

Spielman v Mehraban
2011 NY Slip Op 32534(U)
September 19, 2011
Sup Ct, Nassau County
Docket Number: 19056/10
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17

-----X
JONATHAN SPIELMAN and DODI SPIELMAN,

Plaintiffs,

- against -

DECISION AND ORDER

Index No:19056/10

Motion Sequence Nos. 001- 002
Original Return Dates:04-06-11
05-06-11

**ARIELLE MEHRABAN, KEVIN LALEZARIAN,
OLD MILL II, LLC (a/k/a OLD MILL 2, LLC),
THE INCORPORATED VILLAGE OF GREAT
NECK ESTATES, THE VILLAGE OF GREAT
NECK PLANNING BOARD, THE VILLAGE OF
GREAT NECK, THE BOARD OF APPEALS OF
THE VILLAGE OF GREAT NECK, JEFFREY L.
ROSENBLUM, FRANCINE ROSENBLUM, ONE
HUNDRED CLOVER DRIVE CORP., WONG KO,
WASHINGTON MUTUAL BANK, F.A. and "JOHN"
and "JANE" does 1-10,**

Defendants.

-----X

P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 12 were submitted on these two (2) Motions on May 6, 2011:

Papers numbered

Notice of Motion (Seq. 001), Affirmation and Affidavit	1-3
Memorandum of Law and Further Memorandum	4-5
Affidavit in Opposition	6
Memorandum of Law in Opposition	7
Notice of Motion (Seq. 002) and Affirmation	8-9
Memorandum of Law	10
Affidavit in Opposition	11
Reply Affirmation	12

The (a) motion by the defendants Arielle Mehraban and Kevin Lalezarian for an order pursuant to CPLR 3212 dismissing plaintiffs' verified complaint and for a declaration that the subject covenant is invalid (motion sequence 1); and (b) the motion by the defendant Incorporated Village of Great Neck Estates (Estates) for an order pursuant to CPLR 3212(a)(7) dismissing the complaint against the Estates defendant (motion sequence 2) are decided as follows:

This is an action to declare the rights of the plaintiffs with respect to certain real property.

Plaintiffs, Jonathan Spielman and Dodi Spielman (the Spielmans), are the owners of real property located in the Incorporated Village of Great Neck Estates and the Village of Great Neck, and known as 88 Clover Drive and identified on the Nassau County Tax Map Section 2, Block 354, Lots 93, 114 and 139 (the Spielman property). The Spielmans are the fee owners of the Spielman Property by virtue of a deed between Leslie S. Libow, as grantor, and the Spielmans, as grantees, dated August 28, 1998 and recorded on September 21, 1998 in the Office of the Clerk of Nassau County in Liber 10961 Page 852 (the "Libow/Spielman Deed"). Defendants Jeffrey Rosenblum and Francine Rosenblum (the "Rosenblum Defendants") and defendant One Hundred Clover Drive Corp. ("Clover Corp.") were former owners of 100 Clover Drive and identified on the Nassau County Tax Map as Section 2, Block 354, Lots 94 and 115 (collectively, the "100 Clover Property." In addition, Lot 115 by itself will be referred to herein as "Lot 115"). The Spielman Property and the 100 Clover Property are neighboring properties.

By quitclaim deed dated August 22, 2005 and recorded in the Office of the Clerk of Nassau County on October 5, 2005 in Liber 12019 Page 380, defendant Clover Corp., by its president, defendant Jeffrey Rosenblum, conveyed to Francine Rosenblum, title to, *inter alia*, Lot 115. The Mehraban defendants claim title to the 100 Clover Property and Lot 115 pursuant to a quitclaim deed

between Francine Rosenblum, as grantor, and the Mehraban defendants, as tenants in common, grantees, dated August 22, 2005 and recorded in the Office of the Clerk of Nassau County on October 5, 2005 in Liber 12019 page 384 (the "Rosenblum/Mehraban Quitclaim Deed").

By deed dated February 17, 1949 and recorded on February 28, 1949 in the Liber 3787 Page 248, Ethel Oviatt Grose, as grantor, conveyed to Stanley Namm, as grantee, what is now identified as Lot 115 (the "Grose Deed"). The subject Right of First Refusal (the "Right of First Refusal"), which first appeared in the Grose Deed, provides:

The conveyance made herein as so made with the distinct understanding that the property herein described shall not be reconveyed by the grantee herein named, or by any subsequent owner of the adjoining property now owned by Stanley Namm to any person, persons or corporation unless, such conveyance is made to Theodore Lazar [a prior owner of the Spielman Property] or any subsequent owner of the adjoining premises [which is now the Spielman Property] now owned by Theodore Lazar for the sum of \$1,083.07, plus 50% of the actual costs of any improvements thereon, and 50% of the taxes paid from the date of these presents, until the date of such conveyance, unless, the said Theodore Lazar, or any subsequent owner of the adjoining property now owned by him shall refuse to take title to the premises herein conveyed, after receiving 30 days notice by registered mail offering the sale thereof, upon the terms herein stated (emphasis added).

