MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

PERRY FINKELMAN,

Plaintiff,

INDEX NO.: 013159/2006

-against-

SBRE, LLC, CHECKMATE HOLDINGS, LLC and MAKSIN LEGAL GROUP, PLLC, as Escrow Agent,

DECISION AFTER TRIAL

Defendants.

This is an action seeking a declaratory judgment and the return of a $250,000 down payment on a contract to purchase air rights from defendant SBRE, LLC. On November 10, 2005 plaintiff, Perry Finkelman, and defendant, Checkmate Holdings, LLC, as purchasers, entered into a contract to purchase Lot 110 and the Development Rights (air rights) of an adjoining lot, Lot 89, located in Block 7280 in Brooklyn, New York, from Sea Breeze Development, LLC for $13,800,000. Sea Breeze's property included vacant land located at 213-299 Sea Breeze Avenue, Brooklyn, New York (Lot 110 in Block 7280) and Residential Development Rights appurtenant to property located at 301 Sea Breeze Avenue, Brooklyn, New York (Lot 89 in Block 7280) ("Sea Breeze Property"). Sea Breeze had previously purchased these Development Rights on August 17, 2003 from the owner of Lot 89, Temple Beth Abraham ("Temple ").

Also, on November 10, 2005, Finkelman and Checkmate entered into another "Purchase Agreement" this time with SBRE, LLC ("SBRE"), as seller, to purchase certain residential Development Rights for a price of $4,200,000.00 (the "Development Rights Purchase Agreement").

The aforesaid Development Rights are appurtenant to property located at 321 Sea Breeze Avenue, Brooklyn, New York, which is Lot 92, in Block 7280. The lot is owned by Sea Breeze Synagogue (Gemilath Chesed-Anshe Emmeth) (the "Synagogue"). The Synagogue and the Temple are two distinct entities located on two separate lots within Block 7280 and should not be confused with each other. The tracts of land comprising Sea Breeze's Property (Lot 110), the Temple's Property (Lot 89) and the Synagogue's Property (Lot 92) are contiguous and share common boundaries. The contracts are nearly identical in nature and the contract for the air rights of Lot 92 called for a simultaneous closing with the closing on Lots 110 and 89.

The Development Rights Purchase Agreement was amended on November 28, 2005, by a "first amendment to the purchase agreement". (See Exhibit 8). The only amendment was to paragraph numbered three of the Development Rights purchase agreement increasing the approximate square foot number of Residential Development Rights being purchased from 29,000 ft.^{2} to 30,500 ft.^{2}.

In pertinent part, the Purchase Agreement, for Lot 110 and the Development Rights on Lot 89, states as follows:

Exhibit 1, paragraph 4.8:

> 4.8 The Closing shall take place on or about ninety (90) days after the Date of This Agreement (The "Closing Date"). By delivering to **Steven Maksin, Esq.**, of **Maksin Legal Group, PLLC** (the Escrow Holder) the sum of **One Hundred Thousand Dollars ($100,000.00)** (additional Earnest Money to be applied to the Purchase Price) to be deposited in an escrow account, known as the **IOLA Maksin Legal Group, PLLC** Escrow Account, held at the **JPMorgan Chase Bank, NA**, located at **722 Brighton Beach Avenue, Brooklyn, New York 11235**, Purchaser shall be allow to extend the Closing Date by an additional sixty (60) days, not to exceed one Hundred Fifty (150) days from the date of this Agreement. However, in no event shall Purchaser be required to remit such additional Earnest Money if Seller is unable to close title on the Closing Date.

A similar paragraph, found in the Development Rights Purchase Agreement for the air rights on Lot 92 reads as follows:

Exhibit 7, paragraph 4.7:

> 4.7 Closing shall take place at the office of **Steven Maksin, Esq.,** at 12:00 p.m., located at:

Maksin Legal Group, PLLC
350 Fifth Avenue, Suite 6401
New York, New York 10118

the Closing shall take place on or about **ninety (90) days from the date this Agreement. The Closing shall take place simultaneously, but in no event prior to closing of title on the Purchaser Parcel (Borough Brooklyn, Block 7280, Lot 110 and Residential Development Rights on Lot 89).** By delivering to **Steve Maksin, Esq.,** of **Maksin Legal Group, PLLC** (the Escrow Holder) the sum of **Twenty Five Thousand Dollars ($25,000.00)** (as additional Earnest Money to be applied towards the Purchase Price) to be deposited in an escrow account, known as the **IOLA Maksin Legal Group, PLLC** Escrow Account, held at the **JPMorgan Chase Bank, NA**, located at **722 Brighton Beach Avenue, Brooklyn, New York 11235**, Purchaser shall be allowed to extend the Closing Date by additional sixty (60) days, not to exceed one hundred fifty (150) days from the date of this Agreement. However, **Seller shall extend, without any additional deposit required from Purchaser, the Closing Date until such time when permission to sell the aforementioned Residential Development Rights has been received from the office of the New York State Attorney General's office.** [Emphasis supplied for last sentence.]

In accordance with the Development Rights Purchase Agreement, the plaintiff deposited $250,000.00 as a down payment (the "Earnest Money") with defendant, Maksin Legal Group, PLLC, (Maksin), as Escrow Agent, who deposited the funds in an IOLA account. See Exhibit "7" at ¶ 2.1.

