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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Rozina

- v -

Casa 74th Dev. LLC et al.

INDEX NO. 100617/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion ~~to~~/for preliminary injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 2A
Replying Affidavits	3

Memo of Law M1—M3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/29/09

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

RAISA ROZINA and EDUARD GORENSHTEYN

Plaintiffs,

- against -

CASA 74TH DEVELOPMENT LLC and STARR ASSOCIATES LLP,

Defendants.

Index No.: 100617/09

DECISION/ORDER

Plaintiffs Raisa Rozina and Eduard Gorenshteyn move for a preliminary injunction enjoining defendants Casa 74th Development LLC ("Casa 74th"), the sponsor of a condominium offering plan, and its escrow agent, Starr Associates LLP ("Starr"), from enforcing an Option Agreement for plaintiffs to purchase a condominium unit. In the alternative, plaintiffs seek to stay the time for them to purchase the unit if the Option Agreement is determined to be enforceable.

It is well settled that a preliminary injunction is a drastic remedy that will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606)." (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996].) "The movant has the burden of establishing a right to this equitable remedy." (McLaughlin, Piven, Vogel, 114 AD2d at 172.)

Here, plaintiffs fail to make a showing of likelihood of success on the merits of their claims. Plaintiffs argue that the Option Agreement is unenforceable based on the rule against perpetuities. They also contend that, even if the agreement is enforceable, defendants' notices to close were defective.

The rule against perpetuities is codified in EPTL § 9-1.1. Subdivision (b), the prohibition against remote vesting, states in pertinent part: "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. . . ." Subdivision (b) is "a rigid formula that invalidates any interest that may not vest within the prescribed time period." (Symphony Space, Inc. v Pergola Props., Inc., 88 NY2d 466, 476 [1996] [internal quotation marks and citation omitted].) The rule against perpetuities is, however, subject to the rules of construction set forth in EPTL § 9-1.3 (a) and (d), which provide: "Unless a contrary intention appears . . . (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.) This "saving statute requires that we construe the option in such a way as to avoid invalidating it." (Scutti Enters., Inc. v Wackerman Guchone Custom Bldrs., Inc., 153 AD2d 83, 88 [4th Dept 1989] appeal denied 75 NY2d 709 [1990].) The statute is "designed to prevent the problem . . . created by an instrument's reference to a specified event which ordinarily would take a short time to occur but which theoretically could take more than 21 years." (Id. at 89.)

Where an option agreement "contains no limitation on duration nor words suggesting that the parties intended the extent of its life to be anything other than indefinite," the agreement violates the rule against remoteness in vesting. (Buffalo Seminary v McCarthy, 86 AD2d 435, 444 [4th Dept 1982], affd for reasons stated below 58 NY2d 867 [1983].) Under such circumstances, EPTL § 9-1.3 will not be applied to save the instrument. (See id.; Symphony Space, 88 NY2d at 481-482.)

Plaintiffs argue that the Option Agreement provides no end date by which a notice of closing must be served or title must vest, and that the Option Agreement therefore evidences a "contrary intention" for the estate to vest after 21 years, making the savings statute inapplicable. In opposition, defendants contend that the savings statute applies because the exercise of the option is contingent upon the happening of specified contingencies that would necessarily be expected to occur in the near future.

The court is unpersuaded by plaintiffs' contention that the Option Agreement evidences an intention for the estate to vest after 21 years. The Option Agreement does not provide an unlimited time for plaintiffs' exercise of the option. It requires the sponsor to give the purchasers no less than 30 days' prior written notice of a closing date (Option Agreement, ¶ 6.1), and expressly provides that in the event the purchasers fail to attend the closing and exercise their option, the Agreement "shall be deemed cancelled" and the sponsor shall be entitled to retain the down payment. (Id., ¶¶ 6.3, 13.1.) Contrary to plaintiffs' implicit contention, the vesting event is not defendants' service of a notice of closing, for which the Option Agreement does not contain an express deadline. Rather, the vesting event is plaintiffs' exercise of their option (see Scutti, 159 AD2d at 89. See also Buffalo Seminary, 86 AD2d at 447 n 10), which is required to

take place on the closing date.