It is understood that, however, that this covenant shall not prevent Stanley Namm, or any subsequent owner of the adjoining premise he now owns from conveying the property he now owns, together with the premises herein conveyed, as one parcel. It being understood, however, that this covenant shall run with the land.

By deed dated July 31, 1950 and recorded in the Office of the Clerk of Nassau County on August 16, 1950 in Liber 4243 Page 568, Stanley Namm, as grantor, conveyed to Ben Nazimowitz, as grantee, what is now known as Lot 115 (the Namm Deed"). The Namm Deed contains the same

Right of First Refusal as was previously quoted in the Grose Deed. By deed dated July 26, 1968 and recorded in the Office of the Clerk of Nassau County on July 30, 1968 in Liber 7862 Page 266, Ben Nazimowitz conveyed to Minnie Namm a/k/a Minnie Nazimowitz, the property now known as Lot 115 (the "Nazimowitz Deed"). The Nazimowitz Deed contains the same Right of First Refusal as is set forth in the Grose and Namm Deeds. By deed dated July 15, 1983 and recorded in the Office of the Clerk of Nassau County on August 11, 1983 in Liber 9492 page 774, the Estate of Minnie Namm, as grantor, conveyed to Clover Corp., as grantee, two parcels of property known as Lot 94 and Lot 115 (the "Estate Deed"). By deed dated January 30, 1986 and recorded in the Office of the Clerk of Nassau County on February 27, 1986 in Liber 9707 Page 665, defendant Clover Corp., as grantor, conveyed to defendant Jeffrey Rosenblum, as grantee, Lots 94 and 115 (the "Clover/Rosenblum Deed"). By deed dated October 27, 1998 and recorded in the Office of the Clerk of Nassau County on November 5, 1998 in Liber 10981 page 841, Jeffrey Rosenblum, as grantor, conveyed to Jeffrey Rosenblum and Francine Rosenblum, as grantees, Lots 94 and 115 (the "Rosenblum/Rosenblum Deed").

In or about December of 1995, Jeffrey Rosenblum, a defendant herein and a former owner of Lot 115, commenced an action in the Supreme Court of the State of New York, County of Nassau, under Index No. 95-36662 against Leslie S. Libow, the former owner of the Spielman Property (the "Prior Declaratory Judgment Action"). By the Prior Declaratory Judgment Action, the plaintiff therein, Jeffrey Rosenblum, sought from the Court a declaration that the Right of First Refusal is no longer enforceable as same, *inter alia*, "violate[s] the rule against perpetuities and further violate[s] the property rights of the plaintiff."

By Decision and Order dated May 13, 1998 and entered in the Office of the Clerk of Nassau

County (the “1998 Decision and Order”), the Court (Adams, J.) held that:

Accordingly, this court has concluded that the restrictive covenant [the Right of First Refusal] involved here is a covenant running with the land. Since no evidence has been presented to show that any other factors exist that would make the covenant unenforceable (*see Garrett v Village of Asharoken*, 185 AD2d 87) defendant is entitled to judgment declaring this covenant enforceable by him.

In furtherance of the 1998 Decision and Order, in June of 1998, the Court issued a judgment in the Prior Declaratory Judgment Action wherein the Court determined that the Right of First Refusal . . . “is valid and enforceable by the defendant and any subsequent owner of the Dominant Estate [the Spielman Property]” against the plaintiff and any subsequent owner of the Servient Estate [the 100 Clover Drive Property] (the “1998 Judgment”).

On or about October 7, 2010, the Spielmans commenced the within action. The Spielmans seek, among other things, a declaration that they had and have the right to purchase Lot 115 pursuant to the Right of First Refusal.

The Mehraban defendants served an Answer with 12 affirmative defenses and 1 counterclaim. In their counterclaim, the Mehraban defendants seek an order from this Court voiding the Right of First Refusal on the grounds that, *inter alia*, same violates the rule against perpetuities, violates the rule against remote vesting, violates the rule against restraints on alienation, is void under the stranger to the deed rule and is void as it violates public policy.

The Spielmans served a Verified Reply to allegations contained in the Mehraban defendants’ counterclaim and asserted affirmative defenses to the counterclaim alleging *res judicata*, collateral estoppel, unclean hands, and laches.

