

Stathis v Karas

2011 NY Slip Op 34212(U)

February 25, 2011

Supreme Court, Orange County

Docket Number: 4364/2007

Judge: Robert A. Onofry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X

SAM STATHIS,

Plaintiffs,

- against -

THE ESTATE OF DONALD KARAS, by and
through his heirs, NANCY BLOOM and
CHARLES KARAS, et al.

Defendants.

-----X

To commence the
statutory time period
for appeals as of right
(CPLR 5513[a]), you are
advised to serve a copy
of this order, with
notice of entry, upon
all parties.

THE ESTATE OF DONALD KARAS, by and
through his heirs, NANCY BLOOM and
CHARLES KARAS,

Third-Party
Plaintiff,

- against-

ARIES, LLC and CONNIE ANTZOULIS,

Third-Party
Defendants

-----X

Index No. 4364/2007

Motion Date: April 9,
2010 & April 28, 2010

The following papers numbered 1 to 8 were read and considered on this motion by plaintiff for an Order, pursuant to CPLR §3212, granting him partial summary judgment, and a cross motion by defendants/third-party plaintiffs for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint as against them, and granting them summary judgment on their third-party complaint:

- Notice of Motion - Catania Affirmation - Stathis Affidavit - memorandum of Law- 1-4
- Notice of Cross Motion and Opposition to Motion- DuVall Affirmation - Memorandum of Law 5-7
- Reply Affirmation - Catania- Memorandum of Law 8

Upon the foregoing papers, it is hereby,

ORDERED that the motion and cross motion are decided as follows.

Introduction

Plaintiff, Sam Stathis, alleges that he and the decedent Donald Karas entered into a series of agreements, the existence, nature, scope and enforceability of which are now in issue. The purported agreements, by their terms, related to the development of approximately 168 acres of real property located in Goshen, Orange County, New York; property known as "Karpytown."

Plaintiff contends that the parties' interactions culminated in a July 11, 1997, joint development agreement (hereinafter the "JDA") pursuant to which, plaintiff alleges, he agreed to pay the back taxes on the properties in question and to inject investment funds into a cash-strapped Karas in exchange for which he was to receive a significant interest in the subject properties. Plaintiff contends that his primary interest was in the development and sale of the natural resources derived from the property itself, particularly the potable water and dolomite; whereas Karas' primary interest was the development of the property to establish a personal legacy (Karas' nickname was "Karpy"). The record is clear that the property was never developed to the extent envisioned. After Karas died, plaintiff Stathis attempted to exercise his right under the JDA to purchase the property from the Karas' estate; a demand that was rejected. As a result, plaintiff commenced the

instant action seeking, *inter alia*, the enforcement of his purported purchase option under the JDA and for damages arising from defendants' breach.

In substance, defendants argue that the plaintiff has failed to prove the existence of a valid and enforceable agreement with Karas. Rather, they assert, all of the agreements are unconscionable, lack consideration, are vague, and are the product of overreaching. In addition, they assert, the most onerous provisions of the agreement- the options therein to purchase the property upon the death of Karas- constitute invalid testamentary dispositions and violate the rule against perpetuities and the rule against unreasonable restraints on alienation.

Plaintiff now moves for summary judgment seeking to enforce the purchase option provided for in the JDA. In response, the defendants/third-party plaintiffs cross move to dismiss the complaint and for judgment on their third-party action.

Factual Background/Procedural History

Plaintiff has proffered the following alleged agreements, which, as noted, the existence, nature, scope and enforceability remain in dispute and are at issue. Thus, the description of their purported content, at this juncture, is for background and informational purposes only.

By document dated April 1, 2007, executed by Stathis and

[*4]

Karas, Stathis forwarded a \$5,000 good faith payment toward the "Well Project" (Motion, Exh 6); a payment that was offered with the "understanding" that the parties would be entering into a 50/50 partnership concerning same. Karas' obligation was to provide the land and natural resources, and Stathis' obligation was to provide the funds to pay for the cost of drilling and testing. Finally, it was mutually agreed that the parties would enter into a more formal arrangement concerning the well and the development of the Karpytown property as soon as reasonably possible.

The record further contains a second document also dated April 1, 2007, identical in substance to the first document referenced, and signed by both parties. The two writings differ only in the respect that the second document has no line for the plaintiff's signature, is notarized, and contains the following handwritten notation at the bottom: "April 13, 2007- Additional \$10,000.00 subject to same terms/agreements. Karpy Donald Karas."

