

**Omar v Rozen**

2007 NY Slip Op 31873(U)

June 26, 2007

Supreme Court, Suffolk County

Docket Number: 0004685/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM , PART XXIV - SUFFOLK COUNTY

**P R E S E N T :**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 3-5-07  
Mot. Seq. # 003 - MD

-----X	
SALLY OMAR and MOHAMED OMAR,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
MAREK ROZEN and CHRISTINE ROZEN,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 6 - 8 ; Replying Affidavits and supporting papers 9 - 12; Other plaintiffs' Supplemental Memorandum of Law 13 - 14; defendants' Supplemental Reply Affirmation 15 -17 ; and after hearing counsel in support and opposed to the motion, it is,

**ORDERED** that the defendants' motion for summary judgment dismissing the complaint on the grounds that the parties agreement is void and unenforceable as violating the rule against perpetuities and the common-law rule concerning unreasonable restraints on alienation of property is denied.

In 1989 the plaintiffs purchased undeveloped land in Mattituck in the Town of Southold, Suffolk County, New York (hereinafter Mattituck Property). On November 9, 1999, the plaintiffs executed a note and mortgage on the Mattituck Property in favor of the defendants for the principal sum of \$200,000.00. The plaintiffs defaulted on the note and mortgage by failing to make payments as agreed. On March 9, 2001, the parties executed an agreement wherein the plaintiffs consented to convey title and interest in the Mattituck Property to the defendants by Quitclaim Deed in lieu of a foreclosure action (hereinafter "Agreement").<sup>1</sup>

The Agreement affords the plaintiff Sally Omar the right of first refusal to purchase the Mattituck Property at the price offered by a prospective buyer (hereinafter the Right of First Refusal). If

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<sup>1</sup>The 1989 deed, the note and mortgage, the Quitclaim Deed and the Agreement were all duly recorded in the office of the Clerk of Suffolk County.

the Right of First Refusal is not exercised, Sally Omar is entitled to share the net profits from the sale of the Mattituck Property pursuant to calculations set forth in the Agreement. In the event Sally Omar decides to erect a house within five years and prior to the sale of the Mattituck Property, the Agreement affords her the option to purchase the Mattituck Property at the then fair market value (hereinafter Purchase Option).

Prior to the execution of the Agreement, the defendants made several loans to the plaintiffs which were evidenced by promissory notes. In 2005, the defendants commenced an action in Supreme Court in and for Nassau County alleging that plaintiffs had defaulted on the promissory notes. In the Nassau County action, which was still pending as of the date the instant motion was made, the plaintiffs claimed that upon execution of the Agreement their liability under the promissory notes was fully released and discharged.

Thereafter, the plaintiffs commenced the instant action alleging that the defendants have repudiated and breached the Agreement by failing to honor the release and discharge of any personal liability under the promissory notes. In their complaint, the plaintiffs contend that upon execution and delivery of the Quitclaim Deed to the defendants, the mortgage on the Mattituck Property, as well as all liabilities arising from or relating to the promissory notes, was satisfied and discharged. Moreover, the plaintiffs contend that the inclusion in the Agreement of the Right of First Refusal and the right to share net profits required the defendants to offer the Mattituck Property for sale. The defendants' failure and refusal to do so, the plaintiffs allege, is a breach of the Agreement for which they are entitled to damages (in the first cause of action). In the second cause of action, the plaintiffs seek equitable relief in the form of specific performance maintaining that the defendants should be directed and compelled to reconvey the Mattituck Property pursuant to the terms of the Agreement. In the third cause of action, it is alleged that the defendants hold title to the Mattituck Property as trustees and fiduciaries on behalf of Sally Omar, and that the defendants breached their duties to exercise their best efforts for and on her behalf. The plaintiffs also allege that the defendants have been unjustly enriched, seek the deed to the Mattituck Property, and a declaratory judgment of the parties' rights and remedies, including a declaration that the note and mortgage are discharged, extinguished and satisfied, and that Sally Omar is entitled to exclusive possession and title in fee simple absolute (the fourth, fifth and sixth causes of action).

