mortem purchase

options each of which were discussed supra. These options, by

virtue of their conflicting terms, superseded the operative post

mortem purchase options provided for and afforded to the parties

under the April Agreement thus rendering such provisions moot.

The Purported Invalid Testamentary Disposition

Although rendered academic by the analysis supra, the

defendants did not demonstrate that the purchase option of the

contract was an invalid testamentary disposition (see, In re

45 [* 45] 107, N.Y.S.2d

N.Y.S.2d

"until

[Stathis

"Eighth

/ 100 801, N.Y.S.2d (2003);

N.Y.S.2d ndDept.2010]). Hillowitz Estate, 22 N.Y.2d 291 325 (1968); Heller v.

Heller, 216 A.D2.d 355, 628 177 [2ndDept.1995]). The clear thrust of the provision in the JDA was to provide security for plaintiff's investment all parcels [had] been sold or transferred into an entity owned equally by [Karas] and or his assignee]". Moreover, the thrust of such allegations, in plaintiff's complaint, was to buttress his breach of contract claim not, as referenced in defendants' Affirmative Defense", to contest the admissibility of Karas' Last Will and Testament to probate. Defendants' Eighth Affirmative defense must be dismissed.

The Laches Argument

The defendants also argue·that, even if the court were to find the plaintiff's copy of the JDA admissible, the plaintiff should be barred from enforcing the same based on laches. This argument lacks merit.

Lac hes serves as an equitable bar to recovery based on a lengthy neglect or omission to assert a legal right coupled with resulting prejudice to the adverse party. The mere lapse of time, without more and particularly without a showing of prejudice, will not sustain a defense of laches (see Saratoga County Chamber of Commerce v. Pataki, N.Y.2d 766 654 White v. Priester, 78 A.D.3d 1169, 912 127 [2

Prejudice may be demonstrated by a showing of injury, change of

46 [* 46] Suffice

1081,

706 2000];

S.

A.O. position, loss of evidence, or some other disadvantage resulting from the delay (see, White v. Priester, supra) . Here, the defendants presented no evidence that the plaintiff engaged in any lengthy neglect or failure to act which resulted in prejudice to Karas or for that matter to them. In fact, it is unclear from the record just when any developmental activity, relevant to the Karpytown property, ceased or whether it ceased prior to Karas' death. to say, Karas' death, and plaintiff's delay in exercising the option, without more, is not sufficient to warrant a finding of laches. Thus, defendants' Third Affirmative Defense must be dismissed.

The Statute of Frauds Defense

Defendants also argue that evidence of an oral joint venture agreement between the plaintiff and Karas should be barred by the statute of frauds. In light of the determination supra, that the plaintiff's copy of the JDA is admissible, this argument is academic. In any event, it lacks merit.

As plaintiff correctly points out, a joint venture agreement

is not subject to the statute of frauds (see Ackerman v. Landes,

112 A.D.2d 493 N.Y.S.2d 59 [2ndDept.1985]; Barash v. Estate

of Sperlin, 271 A.D.2d 558, N.Y.S.2d 439 [2 ndDept.

Chalmers v. Eaton Corporation, 71 A. D. 2d 721, 419 N. Y. 2d 217

[3rdoept.1979]; Weinser v. Benensen, 275 324, 89 N.Y.S.2d 331

47 [* 47] 1038, 903

Standing

Stathis

>

Thus, the statute of frauds is inapplicable to and

not render void an oral joint venture agreement dealing in

real property since the interest of each partner is deemed

personalty, not an interest in real property (see Plu.mitallo v.

Hudson Atlantic Land Co., LLC, 74 A.D.3d N.Y.S.2d 127

[2nciDept.2010]). Thus, defendants' First Affirmative Defense must

be dismissed.

The Issue

Lastly, defendants argue that the plaintiff lacks standing to

enforce any rights as to Karas' will because Antzoulis, not the

plaintiff, was to be the purported beneficiary. However, the promise to name Antzoulis as a beneficiary in Karas' will was made

to the plaintiff in the JDA, presumptively as an inducement to his

participation in and contribution to the joint venture as well as

affording security until the parcels were sold or transferred into

an entity equally owned by and Karas. Thus, he is

aggrieved by a breach of that promise and has the requisite

standing to enforce same.

The Defendants'/Third Party Plaintiffs' Cross Motion

The defendants/third-party plaintiffs not only cross move for

summary judgment dismissing the complaint but also with respect to

on their third-party complaint. In the their arguments

48 [* 48] "April

concern the admissibility and enforceability of the plaintiff's

copy of the JDA, and the enforceability of the April 23, 1997,

agreement. As discussed supra, the plaintiff's copy of the JDA is

admissible and enforceable to the extent indicated. Thus, to the

extent that the defendants/third-party plaintiffs' cross motion relies on a contrary conclusion, it is denied. Consequently, the

analysis herein will focus on the April 23, 2007, agreement (the

Agreement") and the third-party action.

