

**Jeffcock v MCP SO Strategic 56, L.P.**

2010 NY Slip Op 32786(U)

September 29, 2010

Supreme Court, New York County

Docket Number: 113713/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN

*Justice*

PART 7

WILLIAM JEFFCOCK,  
Plaintiff,

Index No. 113713/09

-against-

001

MCP SO STRATEGIC 56, L.P.,  
Defendant.

The following papers, numbered 1 to 2 were read on this motion by defendant(s) for summary and Judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED
1

Cross-Motion:  Yes  No

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

MCP SO Strategic 56, L.P. (defendant or the Sponsor) seeks dismissal of plaintiff's complaint. Initially, defendant moved to dismiss, pursuant to CPLR 3211 (a)(1), based upon documentary evidence. Pursuant to CPLR 3211 (c), by order dated December 17, 2009, Justice Martin Shulman converted defendant's motion to dismiss to a motion for summary judgment and gave both parties an opportunity to submit additional papers.

**Parties**

Plaintiff was the purchaser of condominium unit 9A (the Unit) in a building (the Building) located at 33 West 56th Street, New York (complaint, ¶ 4). Defendant was the developer responsible for construction of the Building and the sale of units in it pursuant to an Offering Plan (the Offering Plan) and amendments filed with the New York State Attorney General's Office (the Attorney General) (*id.*, ¶ 3).

**Parties' Contentions**

Plaintiff contends that he entered into an agreement (the Purchase Agreement) with

defendant on February 4, 2008 for the sale of the Unit for \$3.2 million (*id.*, ¶¶ 4, 10, 11). He also asserts that, on January 24, 2008, he made an initial deposit of \$320,000 and that, on July 17, 2008, he made an additional deposit of \$320,000 pursuant to the Purchase Agreement for a total deposit (the deposit) of \$640,000 (*id.*, ¶¶ 6, 7). He alleges that the deposit was placed into an attorney's escrow account and that the deposit is still there (*id.*, ¶ 8).

Plaintiff further contends that the Purchase Agreement does not have a specific closing date, but that it allows the Sponsor to set a closing date on 30 days notice and that the Offering Plan contemplates that the closing of title for units in the Building was expected to commence in March 2009 (*id.*, ¶¶ 13, 14). He further states that, since there was no specific closing date in either the Purchase Agreement or the Offering Plan, vesting of title could occur beyond 21 years (*id.*, ¶ 20). Therefore, he asserts that the Purchase Agreement violates EPTL 9-1.1 (b), the Rule against Perpetuities, and, hence, is void.

Plaintiff's complaint has one cause of action for a declaratory judgment that the Purchase Agreement is void under the Rule against Perpetuities and that he is entitled to return of the deposit.

Defendant contends that the Offering Plan is incorporated by reference into the Purchase Agreement (Berg affirmation, ¶ 6) and that the Offering Plan provided that, if construction of the Building was not complete by March 1, 2009 or, that the first closing of a condominium unit did not occur within 12 months after the anticipated completion date of March 1, 2009, a purchaser would have the opportunity to rescind the Purchase Agreement (*id.*, ¶¶ 7, 8).

Defendant also asserts that the Offering Plan provided that a purchaser would also be afforded an opportunity to rescind if the construction of the Building was not substantially completed before January 1, 2010 (*id.*, ¶ 9). It further states that the Offering Plan was declared effective by the Attorney General on January 28, 2009, that the construction of the Building was

substantially complete on April 22, 2009, and that the first closing of a unit occurred on June 19, 2009 (*id.*, ¶¶ 11, 12).

Defendant also alleges that, pursuant to paragraph 7 of the Purchase Agreement, on May 22, 2009, it sent plaintiff a notice setting a closing date of June 23, 2009 (*id.*, ¶ 13). It further contends that plaintiff failed to close on the scheduled closing date and that this failure constituted a default under the Purchase Agreement, entitling it to retain the deposit as liquidated damages.

Defendant asserts that the Purchase Agreement is not void under the Rule against Perpetuities and that, since this is plaintiff's only basis for his failure to close on the Unit, the complaint should be dismissed. Finally, defendant also seeks legal fees incurred in defending its rights under the Purchase Agreement (*id.*, ¶ 16).

### **Summary Judgment**

A party seeking summary judgment must establish entitlement to judgment as a matter of law by demonstrating the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The party opposing summary judgment must then present evidentiary proof in admissible form that raises a fact dispute as to a material issue (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must not weigh credibility, but must draw all reasonable inferences in favor of non-moving party (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

### **Contract Interpretation**

In interpreting a contract, the court should ascertain and give effect to the parties' intention at the time that they entered into the contract (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]). The court should construe the contract as a whole and interpret its provisions in accordance with "the plain purpose and object" of the contract (*Kass v Kass*, 91 NY2d 554, 567 [1998]; *RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 437-438 [1st Dept 2009]).