Shortly after commencing the instant action, and prior to issue being joined, by letter dated February 23, 2006, Sally Omar notified the defendants that she was exercising the Purchase Option pursuant to the terms in the Agreement. On March 13, 2006, the defendants' counsel responded by rejecting Sally Omar's notice as defective and untimely. The the defendants' counsel stated that the notice fails "to comply with the requirements of the Agreement...fails to provide reasonable notice and time to respond, and [i]s late notice as an action had been commenced prior to the issuance of the notice." However, the defendants' counsel indicated that to resolve the matter in accordance with the terms and conditions of the Agreement, the defendants wanted additional information from Sally Omar, including the documentation, research, correspondence, drawings, proposals, invoices, etc., she reviewed and considered in making her decision to build a house on the Mattituck Property, evidence of the costs and expenses to build, the projected monthly mortgage payments, taxes, costs and expenses to maintain the house, and evidence of her creditworthiness.

In their answer, the defendants denied the material allegations in the complaint, except they admitted the existence of the Agreement, and asserted several affirmative defenses, including, *inter alia*, that the Agreement was unenforceable under the Statute of Frauds, unenforceable as there was no meeting of the minds regarding material elements of the Agreement, and was void *ab initio* as violative of the rule against perpetuities and the rule against unreasonable restraints on alienation. The defendants now seek summary judgment dismissing the complaint based on these affirmative defenses.

The defendants argue that the Agreement is void pursuant to the Statute of Frauds because the Purchase Option lacks the essential and material terms of a real estate contract which cannot be determined without resorting to the type of extrinsic evidence that is barred by the parol evidence rule. Specifically, the defendants assert that the Agreement lacks a legal description of the Mattituck Property and the Purchase Option is vague in connection with Sally Omar's decision to erect a house, and the price she must pay to reacquire title. Additionally, the defendants argue that the Agreement does not contain the terms of the purchase money mortgage which they are required to take back upon Sally Omar's exercise of her rights under the Purchase Option, does not recite the date upon which closing is to take place, and does not set forth the type of deed to be executed, i.e., a warranty deed or a quitclaim deed. The defendants also argue that the Agreement is void *ab initio* as it violates the rule against perpetuities which is codified in EPTL 9-1.1 and also violates the common law rule against unreasonable restraints on alienation of property due to remote vesting.

In opposition, the plaintiffs argue that the Agreement does not violate the Statute of Frauds as the Purchase Option was supported by consideration and contains all the essential and material terms of a contract to sell real property. To the extent the Purchase Option is silent as to certain terms, the plaintiffs assert that there are objective and extrinsic standards by which to make the meaning of the Agreement and the intention of the parties manifestly clear. Furthermore, the plaintiffs assert, the Mattituck Property is adequately described, and the Agreement provides for the methodology as to how the sale price and the terms of the purchase money mortgage are to be determined.

The plaintiffs also argue that the Purchase Option and the Right of First Refusal do not violate the rule against perpetuities or place unduly restrictive controls on future disposition or use of the Mattituck Property because only Sally Omar may exercise these options within her lifetime. Moreover, the plaintiffs argue, the Purchase Option has a limited term of five years, and there is no justiciable controversy for the Court to address with regard to the Right of First Refusal since the the defendants have not entered into a written contract with a third party to sell the Mattituck Property.

An option to purchase an interest in real property is a conditional contract for a future conveyance of land and is within the Statute of Frauds as codified in General Obligations Law § 5-703 (*Kaplan v Lippman*, 75 NY2d 320, 552 NYS2d 903 [1990]; *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 548 NYS2d 920 [1989], *cert denied* 498 US 816 [1990]). To satisfy the Statute of Frauds, the option agreement must be evidenced by a writing that expresses the consideration and is signed by the party to be charged (GOL § 5-703[2]). In addition, the writing must designate the parties, express the essential terms of the agreement with reasonable certainty, and include a sufficient description of the property subject to the option (*Kaplan v Lippman*, *supra*; *Cobble Hill Nursing Home v Henry & Warren*, *supra*; *Bright Beginnings Day Car v Driftwood Day Camp*, 16 AD3d 449, 791 NYS2d 624 [2005]; *Aceste v Wiebusch*, 74 AD2d 810, 425 NYS2d 369 [1980]). Notably, only

reasonable certainty, not absolute certainty, in the material terms is required as reference can be made to an extrinsic standard or method to establish the existence of a legally enforceable contract (*see, Cobble Hill Nursing Home v Henry & Warren Corp., supra; Marder's Nurseries, Inc. v Hopping*, 171 AD2d 63, 573 NYS2d 990 [1991]).