The April Agreement

The defendants/third-party plaintiffs argue that the April

Agreement is unenforceable because it constitutes no more than an

agreement to agree, i.e. , the plaintiff agreed only to fund

development costs if and when a suitable use of the property was

identified. Thus, if there was no agreement on a use, there never

would have been an advancement of any funds. Moreover, they argue,

there was no minimum amount that the plaintiff agreed to provide

and thus, they assert, Karas gave up his right to a substantial

amount of property in exchange for, in effect, nothing.

Accordingly, they argue, there was a lack of consideration, a lack

of mutuality and no meeting of the minds. Finally, they assert,

the April agreement was unconscionable. However, these arguments

lack merit.

Initially, the defendants/third-party plaintiffs' arguments

49 [* 49] S. 2010]

N.Y.S.2d

___ ,,,.

50 the April agreement are not rendered academic by the

supra that the plaintiff's copy of the JDA is

admissible, given that the main relief sought by plaintiff

thereunder - the exercise of the purchase option- has been denied.

Thus, the relevance of the April Agreement cannot be finally

determined at this time, although its significance to the ultimate

outcome of the pending litigation, in this Court's view, has been

significantly undercut due to the Court's determination that the

post mortem buyout provisions of the April Agreement have been

superseded and thus rendered moot by the integrated nature of the April 1st, April 23rd and July 11 th, 1997 writings. Accordingly,

the defendants/third-party plaintiffs' arguments concerning the

same will be addressed on the merits to the extent they retain

their vitality.

If an agreement is not reasonably certain in its material

terms, there can be no legally enforceable contract. Thus, a mere

agreement to agree, in which a material term is left for future

negotiations, is unenforceable (see Teutel v. Teutel, 79 A.D.3d

851, 912 N. Y. 2d 664 [2ndoept. ; Joseph Martin, Jr.

Delicatessen v. Schmacher, 52 N.Y.2d 105, 109, 436 247

[1981]). Here, the April Agreement cannot be properly categorized

as a mere agreement to agree. Rather, the parties specifically

agreed to develop the property as a water well, and to ultimately

transfer ownership of the property to a LLC to be owned jointly by [* 50] United 910

[2ndDept.2010]; Simon

100, [2ndDept.2008];

United v- Simon the parties. The mere fact that every detail of the joint venture agreement was not spelled by the parties is not necessarily fatal to its validity, especially given the uncertainty of the prospective development costs and the timetable for approval. Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance; a covenant that embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits and benefits of the contract (see Atlas Elevator Corp. v. Elevator Group, Inc., 77 A.D.3d 859, N.Y.S.2d 476 Lonner v. Property Group, Inc., 57 A.D.3d 866 N.Y.S.2d 239 Dalton v. Educational Testing Service , 87 N.Y.2d 384, 639 N.Y.S.2d 977 [1995]). Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion and the implied covenant of good faith and fair dealing 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 (Atlas Elevator

Corp. v. Elevator Group, Inc. supra; Lonner v.

Property Group, Inc., supra). The implied covenant of good faith

encompasses any promises which a reasonable person in the position

of the promisee would be justified in understanding were included

51 [* 51] United

plaintUf in the agreement, and prohibits either party from doing anything

that will have the effect of destroying or injuring the right of

the other party to receive the fruits of the contract (Atlas

Elevator Corp. v. Elevator Group, Inc., supra). Here, this

implied covenant bound each party to act in a manner which advanced

the stated objective of the April agreement to develop the Well

Project. Indeed, the plaintiff testified that the development of

the well project advanced at least to some degree, and that he paid

substantial sums toward the same. The exact nature of the events

is a matter for trial. In sum, the April Agreement was not a mere

agreement to agree. For the same reasons, the defendants/third

party plaintiffs did not demonstrate that the April Agreement was

not supported by adequate consideration, that there was a lack of

mutuality or that there was no meeting of the minds. Indeed, the

parties appear to have acted on the April Agreement for a number of

years after its execution. Finally, and for the same reasons discussed supra, the defendants/third-party plaintiffs did not demonstrate that the April Agreement was unconscionable. For all of the foregoing reasons, defendants' Fourth Affirmative Defense must therefore be dismissed.

The defendants/third-party s also argue that the purchase option provision of the April Agreement violates the Rule Against Perpetuities and the rule against unreasonable restraints on alienability. However, the plaintiff is not seeking to exercise

52 [* 52]

that

provision of the April agreement. Rather, the plaintiff is seeking to exercise the purchase option of the JDA. Moreover, the relevance of the provision has been rendered moot by the superseding language of the JDA itself. However, the provision, if reached, would violate the Rule Against Perpetuities and the rule against unreasonable restraints on alienability.

The April agreement purports to be binding upon the parties, their heirs, successors and respective estates. Further, there is no time specified in the April agreement for the exercise of the purchase option. Thus, the option need not have been necessarily exercised within a life in being plus 21 years, i.e., it could have been exercised by the parties' estates more than 21 years after

both parties have died (see Buffalo Seminary v. McCarthy, supra).