Plaintiffs argue that the doctrines of *res judicata* and collateral estoppel prevent the

relitigation of claims and issues that already have been fully decided. Plaintiffs assert that because the Court in the prior Declaratory Judgment Action by the Mehraban defendants' predecessor in interest has already determined that the Right of First Refusal is "valid and enforceable" by the owner of the Spielman Property as against the owner of the 100 Clover Property, the Mehraban defendants are precluded from raising those identical issues herein, or otherwise collaterally attacking the 1998 Judgment.

"Under the doctrine of *res judicata* or collateral estoppel, a party is barred from relitigating an action, claim or issue that is identical to that litigated and resolved in a prior action." New York Jur 2d, Judgments, § 428, at 193; *Lodal, Inc. v Home Ins. Co.*, 309 AD2d 634. This rule is founded upon the belief that "it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be fairly and impartially tried; but proper public tranquility demands that, having been once so determined, all litigation of that question, and between those parties, should be closed forever." *Fish v Vanderlip*, 218 NY 29, 36-37; *Hendrick v Biggar*, 209 NY 440. "It is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it." *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455.

Res judicata, or claim preclusion, is invoked to prevent a party, or one who is in privity with the party, from relitigating a previously litigated action. In other words, *res judicata* will only apply if there has been a final judgment on the merits. This form of claim preclusion applies to all issues and theories of recovery applicable to the cause of action, whether or not they were actually litigated.

"As a general rule, once a claim is brought to a final conclusion, all

other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” *O’Brien v City of Syracuse*, 54 NY2d 353, 357.

Collateral estoppel, or issue preclusion, is a corollary to the doctrine of *res judicata*. It bars the relitigation of an issue (as distinguished from the action or claim) which was actually and necessarily previously decided in a prior proceeding. *Ryan v New York Telephone*, 62 NY2d 494. To invoke the “issue preclusion” doctrine of collateral estoppel the following elements must be established: 1) an identity of an issue which was necessarily decided in the prior action; and 2) a full and fair opportunity by the party against whom collateral estoppel is being invoked to have contested the said issue. *Allied Chemical v Niagara Mohawk Power*, 72 NY2d 271. Since the goal of the doctrine is to avoid duplicative decisions on the same question, emphasis has been placed on the identity of issue, as opposed to the identity of the parties involved, although an “identity” of parties is not absolute. As explained and held in *Ryan, supra*, collateral estoppel will apply even if the tribunal or court was not the same, and the doctrine will also bar a party who was “in privity” with a party to the prior action.

“The doctrine of collateral estoppel, a narrower species of *res judicata*, preclude a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. (cases and authorities cited) emphasis supplied; *Ryan v New York Telephone Co., supra*, at p. 500.

In determining whether or not privity exists between a party to the second action with a party in the prior action, the Courts have not established a hard and fast rule. Indeed, privity has been described as an “amorphous term.” *Weiner v Greyhound Bus Lines, Inc.*, 55 AD2d 189 (2nd Dept

1976).

Privity has also been held to exist where there is a relationship between the litigant in the current suit and the party to the prior suit such that the interests of the nonparty can be said to have been represented in the prior proceeding (*Green v Santa Fe Indus.*, 70 NY2d 244, 253). The New York courts avoid strict reliance on formal representative relationships in favor of a more flexible consideration of whether all of the facts and circumstances of the party's and nonparty's actual relationship, their mutuality of interests and the manner in which the nonparty's interests were represented in the prior litigation establishes a functional representation such that the nonparty may be thought to have had a vicarious day in court. Collateral estoppel is a doctrine based on general notions of fairness involving a practical inquiry into the realities of the litigation and should never be rigidly or mechanically applied. (*Matter of Halyalkar v Board of Regents of State of New York*, 72 NY2d 261, 268-269).

In the prior action the Court concluded that the Right of First Refusal ran with the land. However, the issue of whether the Right of First Refusal violated the Common-Law rule against unreasonable restraints on the alienation of real property was never addressed or raised. Therefore, collateral estoppel and/or *res judicata* are not applicable.

The rules limiting the right of owners to indefinitely control title to property developed because of the conflict between society's own interest in promoting the free and ready transfer of property and the desire of property owners to control the future disposition of their holdings. The 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 restraints on alienation. See *De Peyster v Michael*, 6 NY 467.

In the within action, according to the deed, the owners of Lots 115 and 94 could convey them together without triggering the preemptive right. However, if Lots 115 and 94 were conveyed separately, the owners of the Spielman property would have the Right of First Refusal to purchase Lot 115 for the price of \$1,033.07, plus 50% of the actual costs of any improvements and 50% of the taxes paid from the date of the creation of the Right of First Refusal until the date of such conveyance.