Although the Option Agreement by its terms enures to the benefit of the parties' "successors and assigns" (Option Agreement, Art. 38), this terminology does not evidence an option of unlimited duration given that the Option Agreement otherwise imposes the limitation that the option be exercised on the closing date. (Compare Buffalo Seminary, 86 AD2d at 444-445; Barnes v Oceanus Nav. Corp., Ltd., 21 AD3d 975 [2d Dept 2005].) As the duration for plaintiffs' exercise of the option is not unlimited, the Option Agreement does not contravene EPTL § 9-1.1(b).[1]

Moreover, to the extent that plaintiffs' exercise of the option depends on a contingency, EPTL § 9-1.3 is applicable to validate the Option Agreement. As the Option Agreement does not evidence a contrary intent, where the vesting of an estate is contingent upon "the occurrence of any specified contingency," it is presumed, pursuant to § 9-1.3(d), that the sponsor intended such contingency to occur within 21 years of the Agreement's execution. Here, it clearly appears from the face of the Offering Plan that contingencies to closing were expected to occur within a relatively short period of time after the date of execution of the Option Agreement. For example, pursuant to 13 NYCRR § 20.3(h), setting forth disclosure requirements for condominium offering plans, the sponsor of a new condominium construction must evidence its intent as to when the condominium will be operational by designating a budget year. The

[1]It is noted that the rationale for the rule prohibiting remote vesting is "that it is socially undesirable for property to be inalienable for an unreasonable period of time. [The rule] thus seek[s] 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." (Symphony Space, Inc., 88 NY2d at 475 [internal quotation marks and citations omitted].) Here, of course, plaintiffs' right to restrict defendants' transfer of the property to another buyer is sharply limited by the sponsor's right and obligation to set a deadline for closing.

sponsor must also state the date by which the sponsor expects the first closing of a unit to occur, and such first closing should correspond to the first year of projected condominium operation. (See 13 NYCRR 20.3[o][11]-[12].) The filing date of defendant's Offering Plan was May 24, 2007 and, per Schedule "B" of the Offering Plan, defendant projected that the first full year of condominium operation would begin on January 1, 2009. Another contingency to closing, as stated on page 75 of the Offering Plan, obligates the sponsor to offer purchasers the right to rescind their Option Agreements if the first closing does not occur within 12 months after the January 1, 2009 date set forth in Schedule B. Moreover, the "Rights and Obligations of Sponsor" section of the Offering Plan, on page 95, requires the sponsor to obtain a temporary certificate of occupancy ("TCO") prior to the first closing, and to attempt to obtain a Permanent Certificate within two years after the first closing. Therefore, as indicated by the Offering Plan, the vesting of plaintiffs' estate is dependent on contingencies that were intended to occur well within the perpetuities period.

Plaintiffs thus fail to make the requisite showing of a likelihood of success on the merit of their claim that enforcement of the Option Agreement is barred by the rule against perpetuities. Plaintiffs also fail to show a likelihood of success on the merit of their claim that defendants' closing notices were defective. Contrary to plaintiffs' contention, the fact that Starr sent the first notice of closing to plaintiffs on or about October 17, 2008, before defendants had obtained a TCO, does not invalidate that notice nor any subsequent notices amending the scheduled closing date. The Offering Plan, at pages 85-86, unambiguously states that "sponsor shall be entitled to deliver a 30 day closing notice to a Purchaser prior to meeting the Closing prerequisites," including the prerequisite that a TCO be obtained. In addition, plaintiffs do not submit any

authority that service of the November 12, 2008 notice of closing upon plaintiffs' then counsel was ineffective under these circumstances in which he responded, by letter dated December 4, 2008, stating that plaintiffs would be ready, willing and able to perform with respect to the contract of sale on the December 12, 2008 closing date. (Doc. Supp. to Starr's Op., Exs. C, D.)

Plaintiffs also fail to satisfy the remaining elements for the grant of a preliminary injunction. The balance of the equities is not in plaintiffs' favor, as they are delaying the closing of a contract they made for the purchase of real estate before the downturn in the market. Nor do plaintiffs demonstrate irreparable injury, as they can recover any loss in a damages action. The branch of plaintiffs' motion for a preliminary injunction to enjoin defendants from enforcing the Option Agreement must therefore be denied.

In so holding, the court rejects plaintiffs' claim that the closing should be stayed pending final determination of plaintiffs' claim that the Option Agreement is unenforceable. Plaintiffs have not set forth any authority that they are entitled to specific performance of the contract of sale in the event that they do not succeed on their cause of action for rescission. (See 331 E. 14th St. LLC v 331 E. Corp., 293 AD2d 361 [1st Dept 2002] lv dismissed 98 NY2d 727.)

While the Temporary Restraining Order will be vacated, in view of the parties' December 22, 2008 "standstill agreement" that tolled plaintiffs' time to cure their default in closing, defendant sponsor will be directed to serve plaintiffs with a new notice to cure.

It is accordingly hereby ORDERED that plaintiffs' motion is denied, except to the following extent: Defendants shall serve plaintiffs with a notice to cure their default in closing title to the subject unit; said notice shall set a cure date at least 30 days from the date of service of the notice; and it is further

ORDERED that defendants' application for attorney's fees in connection with this motion is denied without prejudice to renewal at the time of trial or other resolution of this action; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on July 9, 2009 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
May 29, 2009

MARCY FRIEDMAN, J.S.C.