For the same reason, the option provision constitutes an

unreasonable restraint on alienation. Thus, the purchase option of

the April agreement is not enforceable.

Aries

The defendants/third-party plaintiffs' arguments concerning

Aries are less defined. However, in its third-party action, it

alleged three causes of action, each of will be discussed in

seriatim.

In their first cause of action, the defendants/third-party plaintiffs argue that the April Agreement should be declared null

53 [* 53] ;i:and

Jjl ?'However,

''Unless

*.

.LJL_, __,, void and unenforceable for the reasons discussed supra.

the April Agreement is valid and enforceable to the extent

and within the confines previously discussed . Similarly, the

defendants/third-party plaintiffs, in their second cause of action,

argue that the invalidity of the April Agreement renders the transfer of the property to Aries null and void, that the transfer should be set aside and the property re-conveyed to the Karas estate. However, again, the April Agreement is valid and enforceable to the extent set forth supra.

As a third cause of action, the defendants/third-party plaintiffs allege that the death of Karas resulted in the dissolution of Aries. Thus, they argue, Aries should be dissolved and its affairs wound up. However, in relevant part, Limited Liability Corporation Law§ 704(b) provides: otherwise provided in the operating agreement, the death * * * of any member * * * shall not cause the limited liability company to be dissolved or its affairs to be wound up* * Here, there is no evidence of an operating agreement. Thus, the death of Karas did not result in the automatic dissolution of Aries. Moreover, based upon the current record presented, even the most basic questions concerning Aries cannot be determined, whether Aries was validly formed and, if so, who are its members, what are its assets and the extent to which, if at all, it has been dissolved. Thus, the insufficiency of the current record precludes the awarding of

54 [* 54] 2010.

''Receipts

Under

$2,905,000.00

Court's,

10:30 Orange 30 Park Place, any such relief at this time. For all of the foregoing reasons,

summary judgment on the third-party action is denied.

Further Orders. Procedural Matters and Scheduling

Parenthetically, if not inexplicably in light of the pending

litigation, Surrogate Court records reveal that the Estate of

Donald Karas a/k/a Donald G. Karas a/k/a Karpy was formally closed

by Co-Executors and party defendants, Nancy Bloom and Charles

Karas, without judicial settlement, by way of the filing of

Affidavits of Completion of Estate Proceeding on October 29th,

Consistent with the foregoing, executed and acknowledged

and Releases", were also filed; Receipts and Releases executed by

Nancy Bloom and Charles Karas, in their capacity as Co-Trustees of

the Marital Trust the Will of Donald G. Karas, which Receipts

and Releases acknowledge the Trust's receipt [and presumptive

funding] of in real property; real property

presumptively embraced within and forming the subject of the

pending litigation. [see, Surrogate File No. 450/2005 which the Court

takes judicial notice of]. Neither Bloom nor Karas have been joined as party defendants in their capacity as Trustees.

In view of the foregoing and the decision, the parties are therefore directed to appear, through respective counsel, for a settlement/pre-trial conference on March 29th, 2011 at A.M. at the County Surrogate's Court House, Goshen, New York.

55 [* 55] sununary

"JDA"),

sununary Accordingly, and in accordance with the foregoing, it is

ORDERED, that Plaintiff's motion for partial judgment is granted insofar as he seeks the admissibility of the copy of the July 11th, 1997 Joint Development Agreement (the which the Court determines is admissible and enforceable in· accordance with its terms, subject to the un-enforceability of the post-mortem buy out provisions as hereinafter enumerated; and it is further \ ORDERED, that Plaintiff's motion for partial judgment is further granted insofar as it seeks the dismissal of Defendants' First, Third, Fourth, and Eighth Affirmative Defenses which are hereby dismissed; and it is further

ORDERED, the Defendants' cross-motion for summary judgment is granted insofar as it seeks to invalidate the post mortem buyout provisions contained in the JDA, and referenced therein as options i, ii and iii, which options are deemed, and are hereby declared to be, un-enforceable as violating the Rule Against Perpetuities and/or as constituting an unreasonable restraint on alienation but which are nevertheless severable from the remainder of the JDA; and it is further

ORDERED, that all other applications, not specifically addressed herein, are deemed denied, without prejudice to renew.

56 [* 56] 2011

HON.

TO: One PO 12550

PO 509 12602-0509 The foregoing constitutes the decision and order of the court.

Dated: February 25 , Goshen, New York

E N T E R

FRY, A.J.S.C.

Tarshis, Catania, Liberth, Mahon & Milligram, PLLC Attorneys for Plaintiff Stathis Corwin Plaza, Box 1479 Newburgh, NY McCabe & Mack, LLP Attorneys for Defendants Bloom and Karas 63 Washington Street Box Poughkeepsie, NY

57 [* 57]