The New York rule against perpetuities has two parts. The first part found in EPTL 9-1.1(a) is a rule against the suspension of the absolute power of alienation. “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, subd [a], par [1]). The absolute power of alienation cannot be suspended for a period longer than lives in being at the creation of the estate and a term of not more than 21 years (EPTL 9-1.1, subd [1], par [2]).

In the within action the Right of First Refusal does not violate the rule against perpetuities’ prohibition against suspension of the power of alienation (see EPTL 9-1.1 [a][2]) because at all times the plaintiffs and their assigns and the defendants or those taking from them could have acted together and conveyed a fee absolute in the defendants’ parcel. *Buffalo Seminary v McCarthy*, 86 AD2d 435 (4th Dept 1982) *affd* 58 NY2d 867.

The second part of the rule against perpetuities is a rule against remoteness in vesting. The present New York version is found in EPTL 9-1.1(b). The EPTL is not retroactive (EPTL 1-1.5 and 14-1.1[b][1]). The law in effect at the time an interest was created (or purported to be created) will apply, for purposes of determining whether or not an interest violates either the rule against the too long suspension of the power of alienation or the rule against the too remote vesting of an interest

(4 Warren's Weed, NY Real Property [4th ed]). *Buffalo Seminary v McCarthy*, *supra*, provides that the New York rule against remoteness in vesting did not apply to options prior to the enactment of former section 43 of the Real Property Law added in 1965 and which later became EPTL 9-1.1 subd (b). The New York rule against remoteness in vesting, however, prior to 1965, concerned only contingent remainders on terms of years and fees limited upon prior fees upon contingencies and thus would not expressly have encompassed options to purchase. New York's statutory rule against remote vesting between 1830 and 1965 was narrow and concerned only certain types of interests (viz., fees or less estates limited on fees on contingencies and contingent remainders on terms of years) and could not reasonably have been construed to include options (*see Buffalo Seminary v McCarthy* 86 AD2d 435, 438, 440-443 [4th Dept 1982]). Since the law is not retroactive, the statutory rule against remoteness in vesting was not in effect at the time the Right of First Refusal in the deed was created, EPTL 9-1.1(b) does not apply.

The rule regulating remote dispositions also can be found in the Common-Law rule against the unreasonable restraints on alienation. While the statutory rule is inflexible, measured solely by the passage of time, the Common-Law rule is applied by considering the reasonableness of the restraints. Whether the restriction in the disposition of the property is unreasonable is a question of fact depending on its purpose, duration and the designated method for fixing the purchase price. *See Metropolitan Transp. Authority v Bruken Realty Corp.*, 67 NY2d 156. These issues of fact as to the reasonableness of the covenant of the Right of First Refusal under the Common-Law preclude the granting of summary judgment in favor of the Mehraban defendants dismissing the complaint and a declaration that the covenant is invalid.

The defendant the Incorporated Village of Great Neck Estates moves for an order dismissing

the plaintiffs' complaint against the Estates. The only relief sought against the Estates is found in the allegations in the last paragraph of the second cause of action in the complaint (§ 42) in which the plaintiffs seek to enjoin the Estates from taking action with respect to a non-existent subdivision application to Estates. Until such time that a subdivision application involving the 100 Clover Drive property is filed with the Estates, there is no justifiable controversy between the plaintiffs and Estates, no actual (as opposed to remote) possibility of injury to plaintiffs, and no valid basis for Estates to be a party to the action. The plaintiffs are seeking an advance advisory opinion as to possible future events which are not at all certain to occur. *Fairhaven Properties, Inc. v Garden City Plaza, Inc.*, 119 AD2d 796 (2nd Dept 1986); *Guibord v Guibord*, 2 AD2d 34 (1st Dept 1956); *Waterway Development Corp. v Lavalle*, 28 AD3d 539 (2nd Dept 2006).

Accordingly, after due deliberation, it is

ORDERED, that the motion by the defendants Arielle Mehraban and Kevin Lalezarian for an order pursuant to CPLR 3212 dismissing plaintiffs' verified complaint and for a declaration that the subject covenant is invalid (motion sequence 1) is **denied** as there are issues of fact; and it is further

ORDERED, that the motion by the defendant Incorporated Village of Great Neck Estates (Estates) for an order pursuant to CPLR 3212(a)(7) dismissing the complaint against the Estates defendant (motion sequence 2) is **granted without prejudice**; and it is further.

ORDERED, that a Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference Part, located in the basement at the Nassau County Supreme Court on **October 17, 2011**, at 9:30 AM. The attorneys for the plaintiffs shall serve a copy of this Order on the Preliminary Conference Clerk and the attorneys for the defendants and the defendants *pro se*

herein.

This foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 19, 2011

ENTER:



JOEL K. ASARCH, J.S.G.

ENTERED

SEP 22 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Copies mailed to:

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