### Rule against Perpetuities

EPTL 9-1.1 (b) provides, in pertinent part:

“No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years (after its creation)....”

EPTL 9-1.3 (the Savings Statute) provides, in pertinent part:

“(a) Unless a contrary intention appears, the rules of construction ... 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.

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(d) Where the duration or vesting of an estate is contingent upon ... 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.”

The Rule against Perpetuities codifies “the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time” (*Symphony Space v Pergola Props.*, 88 NY2d 466, 475 [1996]). Therefore, a property transfer is required to vest within the requisite time frame and, if the period is too long, the court must consider the transfer to be void (*id.* at 483-484). The Rule against Perpetuities has been termed “a rigid formula ... [with] capricious consequences” (*id.* at 476). To ameliorate these harsh results, the Savings Statute is designed to “embody the unexceptionable propositions that parties who make grants of real property interests presumably intend their grants to be effective and that reviewing courts should, if at all possible, avoid constructions which frustrate their intended purposes” (*Morrison v Piper*, 77 NY2d 165, 173-174 [1990]). While the court should not rewrite the parties’ agreement in the guise of interpretation (*Bleecker Street Tenants Corp. v Bleecker Jones LLC*, 65 AD3d 240, 246 [1st Dept 2009], *lv granted* 14 NY3d 703 [2010]), if there is “a construction that does not violate the rule[, it] will be found to be the one the grantor intended” (*Matter of de Sanchez*, 57 AD3d 452, 455 [1st Dept 2008]).

In this case, the Sponsor set forth contingencies that placed time limitations of less than 21 years from the Purchase Agreement. Specifically, it provided for an opportunity for rescission of the Purchase Agreement if construction of the Building was not completed by March 1, 2009 or if the first closing did not occur within 12 months of the anticipated completion date of March 1, 2009 of the construction of the Building was not substantially complete before January 1, 2010.

The Savings Statute provides that "where the duration or vesting ... is contingent upon the occurrence of any specified contingency," it is deemed that the contingency will occur within the statutory period (*Housing Help v Kasper-Staller Venture*, 196 AD2d 805, 807 [2nd Dept 1993]; *Scutti Enters. v Wackerman Guchone Custom Bldrs.*, 153 AD2d 83, 89 [4th Dept 1989], *lv denied* 75 NY2d 709 [1990]).

The reasonable interpretation of the Purchase Agreement is that the parties intended a sale of the Unit to occur, subject to the contingencies of the construction of the Building being completed by March 1, 2009 or substantially completed by December 31, 2009. Plaintiff's interpretation that the closing could be delayed indefinitely is unreasonable, since it conflicts with the standard presumption of the Savings Statute that "it is presumed that an estate is intended by its creator to be valid" (*Reynolds v Gagen*, 292 AD2d 310, 311 [1st Dept 2002]).

Since plaintiff's complaint is based solely upon the alleged invalidity of the Purchase Agreement due to the purported violation of the Rule against Perpetuities, defendant's motion for summary judgment dismissing the complaint is granted.

Defendant also seeks a hearing to establish its attorney's fees pursuant to paragraph 30 of the Purchase Agreement. This requires plaintiff to "reimburse Sponsor for any legal fees and disbursements incurred by Sponsor in defending Sponsor's rights under (the Purchase Agreement)." Plaintiff has not presented any basis for failing to enforce this provision of the parties' contract.

**Order**

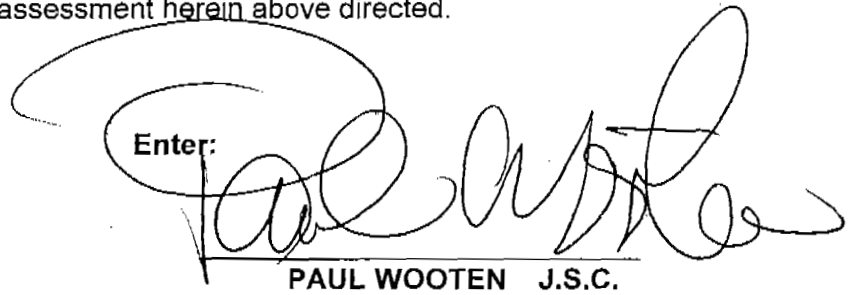
It is, therefore,

ORDERED, ADJUDGED and DECLARED that the Purchase Agreement between Plaintiff and Defendant is not void ab initio for violation of the Rule against Perpetuities and that plaintiff is not entitled to a return of his deposited funds; and it is further

ORDERED that an assessment of damages for legal fees and disbursements against plaintiff is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the proper fees, if any, and to place the matter on the appropriate trial calendar for the assessment herein above directed.

**Dated:** September 29, 2010

Enter: 

PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate: :  DO NOT POST  REFERENCE

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