Here, the Statute of Frauds is satisfied as the Agreement is in writing, expresses the consideration (i.e., the plaintiffs' conveyance of title to the Mattituck Property to the defendants by deed in lieu of a foreclosure action, ), and is signed by the the defendants against whom it is sought to be enforced (*see, Kaplan v Lippman, supra; Weissman v Adler*, 187 AD2d 647, 590 NYS2d 241 [1992]). Additionally, contrary to the the defendants' assertions, the Mattituck Property is identified with exactness in Schedule A referred to in the Agreement and annexed thereto (*see, Frank v Katz*, 145 AD2d 597, 536 NYS3d 135 [1988]).

Moreover, the terms of the purchase money mortgage to be provided to Sally Omar by the defendants is reasonably certain. The rate of interest is not indefinite simply because it is not expressed in specific numbers (*Shreiber v Delia*, 222 AD2d 1063, 635 NYS2d 876 [1995], *lv denied* 88 NY2d 806 [1996]). The interest rate provided in the purchase money mortgage (i.e., the prevailing interest rate on a variable rate residential mortgage) "may be determined 'by reference to an extrinsic standard that makes its meaning clear'" (*id.*, at 1064, quoting *Cobble Hill Nursing Home v Henry & Warren Corp., supra*, at 483; *see, Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 571 NYS2d 686 [1991]).

Similarly, the failure to set forth the purchase price, is not fatal to the enforceability of the Agreement and does not, as the defendants contend, make out only an agreement to agree (*Marder's Nurseries, Inc. v Hopping, supra*). The parties never agreed to agree on a purchase price in the future, but instead agreed that the purchase price would reflect the fair market value of the Mattituck Property as established by the average of two appraisals, one obtained by the purchaser and one obtained by the seller, or by a bona fide purchase offer. Such an agreement provides an "objective standard that renders the [Agreement] definite and enforceable" (*Tonkery v Martina*, 78 NY2d 893, 895, 573 NYS2d 450 [1991], *affg* 167 AD2d 860, 562 NYS2d 895 [1990]; *see, Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp., supra; Marder's Nurseries, Inc. v Hopping, supra*). In the absence of an offer by a bona fide third-party purchaser or in the event of a dispute regarding the qualifications of an appraiser, "the court ha[s] the authority to make the finding of fair market value in order to carry out the intention of the parties" (*Tonkery v Martina*, 167 AD2d, *supra*, at 860).

The defendants' argument is unpersuasive that the omission of the type of deed and quality of the title to be conveyed prohibits a finding that there was a meeting of the minds. Every purchaser is entitled to marketable title, thus, such a provision may be inferred (*O'Brien v West*, 199 AD2d 369, 605 NYS2d 366 [1993]). Where, as here, an agreement is silent and there is an absence of negotiations with regard to the type of deed to be furnished, "the law implies a deed conveying all of the title the grantor has" (*Safier v Kassler*, 124 AD2d 944, 945, 508 NYS2d 353 [1986], citing *Tymon v Linoki*, 16 NY2d 293, 266 NYS2d 357 [1965]).

The failure to specify a closing date is also not fatal. The date of closing of a real estate transaction is not generally considered an essential term to establish an enforceable contract (*Safier v*

*Kassler, supra*). When time is not of the essence, the closing date is considered flexible, and the parties are given a reasonable time within which to close title (*2M Rlty. Corp. v Boehm*, 204 AD2d 620, 612 NYS2d 207 [1994]; *Dahm v Miele*, 136 AD2d 586, 523 NYS2d 851 [1988]; *Safier v Kassler, supra*).

