

**H & A Johnson, LLC v LKG Assoc. LLC**

2008 NY Slip Op 31355(U)

April 28, 2008

Supreme Court, Suffolk County

Docket Number: 0020016/2006

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,  
Justice

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 H & A JOHNSON, LLC,

Plaintiff,

- against -

LKG ASSOCIATES, LLC,

Defendant.

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CASE DISPOSED: YES  
MOTION R/D: 8/17/07  
SUBMISSION DATE: 2/29/08  
MOTION SEQUENCE No.: 002 MG

ATTORNEY FOR PLAINTIFF  
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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated June 27, 2007; Affidavit dated June 27, 2007; Exhibits A through G annexed thereto; Affidavit in Opposition dated August 6, 2007; Affirmation in Opposition dated August 6, 2007; Reply Affidavit dated August 23, 2007; Exhibit A annexed thereto; Defendant's Memorandum of Law; Plaintiffs' Memorandum of Law; Defendant's Reply Memorandum of Law; and upon due deliberation; it is

**ORDERED**, that the motion by defendant, for an Order directing that judgment be entered (1) declaring that an option to purchase is enforceable; (2) directing plaintiff to execute the tendered contract of sale; (3) dismissing the plaintiff's sixth cause of action for an award of attorney's fees; (4) directing that a hearing be held to determine the amount of attorney's fees that should be awarded to defendant for the successful defense of the action and prosecution of the counterclaims; is granted as follows:

The plaintiff (hereinafter "Johnson") is the owner of a two acre parcel of commercial real property located in Commack, New York. The defendant (hereinafter "LKG") holds a long term lease to the property which contains an option to purchase. The parties originally entered into a lease in 1966 for a term which was to expire in 2029 and was designed to permit the defendants to redevelop the property. At or about the time that LKG sought to begin the redevelopment of the property in the mid-1980's, the plaintiff attempted to terminate the original lease. In 1990 the Appellate Division issued a decision which denied the plaintiff's attempt to terminate the original lease. LKG sought to purchase the property prior to commencing construction. Plaintiff however did not want to sell at that point since they believed a sale would trigger substantial income taxes and eliminate the income stream that the property provided to them. Accordingly, the parties

agreed to renegotiate the lease in 1993 to provide plaintiff with a substantially higher rent. The new lease extended the original term by 13 years until 2042, and gave LKG an option to purchase the property. Although the option could be exercised at any time, the purchase could not close until the end of the new lease's term in 2042. LKG proceeded to redevelop the property and constructed a 40,000 square foot retail building that was rented to Staples and Barnes & Noble. When that lease lapsed, LKG was able to lease the building to Walgreens.

Article 27 of the Lease provides that defendant shall have an option to purchase the premises subject to the following terms and conditions:

(A) The Option shall be exercised by Tenant only by the execution and delivery by Tenant to Landlord at least twelve (12) months before the Expiration Date of three copies of the Contract of Sale in the form annexed hereto as Exhibit B (the "Contract") signed by Tenant (provided that should Tenant fail to so exercise the Option by such date, its time shall be extended to fifteen (15) days after Landlord shall have given notice to it of such failure.

(B) The Purchase Price for the Demised Premises to be filled in the Contract shall be an amount equal to ten times the Net Rental payable hereunder for the last year of the term.

( C) Within ten (10) business days after receipt of the copies of the Contract so executed by Tenant, Landlord shall execute the copies of the Contract and deliver one fully executed copy to Tenant.

Thereafter the instant litigation was commenced with plaintiff seeking to invalidate the renegotiated 1993 lease. The plaintiff stipulated to a discontinuance with prejudice of three of the original causes of action. Two of the three remaining causes of action seek to invalidate the option to purchase on the theories that said option is (1) barred by the Rule Against Perpetuities, and (2) violates the rule against unreasonable restraints on alienation. The third cause of action seeks an award of attorney's fees. The defendant has counterclaimed for an award of attorneys' fees and for an Order directing the plaintiff to execute and return the contract of sale previously tendered to it.

Ordinarily, the application of the Rule Against Perpetuities to a purchase option would mean that under EPTL §9-1.1(b), in order to be valid and enforceable, the option would have to be exercisable, 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." The plaintiff alleges that because the fee interest available under the subject purchase option need not vest within 21 years after the option was created in 1993, the option violates the Rule Against Perpetuities and is therefore unenforceable.

While a bare option to purchase contained in a stand alone document is unenforceable if title might not vest until after the perpetuities period had expired, the Court of Appeals has distinguished a "bare option to purchase" from an option to purchase contained in a lease. The latter type of option is not subject to the Rule Against Perpetuities, even if it vests beyond the perpetuities period, since an option to purchase contained in a lease encourages, not discourages, investments into real property. Under the instant circumstances, it is undisputed that LKG

significantly developed and improved the subject property.

“Such options - known as ‘options attendant or appurtenant’ to leases- encourage the possessory holder to invest in maintaining and developing the property by guaranteeing the option holder the ultimate benefit of any such investment. Options appurtenant thus further the policy objectives underlying the rule against remote vesting and are not contemplated by EPTL 9-1.1(b) [the Rule Against Perpetuities].” Symphony Space v. Pergola Properties, Inc., 88 N.Y.2d 466.

The plaintiff maintains that the Rule Against Perpetuities would invalidate the purchase option if the option continued beyond the expiration of the new lease. However, as has been demonstrated, the purchase option will not survive expiration of the 1993 lease unless it has been exercised. As long as a purchase option contained within a lease has been exercised prior to the expiration of that lease, as is the case here, the option is exempt from the Rule Against Perpetuities.

Although the plaintiff maintains that the subject option “constitutes a prohibited restraint on alienation which is violative of public policy, the Complaint does not allege that the option will in any way impede the Johnson family’s ability to sell the property by discouraging potential purchasers. The gravamen of the plaintiff’s complaint seems to be instead that the rental amount they agreed to is too low in the current market and will cause them an “unreasonable financial hardship.” (Complaint ¶¶ 16,18). A review of the subject agreement granting defendant an option to purchase the leased premises, is not, on its face, invalid as an unreasonable restraint on alienation. (See, In re Sipmeier, 61 A.D.2d 798).

The Sixth Cause of Action set forth in the Complaint seeks an award of attorneys’ fees and is based upon §26.07 of the subject lease, which provides:

“In the event any action is instituted by either party hereto against the other, the party which prevails shall be entitled to recover from the other party the reasonable counsel fees and disbursements incurred by it in such proceeding.”

Inasmuch as the plaintiff has either withdrawn or been unsuccessful in its first five causes of action as set forth in the Complaint, the Sixth Cause of Action for attorneys fees must also be dismissed. On the other hand, since the defendant has been successful on the instant motion dismissing the Complaint, it shall be entitled to reasonable counsel fees and disbursements incurred in the instant proceeding, pursuant to §26.07 of the lease.

Finally, as set forth above, Article 27 of the 1993 lease permits LKG to exercise the option at any time prior to twelve (12) months prior to the expiration date on the lease in 2042. Defendants have already chosen to exercise the option pursuant to the terms of the lease and have forwarded an executed copy to the plaintiff who has refused to sign the contract, commencing the instant litigation instead. Inasmuch as the option has been determined to be valid and enforceable, the plaintiff is required to enter into a contract of sale for the subject premises in accordance with the terms and conditions as set forth in the lease between the parties.

**ORDERED**, that the option to purchase contained within the 1993 lease agreement between the parties is hereby declared and adjudged to be valid and enforceable; and it is further

**ORDERED**, that the Sixth Cause of Action asserted in the plaintiff's Complaint is hereby dismissed; and it is further

**ORDERED**, that the parties are directed to appear for a hearing on the issue of attorneys' fees due defendant from the plaintiff pursuant to §26.07 of the lease; said hearing to be held at the Courthouse, One Court Street, Room A201, Riverhead, New York on July 28, 2008 at 9:30 a.m.

The foregoing constitutes the Order of this Court.

Dated: April 28, 2008

  
HON. DENISE F. MOLIA J.S.C.