In order for SBRE to sell the air rights on Lot 92, to plaintiff, it had to purchase them from Sea Breeze Synagogue. In order for Sea Breeze Synagogue to sell said air rights, it needed to get approval of the Attorney General and a Supreme Court Justice.

Not only did SBRE not own the Development Rights, but also, in fact, it was not in contract to purchase them. Sea Breeze Development - not SBRE - was the contract vendee in a contract to purchase these Development Rights. Sea Breeze Development, LLC and SBRE, LLC are owned or controlled by the same person, Igor Fleyshmakher. Fleyshmakher was "a" member of Sea Breeze Development and the sole member of SBRE. On or about July 6, 2005, the Synagogue, as owner, and Sea Breeze Development, LLC, as developer, entered into a "Zoning Lot Merger Purchase and Sale Agreement" for Sea Breeze Development to acquire the Synagogue's Development Rights for the purchase price of $500,000.00 (the "Underlying

Agreement") (Exhibit 9). This document eventually became Exhibit D to the Purchase Agreement between plaintiff and SBRE, LLC (November 10, 2005). At some point in time prior to or after November 10, 2005, Sea Breeze Development, LLC transferred its interest in the Development Rights of Lot 92 to SBRE, LLC. However, it was Sea Breeze Development that purchased the Synagogue's air rights on July 20, 2006. (In response to an objection of the Attorney General's office the purchase price for the air rights on Lot 92, was eventually increased to $550,000.) SBRE sought to reconvey these Development Rights for $4,200,000.00 to Finkelman and Checkmate, pursuant to the purchase agreement executed on November 10, 2005 (Exhibit 7).

There were conditions precedent to closing both the Development Rights Purchase Agreement and the Underlying Agreement (see Exhibit "7" at ¶1.1): (i) Court approval of the sale was required by the Kings County Supreme Court pursuant to §12(1) of the Religious Corporation Law and §511 of the Not For Profit Corporation Law (the "Court Approval"); (ii) permission from the Attorney General was required ("Attorney General Approval"); (iii) a Memorandum of Contract and Notice of Pendency (pending against the Synagogue) were required to be removed of record and (iv) a pending action was required to be dismissed.[1]

The umbrella document that controls these land and Development Rights transactions (from July, 2005) is the aforementioned "Zoning Lot Merger Purchase & Sale Agreement" (between Sea Breeze Synagogue (Gemilath Chesed - Ansho Emeth) and Sea Breeze Development, LLC (predecessor to defendant SBRE, LLC) and Temple Beth Abraham. (Exhibit 7). Note: This does not include plaintiff who was buying from the developer. (The contract between our plaintiff and Sea Breeze Development, LLC was not executed until November 10, 2005).

Paragraph 1 B. of Exhibit 9, Zoning Lot Merger Purchase & Sale Agreement, reads:

> B. Owner agrees to sell and transfer to Developer, and Developer agrees to purchase from Owner, the Available Development Rights upon the terms and conditions hereinafter set forth. The parties understand and agree that the creation of the Single Zoning Lot and the Transfer of the Available Development Rights

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[1] C&D Development, Inc. v. Sea Breeze Jewish Center, Index No. 7065/2003 (Kings County). C&D sought specific performance to enforce contract to buy Synagogue's air rights, entered into September 30, 2002.

from Owner's Land to Developer's Land will (i) prevent Owner from constructing any floor area on Owner's Property subject to the terms and conditions of this Agreement and of the Master ZLDA (as hereinafter defined) and (ii) enable Developer to incorporate the Available Development Rights into the New Building.

Paragraph 3 B. (viii) of Exhibit 9, Zoning Lot Merger Purchase & Sale Agreement, reads:

3. Closing Date and Deliveries.

B. At the closing, Owner shall deliver to Developer, in duplicate original, each of the following documents:

(viii) such other documents or instruments, if any, duly executed and acknowledged by Owner consistent with terms of this Agreement, as shall be necessary to effect a merger into the Single Zoning Lot of Owner's Land; Temple's Land, Developer's Land and any Additional Parcels.

In the above paragraph the owner is the Synagogue and the developer is Sea Breeze Development, LLC. Sea Breeze Synagogue (the Synagogue) is the owner of land and buildings at 321 Sea Breeze Avenue, Brooklyn, New York (owner's land). Block 7280, Lot 92. Developer's land is the land that was sold by Sea Breeze Development to plaintiff on June 9, 2006. The Temple is owner of land and buildings at 301 Sea Breeze Avenue, Brooklyn, New York, Block 7280, Lot 89. The air rights appurtenant to Lot 89 were sold to the developer Sea Breeze Development, LLC and reconveyed to plaintiff on June 9, 2006.

Exhibit G to the above Agreement is known as the "Master Zoning Lot Development Agreement." The aforementioned developer intends to build on its property (Lot 110). In order for the developer to build on its property, it was necessary to construct a "Single Zoning Lot" as it is defined in Section 12-10 of the Zoning Resolution of the City of New York, effective as of December 15, 1961, as amended. It is referred to as the "Zoning Resolution" in the documents in this matter.

Exhibit G, paragraph E recites the requirements of each of the parcels. More specifically, that the tracts of land of owner (Sea Breeze Synagogue), the developer (Sea Breeze Development, LLC), and the Temple "are contiguous for a distance of more than (10) ten linear

feet on their common boundary."

Schedule C to Exhibit G (as found in plaintiff's Exhibit 9) is a "Declaration of Zoning Lot Restrictions." The parties in interest, as defined in Section 12-10 of the aforementioned "Zoning Resolution of the City of New York" (effective December 15, 1961) are/were the Synagogue, the Temple and Sea Breeze Development, LLC. The declaration stated that Lots 110, 89 and 92 were to be treated as one zoning lot for the purposes of and in accordance with the provisions of the Zoning Resolution.

The Declaration of Zoning Lot Restrictions (Schedule C to Exhibit G to Exhibit 9) further stated:

> This Declaration is a covenant running with the lands covered by this Declaration and shall bind and inure to the benefit of the heirs, executors, administrators, successors and assigns of the declarants herein and every party now or hereafter acquiring any right, title or interest in said lands or in any part thereof.

Despite being not yet able to obtain the Attorney General's approval (needed to get court approval), Steven Maksin, attorney for seller, Sea Breeze Development, and seller, SBRE, sent a letter dated March 21, 2006 to the buyers requesting a closing pursuant to contract, paragraph 4.8, (150 days maximum from date of the agreement) (Exhibit 21). Maksin quoted paragraph 4.8 in his letter and then wrote:

> Again, the contract was executed on 11/10/2005; the 150 day time period expires on 4/11/2006, which should be the date your client to acquire [sic] the property. Please inform our offices as soon as possible about your clients' readiness to acquire the aforementioned property.

On April 11th, Steven Maksin sent a letter to David Cohen, counsel for plaintiff, Finkelman, and Melody Chang, counsel for co-purchaser Checkmate Holdings, LLC (Exhibit 22). It restated the fact that Igor Fleyshmakher, managing member of Sea Breeze Development, LLC, was ready and able to close the Sea Breeze property part of the deal for "quite some time." He re-quoted paragraph 4.8 and then wrote:

> Today is April 11, 2006, and it has been more than 90 days since the contract was mutually executed and you have not elected to extend the closing date by additional 60 days as described above. Yet, your clients have not purchased the property. Accordingly, this letter is written to serve as a formal the **"Time of the**

Essence" notification to you and your clients. We insist that you close on the Property within the next 20 days. If not, we will have no choice but to issue a formal default letter.

Pursuant to this letter the parties entered into a First Amendment to Purchase Agreement on May 10, 2006, (Exhibit R), of what has been called the "underlying agreement", the Land Purchase Agreement for the vacant land located at Lot 110 and the Development Rights of Lot 89 (Exhibit 1). The key element in the amended agreement being a closing date of June 12, 2006 for Lot 110 and the air rights of Lot 89, both located in the same block (7280). No amendment was made to the contract selling the air rights (Exhibit 7) to Lot 92 by Finkelman. The reason for the date change is given as "time being of the essence." If the purchaser did not close on that new date (June 12th) he would forfeit the earnest money previously posted and said forfeiture would be deemed liquidated damages.

During the month of May, 2006, Maksin sought a second amendment to the Development Rights Purchase Agreement (SBRE as seller and Finkelman and Checkmate as buyers). Said amendment was prepared by Ms. Chang counsel for Checkmate Holdings (Exhibit U). This second amendment to the air rights contract moved the closing date for said purchase agreement to August 13, 2006. This document was executed by a representative of Checkmate Holdings and has a signature line for the plaintiff, Perry Finkelman. Mr. Finkelman did not sign this Second Amendment that moved the closing to August 13, 2006.

On June 9, 2006 the closing took place for the underlying property, Lot 110 and the air rights to Lot 89. At that time Mr. Finkelman, both in writing (Exhibit 11) and orally, terminated the Development Rights Purchase Agreement with SBRE, and requested the return of his $250,000 contract deposit ("earnest money"). Mr. Maksin stated that he could not give them a check for that amount at that time because he did not have his escrow account checkbook with him, but would be forwarding him a check within a short period of time. No refund was ever made to plaintiff of the "earnest money". At or shortly after the closing, three of four members of Sea Breeze Development assigned their interest to the fourth member, Igor Fleyshmakher. Thus, only Fleyshmakher stood to gain by the sale of the air rights on Lot 92.

In a decision dated August 23, 2007, Justice Demarest (Supreme Court, Kings County)

wrote:

> By court order dated July 19, 2006, Justice Lawrence Knipel granted SBJC's [Synagogue's] motion, in the approval proceeding, approving the sale of SBJC's air rights in Lot 92 to SBD at the purchase price of $550,000 pursuant to the terms of the July 6, 2005 agreement and an amended agreement dated April 28, 2006. In so ruling, Justice Knipel found that the corporate purposes of SBJC [Synagogue] and the interests of its constituents would be served by the proposed transaction, and that the sale had been duly authoritzed by the Board of Trustees and membership of SBJC [Synagogue]. The Attorney General appeared in the approval proceeding and did not object to the granting of judicial approval.
>
> On July 20, 2006, the closing of the sale to SBD [Sea Breeze Development] took place. C&D attended and sought payment of the $400,000 funds which it believed were being held in escrow under the May 24, 2006 settlement agreement. SBD's attorney, Saadia M. Shapiro, Esq., refused to pay C&D any money and disavowed the existence of any settlement agreement. Consequently, on July 24, 2006, C&D brought this action against defendants.

(C&D Development, Inc. v. Sea Breeze Development, LLC, from decision of Justice Demarest, Supreme Court, Kings County, August 23, 2007.)

RELIEF REQUESTED

Plaintiff now seeks a Declaratory Judgment to determine (a) the validity of the Development Rights Purchase Agreement, (b) the right and liabilities of the parties thereunder, and (c) a direction to Maksin as Escrow Agent to pay the Earnest Money and all accrued interest to Finkelman and other relief as set forth in the Wherefore Clause. Plaintiff terminated the contract, according to the complaint, pursuant to paragraph 4.7 of the contract.

Defendant argues numerous defenses, but essentially contends that plaintiff breached the Development Rights Purchase Agreement of Lot 92 by failing to close (after June 9, 2006); that defendants are entitled to keep the $250,000 down payment; and that pursuant to paragraph 4.7, Fleyshmakher could adjourn the closing as he pleased until the Attorney General approved the sale of the air rights by the Synagogue. Factors for the court to consider are: Was seller ready, willing and able to convey the Development Rights of Lot 92 on June 9, 2006? Did the defendant have the right to delay the closing at its pleasure pursuant to paragraph 4.7 of the Development Rights Agreement (Exhibit 7); does it trump the "simultaneous closing" clause;

and, even if it did, was that relevant if he no longer could convey title to the Development Rights of Lot 92 after June 9, 2006?

Defendant argues that when Checkmate signed the Second Amendment to the air rights contract (appurtenant to Lot 92) fixing the closing date for August 13, 2006 (Exhibit U) it signed for all purchasers, and, thus, Finkelman waived the simultaneous closing requirement of paragraph 4.7. The contract uses the term "purchaser" not "purchasers" to describe Checkmate and Perry Finkelman collectively as "purchaser" and allows "any authorized officer of purchaser" to execute any amendment, modification or cancellation to the air rights contract (Exhibit B) ("collectively, The Purchaser").

Defendant, therefore, argues that when Checkmate signed, it signed for Finkelman as well. Thus, he argues, the Development Rights closing was adjourned on consent of plaintiff to August 13, 2006 (waiving the "simultaneous closing" clause). Defendant also points out that Ms. Chang, Checkmate's attorney, drafted the Second Amendment, and that it was circulated by her to all sides including one David Cohen, then the attorney for Mr. Finkelman. Though there is no indication Mr. Cohen consented to the Amendment and clearly Mr. Finkelman did not sign it (space for his signature is blank), defense counsel argues that this supports his waiver theory. Defendant contends that it is only logical that Checkmate would not act against Finkelman's wishes or against the will or consent of David Cohen.

The defendant further argues that it was at this time in May 2006 that plaintiff took affirmative steps which reflected he did not intend to close on the air rights contract simultaneously with the fee simple contract on the land.

Plaintiff advised the financing Bank that there would not be a closing on the air rights contract and he instructed the bank to reappraise the property (reducing the project's square footage by what would be added to the building if the Lot 92 air rights were included). Furthermore, plaintiff caused to be made an amendment to the project, the Private Placement Memorandum, (the "PPM"), advising the investors that plaintiff did not anticipate to close on the air rights contract simultaneously with the fee simple contract. Defendant, therefore, argues that these actions are contrary to plaintiff's expressed contentions, and, therefore, plaintiff was not ready, willing and able to close on the air rights contract on June 9th.

These two arguments must be examined. First, Checkmate does not and did not speak for Finkelman. If Ms. Chang in her role as Checkmate's lawyer believed Checkmate was signing the Amendment for Finkelman, there was no need to place Finkelman's name separately on the document, a document she allegedly drafted. If the language of the agreement could be interpreted so that one purchaser could act for both to amend the agreement, once again there would be no need for a signature of Finkelman on the document, and the court does not so interpret the contract's language.

As to the actions taken by Finkelman, as stated above, these actions were a direct consequence of the fact that Finkelman knew that the defendant could not close on June 9, 2006 on the air rights contract. Why? Because (a) the defendant (SBRE) did not yet own the air rights, (b) it could not buy them without permission of a Supreme Court Justice and the Attorney General of the State of New York, and (c) there was no indication this could happen by June 12, 2006, the dates set for the closing on the underlying land contract as demanded by Maksin (counsel for Sea Breeze Development and SBRE, LLC); a date that was to be simultaneous with the closing on the air rights agreement, pursuant to the air rights agreement on Lot 92 (Exhibit 7).

Plaintiff advised his investors that the project would have to be reduced in height if he could not get the air rights to the adjoining property. In fact, he offered to reimburse investors' money, due to the change in the project (as noted he amended the private placement memorandum). Thus, defendant argues the foregoing as further support of his claim that plaintiff was not ready, willing and able to purchase the air rights on June 9, 2006, but intended to proceed on a future date, or that he never intended to close on the air rights at all. The defendant notes, that at the time of the trial, the plaintiff had only proceeded to pour the foundation of the project, specifically 60% of the foundation, which could support a building of the square footage including the air rights coming from Lot 92.

The defense argument that Finkelman was not ready to close is circuitous. He was not ready to close because he knew the seller-defendant could not close. All evidence indicates he would have been ready to close if the seller would have been ready to sell. The court rejects defendant's argument. Furthermore, what the current foundation of the project could carry, and what the intent of Finkelman is in futuro, are not relevant to the ability of the defendant seller

SBRE, LLC to close on June 9, 2006.

The court ruled at trial and reaffirms that ruling now that the Second Amendment unsigned by Finkelman adjourning the closing of the Development Rights agreement to August 13, 2006, is not binding upon him. Therefore, Finkelman never waived the simultaneous closing.

Where does this leave us? Let's review. When Sea Breeze Development, LLC closed on Lot 110 and the Development Rights of Lot 89 on June 9, 2006, selling them to Finkelman and Checkmate, it no longer owned property contiguous to Lot 92. Therefore, it could no longer acquire the Development Rights of Lot 92 because they were not adjoining or contiguous to any tract of land it owned (yet they did close on the air rights on July 20, 2006). In that Sea Breeze Development or the other entity, SBRE, LLC, could not purchase the Development Rights of Lot 92, owned by Sea Breeze Synagogue, it could not sell them to plaintiff or his group. In other words, a condition precedent could no longer be met.

Once the June 9, 2006 closing took place, Sea Breeze Synagogue could not sell its Development Rights to Sea Breeze Development, LLC or SBRE, LLC in that they were no longer owners of land contiguous to Sea Breeze Synagogue's Lot 92.

The defendant argues that this is invalid reasoning. He contends that it is a "well settled and salutary rule that a party cannot insist upon a condition precedent, when its nonperformance has been caused by himself." A.H.A. Gen. Constr. v. NYCHA, 92 N.Y.2d 20, 31 (1998). The very same fact that plaintiff became the owner of the adjacent lot and now uses his ownership as the means to prevent defendant to close shows that plaintiff "frustrates or prevents the occurrence f the [closing and therefore] cannot rely on the [defendants] failure." Koolaire Serv. & Installation Corp., v. Board of Educ., 28 N.Y.2d 101,106 (1971). This reasoning is truly unbelievable. Defendant's argument might have had some weight with the court if the actions of the plaintiff had brought about the closing on June 9, 2006. It is clear to the court that that is incorrect. It was the acts of the defendant's counsel, Maksin, (Exhibit 21, May 10, 2006), that made the closing on the underlying land contract "Time is of the essence" which precipitated the amendment of the Purchase Agreement on the land. Thus, it was the acts of the defendant itself that deprived the defendant of ownership of land with the necessary nexus to the adjoining lots/property, specifically Lot 92, that the court finds was needed to accomplish the sale of the

Synagogue's air rights to SBRE.

The failure to simultaneously close created an incurable title defect and an incurable contractural default. In the opinion of the court, under the Zoning Resolution, the Development Rights appurtenant to Lot 92 could no longer be transferred to Sea Breeze Development or SBRE once Sea Breeze Development no longer owned property contiguous to Lot 92.

In Exhibit 9, the Agreement amongst Sea Breeze Development, LLC, the Synagogue and the Temple, the Synagogue was required to get court and Attorney General approval for the sale of the air rights. If they did not do it within three months of the Agreement signing, then the buyer (Sea Breeze Development, LLC) was permitted to undertake all the obligations of the Synagogue (Exhibit 9, paragraph 4 (I)). Also, the Synagogue had to remove any notice of pendency filed against its property and to dismiss an action pending against it (brought by C&D Development) then developer (Sea Breeze Development, LLC) could undertake to have these impediments to title removed on the owner's behalf (Exhibit 9, paragraph 4 (iii)). None of this was accomplished by June 9, 2006.

Defendant has argued that plaintiff has no right to a Declaratory Judgment since there has been no claim the agreement is not clear on its face, ambiguous or void. He argues that if plaintiff believes defendant has wronged him he can always bring an action for breach of contract.

A cause of action seeking a Declaratory Judgment to determine the reciprocal rights and obligations of parties to a contract is appropriate under the circumstances of this case, especially where the seller's attorney is in possession of the down payment paid by plaintiff. See Widewaters Property Development Co., Inc. v. Katz, 38 A.D.3d 1220 (4th Dept. 2007). Plaintiff's Declaratory Judgment action is not duplicative of a breach of contract cause of action and is not precluded by the failure to bring a breach of contract action. See Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc., 5 A.D.3d 352 (2d Dept. 2004); Lazech v. Vittoria & Parker, 196 A.D.2d 526 (2d Dept. 1993).

RULE AGAINST PERPETUITIES

Defendant, relying on the aforementioned last sentence of paragraph 4.7 of Exhibit 7, also argues that the seller, SBRE, LLC, had the right to adjourn the closing of the contract for the sale

of the air rights appurtenant to Lot 92 until permission to sell the Development Rights had been received from the Attorney General's office (irrespective of the alleged adjournment of the closing agreed to by Checkmate). Defendant argues that his right to adjourn the closing of the air rights on Lot 92 trumps the "simultaneously but in no event prior" clause of paragraph 4.7.

Plaintiff argues that such a clause violates the rule against perpetuities, or the rule against remote vesting as found in the Estates, Powers & Trusts Law.

EPTL § 9-1.1(a)(1) states:

> (a)(1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

* * *

EPTL § 9-1.1(b) states:

> (b) No 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. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

"The current New York Rule against Perpetuities is codified at EPTL § 9-1.1. It rigidly limits the ability of owners to control future dispositions of their property with respect to both the suspension of alienation (subdiv. [a]) and the remote vesting of property (subdiv. [b]). In addition, even interests which do not offend the strictures of the statute may be limited by the common-law prohibition against unreasonable restraints on alienation, which is a somewhat more flexible standard [citations omitted]." Symphony Space, Inc. v. Pergola Properties, Inc., 214 A.D.2d 66, 72, 631 N.Y.S.2d 136, 140-145, (1st Dept., 1995).

Defendant argues that if the rule applies at all, then since the plaintiff was an individual purchaser, his rights and obligations under the contract would terminate upon plaintiff's death, and, as such, plaintiff's right to purchase could not be exercised "not later than 21 years after [plaintiff's life] in being." Furthermore, unless the agreement indicates otherwise, the courts should presume that the parties intended the vesting to be within the rule. EPTL § 9-1.3(b); Morrison v. Piper, 77 N.Y.2d 165 (1990).

EPTL § 9-1.3(a), (b) and (d), Rules of Construction:

> (a) Unless a contrary intention appears, the rules of construction provided in this section govern with respect to any matter affecting the rule against perpetuities.
>
> (b) It shall be presumed that the creator intended the estate to be valid.
>
> (d) Where the duration or vesting of an estate is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax or the occurrence of any specified contingency, it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate. [Emphasis supplied.]

The rule against remote vesting is as we know it found in statutory form in EPTL § 9-1.1(b) (above). However, there is also a common law prohibition against unreasonable restraint on alienation, as noted in Symphony Space, Inc., supra.

Defendant argues the Rule does not apply to our facts because there is no "suspension on alienation" in the air rights contract. Defense counsel argues that that law as expressed in Metropolitan Transp. Auth.(MTA) v. Bruken Realty Corp., 67 N.Y.2d 156 (1986) should apply.

> The Legislature did not intend EPTL § 9-1.1(b) to apply to those contingent future interests in real property that encourage the holder to develop the property by insuring an opportunity to benefit from the improvements and to recapture any investment.

MTA v. Bruken Realty, at p. 165.

The MTA case gives us some background on the Rule against Remote Vesting, which originated in the 17th Century:

"The rules limiting the right of owners to indefinitely control title to property developed because of the natural antagonism between society's interest in promoting the free and ready transfer of property and the desire of property owners to control the future disposition of their holdings. Originally intended to restrict family dispositions, usually dispositions by royalty or the landed gentry, the rules have antecedents as old as any known to the common law. ***Their purpose is to ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or***

embarrassing impediments to alienability." Id. at 161.

The Inwood Park Apartments, Inc. v. Coinmach Industries Co. case describes both the statutory rule prohibiting remote vesting and the common law rule against unreasonable restraints as similar. It states that both rules "serve the same general purpose by limiting the power of an *owner* to create uncertain future estates. Inwood v. Coinmach, 6 Misc.3d 246, 250 (Sup. Ct., N.Y. County 2004). The statutory rule simply measures validity of restraints by measuring a strict 21 years after creation of the interest, and the common law rule determines the validity of the restraint by its reasonableness. The reasonableness of the restraint is based on its duration, a reasonable price, and whether the pre-emptive right had a beneficial purpose. Id. at 257.

When the restraint is unreasonable, "where an owner attempts to control the transferability of *his property* for too long, the courts will step in, invalidate the restricting provisions and permit transfer to take effect uninhibited by the restraint. Id. at 251, citing Metropolitan Transp. Authority v. Bruken Realty Corp. (emphasis added). Our case is different because the owner of the property in question, the Synagogue, is not the one who is attempting to control its property for an unreasonable amount of time by creating the restraints on its alienability. Neither is the Attorney General the owner. Nor is the Attorney General attempting to enforce a classic pre-emptive right of first refusal. It does not want to purchase the land for itself.

In fact, the Attorney General is not even a party to the action. The holder of the preemptive right is not a party to the contract. The Attorney General is not a party to this action for declaratory judgment either, but the legitimacy of the Attorney General's right is the deciding criteria on whether the subject contract is enforceable. The Attorney General is not seeking to keep the land so that it can develop it. Rather, it seeks to protect the interest of the not-for-profit corporation that is the seller of air rights to SBRE, our defendant. It does not qualify for exemption from the rule because the pre-emptive right does not match the policy interests for exemption, which is that the right promotes development of the property.

A complication is that the Attorney General's preemption prevents development, whereas the seller's right to adjourn pending the occurrence of the condition precedent promotes it, and pursuant to the Rules of Construction, it is to be presumed that the creator of the estate intended

such contingency to occur within twenty-one years from the effective date of the instrument.

Another complicating aspect is that the land in question, the air above the Synagogue, will not be built into. The land in question will not itself be used for building or development. It will not contain additional stories to the Synagogue, and the property will only house a shadow, the shadow that will be cast by the building to be erected on Lot 110.

This reminds the court of the English Doctrine of Ancient Lights which would give to a property owner a common law right of action against his or her neighbor for blocking or stopping air or light to the property owner if there had been a twenty year period or more of unobstructed light, air or view. This doctrine is uniformally rejected in the United States and is not part of the common law of New York. Chatsworth Realty v. Hudson Waterfront, 2003 W.L. 1085888.

In MTA v. Bruken, the court held that when the parties are corporations, or it is a governmental transaction, 'lives in being are irrelevant,' so the interest must vest 21 years from the creation of the interest. Id. With regard to preemptive rights in commercial or governmental transactions, the validity of the interest should be judged by the rule against unreasonable restraint.

Here, however, because Finkleman is a person, he can be the life in being, even though his name is not mentioned specifically in the instrument, designating him as such. The purchase contract is personal to him, and nobody else can purchase the air rights. The contract is not assignable, and does not descend to Finkleman's heirs.[2] The air rights cannot be purchased more than twenty-one years after the life of Finkleman, so they must vest within the time frame required by the Rule. To use the Attorney General's life as the measuring life is an impossibility. The Attorney General is not a specific person. The person who fills the office may be here one day and gone the next. Thus, the court could never rule that the life of the Attorney General is a "life in being" to be applied to EPTL § 9-1.1(b).

Many of the cases which evaluate whether a provision violates the Rule are looking at "Options to Purchase." In our case, we are looking at the Preemptive right of the Attorney General not to approve the sale from the Synagogue to our defendant. This power of approval

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[2]In contrast see the original agreement amongst Sea Breeze Development, the Synagogue and the Temple.

presents an encumbrance on the property which makes it less freely alienable.

The plaintiff in Anderson v. 50 East 72nd St. Condominium sought a declaratory judgment that a preemptive right of first refusal is invalid as per the rule against remote vesting. That case explains that the distinction between an option and a preemptive right is that an option creates a "power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership. A preemption merely requires the owner when and if he decides to sell, to offer the property first to the person entitled to the pre-emption." 119 A.D.2d 73, 75, 505 N.Y.S.2d 101, 103, (1st Dept. 1986).

The Anderson court held that not subjecting pre-emptive rights to the rule is "more consistent with the realities of contemporary commerce and economics." Id. The court supported this reasoning by holding that "Preemptive rights violate the rule against remote vesting only marginally..." Id. at 166. It stated that "enforcement of the pre-emptive right in such cases (condominium ownership) encouraged the owner to develop the property by insuring his opportunity to benefit from development and recapture his investment in it." Id. at 77. The instant case does not compare point for point with the Anderson analysis, because the pre-emption hinders development of the property.

In Wildenstein & Co., Inc. v. Brent Wallis, et al., the Court of Appeals held that a pre-emptive right to buy paintings that are held by a non-profit, tax exempt organization are not invalidated by the statutory rule. 79 N.Y.2d 641, at 651 (1992). The court further held that in evaluating reasonableness of the restraint, the price to exercise the pre-emptive right by meeting a third party's price is reasonable because the seller suffers no cognizable loss by selling to one over another. This scenario applies where there are two buyers competing as to price where one has the pre-emptive right. This proposition cannot be used to analyze this case because the Attorney General is not offering to pay an amount of money to match SBRE's price for the air rights. The Wildenstein case holds the right valid because they "found an interpretative path, as the statute prescribes, to avoid invalidation of the transfer whenever possible." Id. at 650. The court in Wildenstein notes "that a remarkable old doctrine - the Rule against Perpetuities - should emerge to dominate this modern commercial transaction is a royal irony that does not serve the common law policy designed to block long term retention over property by long gone ancestors."

Id.

In the opinion of the court, taking into consideration that the parties jointly desired that this multiple transaction take place, that each side was represented by experienced counsel, that all parties appear to have been experienced investors and developers, and considering the Rules of Construction as found in EPTL § 9-1.3(a)(b) and, (d) that the right of the seller to adjourn the closing on the air rights pursuant to the purchase agreement with plaintiff, until the Attorney General has given its "permission to sell the aforementioned Residential Development Rights" does not violate the rule against perpetuities nor the common law prohibition against unreasonable restraints on alienation.

From the evidence, these experienced parties and their lawyers knew that SBRE could not obtain the Synagogues's air rights until a condition precedent was met, the Attorney General's approval of the sale. Thus, the right of SBRE to adjourn the closing pending the approval of the Attorney General would be appropriate and is not barred by the rule against perpetuities.

The court finds and declares that the plaintiff was entitled to a simultaneous closing of the Agreement conveying the air rights appurtenant to Lot 92 with the land of Lot 110 and the air rights appurtenant to Lot 89. That SBRE could not convey said air rights as of the closing date of the Purchase Agreement for Lot 110 and the air rights appurtenant to Lot 89 because it did not own said air rights as of June 9, 2006. In fact Sea breeze Development, LLC, not SBRE, LLC, was the contract buyer of the Air Rights appurtenant to Lot 92 (Ex. 9).

Furthermore, even though the court does find that SBRE had the right to adjourn the closing on said air rights until the Attorney General approved the sale of said air rights from the Synagogue to SBRE, said Agreement became meaningless or moot under our facts. After June 9, 2006 neither Sea Breeze Development nor SBRE, LLC owned property contiguous to the Synagogue's property (Lot 92). Thus, not only could SBRE not sell what it did not own, but also it could no longer buy what it needed in order to convey it to the plaintiff, and the Attorney General's approval became meaningless in that neither Sea Breeze Development nor SBRE, LLC could legally buy the air rights to Lot 92 after June 9, 2006. The weakness of defendant's claim to a valid adjournment that would trump the simultaneous closing clause is seen in the complaint

they filed against C&D[3], dated July 24, 2006, contending C&D's lack of an interest in the adjacent lots to Lot 92 precluded any claim by C&D to a right to purchase the Synagogue's air rights.

The court orders that defendant Maksin, as the Escrow Agent, pay to plaintiff the $250,000 down payment/earnest money that it has held since November 10, 2005 with all accrued interest to the date of this decision. Thereafter, interest shall accrue at the statutory rate on the total of the $250,000, plus the interest accrued pursuant to the Escrow Agreement.

In addition to requesting that the Escrow Agent be ordered to return to plaintiff the "Earnest Money" it currently holds plus accrued interest, plaintiff requests costs and sanctions be awarded against SBRE.

The awarding of costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" resulting from frivolous conduct is controlled by 22 NYCRR § 130-1.1. See also Yenom Corp. v. 155 Wooster Street, Inc., 33 A.D.3d 67 (1st Dept. 2006).

Section 130-1.1[c]:

> For purposes of this Part, conduct is frivolous if:
>
> (1) It is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

Perhaps the strongest basis for a claim of frivolous conduct is that the defendants, in an action commenced on July 24, 2006 against C&D[4] (before the plaintiff commenced this action on August 15, 2006 as previously noted), claimed:

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[3]C&D was an entity that had contractual dealings involving the Synagogue and Sea Breeze Development.

[4]Sea Breeze Development, LLC and SBRE, LLC v. C&D Development, Inc., et al., Index No. 21978/2006, Kings County.

> ... 'C&D had no interest in any of the adjacent lots and thus, certainly, could have no conceivable use of the Lot 92 Development Rights' and that '[i]t cannot be overemphasized that Lot 92 Development Rights had no monetary value to C&D (who had no interest of any kind in the adjacent lots) other than to extort monies from the Plaintiffs who were the developers of the adjacent lot' (see Exhibit '20 or Exhibit 'V', at unnumbered paragraphs between paragraphs designated 9 and 10 and at ¶ 16).

It is clear to this court that the above allegation made by Sea Breeze Development and SBRE against C&D in the Brooklyn matter are the same that can be made against SBRE in our case, that it has "no interest in any of the adjacent lots." In other words, how can SBRE argue here that they have any air rights to convey appurtenant to Lot 92 after they are no longer owners of property adjacent to Lot 92 when they argued, in the C&D case, that C&D had no valid claim because C&D did not own property adjacent to any of the lots in issue?

Judge Demarest, Supreme Court, Kings County, in her ruling dismissing C&D's[5] action for specific performance noted that the Synagogue, (same designation as our "Synagogue" that owns Lot 92 and its air rights), "points out that the transfer of air rights generally occurs only as between adjacent properties, and C&D, unlike SBD [Sea Breeze Development - predecessor in interest to SBRE], has no ownership interest in a plot adjacent to Lot 92." (See Exhibit "16"). Paraphrasing Judge Demarest, as of June 9, 2006, SBRE had no ownership interest in a plot adjacent to Lot 92.

The seven affirmative defenses and two counterclaims made by SBRE in this action are made frivolous by the claims affirmatively made by Sea Breeze Development and SBRE in the action with C&D. It is one thing to have alternative defenses in an action, it is another when the defenses in one action are diametrically opposed by the same party in a related action.

It is interesting to note that C&D, in its 2006 action against Sea Breeze Development and Igor Fleyshmakher, et al., alleged the court approval of the Synagogue sale of its air rights was procured through fraud (Exhibit 17). There was no evidence submitted that Justice Knipel, the Supreme Court Justice that had the Synagogue application before it, had been informed that the

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[5] C&D Development, Inc. v. Sea Breeze Development, LLC and Igor Fleyshmakher, et al., Index No. 21923/2006.

$550,000 sale of the air rights to SBRE was to be "flipped" to Finkelman for $4.2 million. That of course is not equivalent to fraud but if this court was a member of that Synagogue I'd be asking a lot of questions. Nor is there any indication that Justice Knipel was aware Sea Breeze Development was no longer an owner of adjacent property when it purchase the Synagogue's air rights on July 20, 2006.

The court orders that SBRE show cause within thirty (30) days of this decision why costs and attorney's fees should not be imposed against the defense for the frivolous defenses put forth by them in this case in light of the fact that defendant, SBRE, LLC, did not own property adjacent to Lot 92 after June 9, 2006.

Dated: June 5, 2008

J.S.C.