Therefore, the defendants are not entitled to summary judgment dismissing the complaint on the grounds that there was no meeting of the minds between the parties regarding material elements or that the Agreement is unenforceable under the Statute of Frauds. The Court will now address the defendants' arguments that the Purchase Option and the Right of First Refusal violate the rule against perpetuities and the rule against unreasonable restraints on alienation of property.

"An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date" (*Kaplan v Lippman, supra* at 324-325, quoting *Leonard v Ickovic*, 79 AD2d 603, 433 NYS2d 299 [1980], *aff'd* 55 NY2d 727, 447 NYS2d 153 [1981]). The holder of an option has an unconditional and irrevocable right to exercise the option to purchase at the holder's sole discretion, whether the owner is willing to part with ownership or not (*Metropolitan Transp. Auth. v Bruken Rlty. Corp.*, 67 NY2d 156, 163, 501 NYS2d 306 [1986]). A right of first refusal is a contractual obligation to make an offer to the holder once the owner decides to sell to a third party (*Jeremy's Ale House Also, Inc. v Joselyn Luchnick Irrevocable Trust*, 22 AD2d 6, 798 NYS2d 414 [2005]). Unlike a typical option to purchase, a right of first refusal, also known as a preemptive right, does not, at the time given, include an operative offer but involves a future offer to be made if and when the owner decides to sell to a third party at an agreed upon price (*Morrison v Piper*, 77 NY2d 165, 565 NYS2d 444 [1990]; *Metropolitan Transp. Auth. v Bruken Rlty. Corp., supra*; *Jeremy's Ale House Also, Inc. v Joselyn Luchnick Irrevocable Trust, supra*). A right of first refusal "effectively ripens into an option upon the happening of a contingency: the decision of the obligated party to accept a third-party's offer for the property" (*Morrison v Piper, supra* at 170). Notwithstanding these distinctions, the holder of a right of first refusal and the holder of any option, have an interest in land which is to vest, if at all, sometime in the future (*Morrison v Piper, supra*). Hence, the rule against perpetuities and the common-law rule concerning restraints on alienation of property are applicable to options in real estate transactions and in certain contexts to a right of first refusal (*Wildenstein & Co., Inc. v Wallis*, 79 NY2d 641, 584 NYS2d 753 [1992]; *Morrison v Piper, supra*; *Metropolitan Transp. Auth. v Bruken Rlty. Corp., supra*; see, *Buffalo Seminary v McCarthy*, 58 NY2d 867, 460 NYS2d 528, *aff'd for reasons stated in parts I and II of opn below* [*Hancock, Jr., J.*] 86 AD2d 435, 451 NYS2d 457).

In general, the rule against perpetuities limits the power of an owner to create future interests in property and is measured by a statutory period of alienation or vesting of the "lives in being at the creation of the estate plus 21 years" (*Metropolitan Transp. Auth. v Bruken Rlty. Corp., supra* at 162; see, McKinney's Cons. Laws of N.Y., Book 17B, EPTL § 9-1.1). The common-law rule of unreasonable restraints on alienation prohibits an owner from creating provisions which block the transferability of property; the duration of the restraint is judged by its reasonableness, duration, price and purpose (*Metropolitan Transp. Auth. v Bruken Rlty. Corp., supra*). Notably, the common-law rule "does not condemn restrictions on transfer, i.e., provisions which postpone sale during the option period; it condemns only the 'effective prohibition against transferability itself'" (*id.*, at 167, quoting *Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 542, 161 NYS2d 418 [1957]).

In the case at bar, the subject Purchase Option and the right of first refusal do not violate the rule against perpetuities. By its terms, the Purchase Option must be exercised by Sally Omar within five years and prior to the sale of the Mattituck Property. Thus, the term of the Purchase Option does not extend beyond the statutory period set forth in EPTL 9-1.1, i.e., lives in being plus 21 years (*see, Witt v Disque*, 79 AD2d 419, 436 NYS2d 890 [1981]). The Court also concludes that first refusal right created in the Agreement does not violate the rule against remote vesting and is not an unreasonable restraint on alienation. The language in the Agreement creating the preemptive right is contained in paragraph 4, which reads, in pertinent part:

MAREK ROZEN and CHRISTINE ROZEN agree that notwithstanding the Quitclaim Deed in lieu of a foreclosure, when the said premises is put up for sale, that SALLY OMAR shall be afforded a first right of refusal to purchase said property at the price offered by the prospective purchaser in writing. MAREK ROZEN and CHRISTINE ROZEN shall give SALLY OMAR written notice of any such offer together with a copy of a written contract of sale executed by the prospective purchaser and MAREK ROZEN and CHRISTINE ROZEN, subject to SALLY OMAR's right of first refusal. SALLY OMAR shall have Fifteen (15) business days from receipt of such notice and copy of the executed contract of sale to elect whether or not to exercise such right of first refusal and to sign a contract of sale for the same price.

This language clearly limits the exercise of the option to Sally Omar and the defendants with the "measuring lives" of the parties themselves and, thus, does not violate the rule against perpetuities (*see, Morrison v Piper, supra; Reynolds v Gagen*, 292 AD2d 310, 739 NYS2d 704 [2002]). Contrary to the defendants' argument that the language contained later in the Agreement in paragraph 7, i.e., "[t]his Agreement shall bind the respective heirs, executors and administrators of the undersigned" does not enlarge the preemptive right created in paragraph 4. The right to exercise the first refusal option is explicitly limited so as to be personal to Sally Omar (*see, Morrison v Piper, supra; see also, Reynolds v Gagen, supra*). In the event Sally Omar died before she exercised her first refusal option, it would die with her; in the event the defendants died before Sally Omar, the defendants' heirs, executors and administrators would have to honor the defendants' commitment in the event Sally Omar sought to exercise her option (*Reynolds v Gagen, supra*). This construction of the Agreement, contrary to the construction urged by the defendants, comports with the statutory presumption in EPTL 9-1.3(b).

Pursuant to EPTL 9-1.3(b) and the common-law rule of construction which it codifies, it is presumed that parties who make grants of real property interests intend their grants to be valid (*Morrison v Piper, supra; Reynolds v Gagen, supra*). Therefore, courts should, if at all possible, avoid constructions which frustrate a party's intended purpose of creating an effective estate (*Morrison v Piper, supra*). Stated another way, the rule of construction embodies the proposition that if no "contrary intention appears" in the grant, it is presumed that the creator intended the grant to be valid (*id.*).

The Court now addresses the validity of Sally Omar's rights under the common-law rule against unreasonable restraints on alienation. The reasonableness of the Right of First Refusal and the Purchase Option depend upon their duration, price and purpose (*Wildenstein & Co., Inc. v Wallis*, 79 NY2d 641, 584 NYS2d 753 [1992]). The duration of the first refusal option is measured in terms of the fifteen day period during which Sally Omar could exercise her preemptive right after receiving written notice from

the defendants of the purchase price; the Purchase Option, by its terms, must be exercised within five years and prior to the sale of the Mattituck Property. Such terms of duration are reasonable (*see, id.*; *see also, e.g., Metropolitan Transp. Auth. v Bruken Rlty. Corp., supra* [finding reasonable a ninety day period for exercising preemptive right to purchase land]).

Additionally, preemptive rights, such as Sally Omar's Right of First Refusal, which are conditioned upon payment equal to a third-party's offer, as well as Purchase Options determined by fair market value, are considered reasonable (*Wildenstein & Co., Inc. v Wallis, supra; Metropolitan Transp. Auth. v Bruken Rlty. Corp., supra; see also, Witt v Disque, supra* citing Restatement of Property §§ 406, 413). Finally, the Court finds that the purpose for entering the Agreement containing the preemptive right and Purchase Option was reasonable, as the agreement had been negotiated in lieu of the commencement of a foreclosure action and by businesspeople represented by counsel. Consequently, given the reasonableness of the price, duration and purpose of Sally Omar's Right of First Refusal and Purchase Option, the Agreement is valid under the common-law rule prohibiting unreasonable restrictions on the alienation of property.

Accordingly, the motion by the defendants must be denied.

Dated: June 26, 2007

  
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J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION