

**Gopi v Henriquez**

2003 NY Slip Op 30152(U)

October 3, 2003

Supreme Court, Queens County

Docket Number: 0007120/1998

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ~~MARGUERITE A. GRAYS~~ IA PART 4  
Justice

<p style="text-align: right; margin-right: 10px;">X</p> <p>CHOWDHARY GOPI,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against-</p> <p>HEITUS RUB HENRIQUEZ AND GINA BRANDO, AS CO-EXECUTRIXES OF THE ESTATE OF YOLANDA HENRIQUEZ, DECEASED, HEITUS RUB HENRIQUEA, INDIVIDUALLY AND GINA BRANDO, INDIVIDUALLY,</p> <p style="text-align: center;">Defendants.</p> <hr style="border: 0.5px solid black;"/> <p style="text-align: right; margin-right: 10px;">X</p>	<p>X</p>	<p>Index Number <u>7120</u> 1998</p> <p>Motion Date <u>August 19,</u> 2003</p> <p>Motion Cal. Number <u>17</u></p>
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The following papers numbered 1 to 10 were read on this motion by the defendants, pursuant to CPLR 3211, to dismiss the complaint based upon the statute of frauds, the documentary evidence and for failure to state a cause of action; and, cross motion by the plaintiff, pursuant to CPLR 3025, for leave to amend the complaint to substitute and annex a recorded option agreement.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits ...	5 - 7
Answering Affidavits - Exhibits .....	8 - 10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

**I. The Relevant Facts**

A. Background

On or about November 14, 1995, a "Standard Option to Purchase Agreement" was executed by the plaintiff Chowdhary Gopie ("Gopie") and Yolanda Henriquez ("Henriquez"), now deceased, in consideration of Gopie's payment of \$1,000. That option agreement gave Gopie the

right to purchase real property located in Richmond Hills, Queens. Henriquez granted Gopie, and his successors and assigns, the right to purchase the premises anytime after November 14, 1995, and prior to November 14, 2000, upon at least 30 days' prior written notice to Henriquez in writing. Within 10 business days of the exercise of the option, the parties were to execute a "standard NYBTU form Contract of Sale." The price was to be negotiated in good faith for a period of thirty (30) days and, if the parties were unable to agree, they were to utilize an appraisal process.

The option agreement was executed, witnessed and recorded. In the recorded option agreement, paragraph 10 was stricken, and paragraphs 11 through 14 were renumbered. The stricken paragraph 10 was initialed, apparently by Henriquez. Paragraph 9 of the recorded option agreement provides, inter alia, that the option was to be binding on the heirs, assigns, trustees and successor of Henriquez in the event of her death or incompetence. The terms embodied in the stricken paragraph 10 are not relevant to this action.

By letter dated January 26, 1998, Gopie notified Henriquez that he was exercising his option to purchase. In an undated letter, Henriquez, through her attorney, declined to recognize the exercise of the option, asserting, inter alia, that the option agreement was fraudulent.

Gopie commenced this action on or about April 1, 1998, seeking a declaration that a valid and enforceable option existed, and specific performance requiring Henriquez to convey the premises to him. Annexed to the original complaint was a copy of an executed, but unrecorded option agreement. The unrecorded option agreement differs from the recorded option agreement only in that it does not have paragraph 10 stricken out and subsequent paragraphs renumbered.

#### B. Prior Proceedings

By prior decision and order dated August 24, 1998, this Court (LaTorella, J.), denied a motion by Henriquez, pursuant to CPLR 3211[a][1], [5] and [7], to dismiss the complaint on the grounds that the action could not be maintained because the option agreement violated the statute of frauds, and the complaint failed to state a cause of action as there existed two different copies of the option agreement.

Henriquez subsequently died. Gopie then moved for summary judgment and Henriquez, through her attorney, cross-moved for summary judgment dismissing the complaint. Gopie asserts that in

his motion, he had also sought leave to substitute the recorded option agreement for the unrecorded option agreement which he had inadvertently annexed to the complaint.

By order dated February 8, 2001 and filed on February 27, 2001, this Court (LaTorella, J.), denied the motion and cross motion and stayed the action, pending the substitution of a legal representative for Henriquez' estate.

By memorandum decision dated November 9, 2001, and by order dated February 20, 2002 this court (LaTorella, J.), granted an unopposed motion by the defendants Heigtus Rub Hernandez and Gina Brando ("the defendants"), as co-executrices of Henriquez' estate, to be substituted in the place of Henriquez, amended the title of the action to reflect that substitution, and lifted the stay.

By decision and order dated July 24, 2002, this court (LaTorella, J.) denied the prior motion for summary judgment by Gopie and the prior cross motion for summary judgment dismissing the complaint by the defendants, without prejudice to a motion by Gopie for leave to serve and file an amended complaint or supplemental summons and amended complaint. The court noted that all parties had simply resubmitted the original motion and cross motion papers without seeking leave to amend the pleadings, and expressed concerns relating to, inter alia, whether all necessary parties had been joined.

In a second amended verified complaint, Gopie alleged that the defendants, individually, were named as the sole residuary beneficiaries in Henriquez' will, and there were no other beneficiaries. He interposed the same causes of action and, once again, annexed the unrecorded option agreement.

#### **11. Motion and Cross Motion**

The defendants move to dismiss the second amended complaint contending that: (1) Gopie did not annex the recorded option agreement to the new complaint; (2) the unrecorded option agreement that he did annex violates the Statute of Frauds; (3) Gopie never sent a notice of his intent to exercise the option pursuant to the recorded option agreement and, instead, annexed the unrecorded option agreement to his letter of intent; and, (4) in prior motion papers, Gopie admitted that he annexed the unrecorded option agreement to the pleadings. As a result, the defendants contend that Gopie is estopped from asserting that he exercised his option pursuant to the recorded option agreement, and Gopie did not validly exercise the option.

Gopie opposes the motion and cross-moves for leave to amend the second amended complaint to annex the recorded option agreement. In support, he asserts that he could not annex the recorded option agreement to the second amended complaint because this court never ruled on his prior motion seeking leave to do so, and he could not serve a second amended complaint that differed from the original complaint.

### III. Decision

To the extent that the defendants' motion is not barred by the law of the case (see, e.g., In re Estate of Billings, 122 AD2d 941), the motion lacks merit.

Any differences between the unrecorded and recorded option contracts are de minimus, and Gopie's annexation of the unrecorded option agreement to his letter of intent to exercise the option does not amount to a failure to comply with the option provisions (see, Weisman v Adler, 187 AD2d 647; United Skates of America, Inc. v Kaplan, 96 AD2d 232, appeal dismissed, 63 NY2d 944). Gopie is not barred from relying upon the recorded option agreement by either the doctrine of judicial estoppel or the doctrine of equitable estoppel (see, Bono v Cucinella, 298 AD2d 483; Brelsford v USAA, 289 AD2d 847; National Union Fire Ins. Co. v Pardo, 208 AD2d 702).

Gopie's cross motion for leave to amend the complaint to annex the recorded option agreement is granted (see, CPLR 3025). The recorded option agreement annexed to the motion papers of the defendants and Gopie is hereby deemed to be annexed to the second amended complaint. Gopie is directed to file with this court a copy of this order along with a copy of the second amended complaint with the recorded option agreement annexed thereto.

### Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is


ORDERED that the motion by the defendants to dismiss the complaint based upon the statute of frauds, the documentary evidence and for failure to state a cause of action is denied; and it is further

ORDERED that the cross motion by the plaintiff for leave to amend the complaint to substitute and annex a recorded option agreement is granted, and the recorded option agreement annexed to the motion papers submitted upon the motion and cross motion

decided herein is deemed to be annexed to the second amended complaint; and it is further

ORDERED that the plaintiff shall file with the clerk of this court a copy of this order along with a copy of the second amended complaint with the recorded option agreement annexed thereto.

Dated: **OCT 3 2003**

  
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J.S.C.