By document dated April 23, 1997, captioned: "Re: Joint Development Project in Goshen, New York", signed by Karas and plaintiff by "RO," the parties entered into a "binding agreement concerning the development of the Well Project on Lot No. 11" (Motion Exh. 8). Pursuant to the purported agreement, it was agreed that Lot No. 11 would be transferred as soon as possible to a limited liability company to be established under the name Kasco Enterprises, LLC, or such other name to which they could agree

should that name be taken. Karas was to contribute the property, and plaintiff the money; money in addition to the money he had already contributed. Each was to be 50% owner of the LLC. It was further agreed that the plaintiff would pay for the development costs needed to obtain permits, and for the outstanding taxes, which Karas represented to be no more than \$2,500. The intention was to develop Lot No. 11 for commercial water sales, or for any other alternative use to which the parties could agree, should that use prove impractical. The document further sets forth the following terms for a buy out of one party by the other- if Karas died first, either the plaintiff or the estate of Karas could buy the other out as follows: One party would offer to purchase the properties at a stated price. The other party could then either accept the offer or buy the property from the offering party at the same price. However, the parties agreed, if the estate of Karas exercised the later option, it would be required to pay the plaintiff a premium of 50% over the offered price. If the plaintiff died first, the same methodology was applicable. However, no premium was payable to the plaintiff's estate. Finally, it was agreed that the agreement would be binding on the parties' heirs, successors in interest, and respective estates.

By document dated July 11, 1997, captioned "Re: Joint Development Project," and signed by the plaintiff and Karas, the parties entered into a joint development agreement (hereinafter the

"JDA") (Motion Exh. 14) pursuant to which it was agreed that all tax liens, etc. on the property would be satisfied, and that "each of the properties [would] be transferred to me [the plaintiff] or my assignee upon permits being issued or commencement of work on each phase/parcel." Further, it was agreed that the parties would move expeditiously once a "water deal" was signed with the Town of Goshen or with any agreed upon third party and that all entities created by the parties would be "jointly and equally" owned. Karas would be responsible for paying all day-to-day expenses and taxes related to the properties until they were transferred. In return, he was entitled to live rent free in an apartment on the property and retain all rental income from an office building on the premises. If any of the properties were sold (pre-development), Karas was to receive 75% of the sale price, net of any investment made by the plaintiff to improve the parcel. Karas was also responsible for the day-to-day operations of the properties and for maintaining the books and records relating to the project. Plaintiff, however, was the managing partner. Unless otherwise agreed, neither was to receive a salary or other compensation. In the event of delays, the plaintiff was not responsible for funding plans, permits, or other associated costs, unless and until there was an agreed upon contract with a third-party user or developer, or the properties began realizing income from the water or other resources extracted from the property.

[*7]

Stathis agreed to initially contribute \$25,000 to obtain the necessary plans and approvals for the property. Any contributions in excess of that amount would be paid back to the plaintiff as "first money out." The parties also agreed to allocate and use 50% of all profits derived from the property to expedite the project's development. Karas also agreed to convey that portion of the residential property that overlapped with the commercial area of the subject properties (the "Wedge") without consideration. The parties also agreed to form a separate entity for the purpose of holding title to the properties, in which each would be vested with a 50% ownership interest. Alternatively, Karas agreed to transfer to the plaintiff a 50% interest in any entity holding title to the properties. If Karas predeceased the plaintiff, it was agreed that his estate would forfeit its right to run the day-to-day operations of the properties, and that there would be no sale of any property without the plaintiff's written consent for two years after Karas' death. It was also agreed that a copy of Karas' Last Will and Testament (provided to plaintiff), dated April 21, 1997, (the "Will") was an exact copy of Karas' original will, and that Karas would not change the Will insofar as it pertained to naming plaintiff's wife, Connie Atzoulis, as a residuary beneficiary; a prohibition that was to remain intact until all of the subject properties had been sold or otherwise transferred. Further, it was agreed that, upon Karas' death, the plaintiff would have the right

[* 8]

to purchase Karas' interest in the subject properties by one of the following three methods (chosen at his or Antzoulis' sole discretion): (1) pay the Karas estate 25% of the fair market appraisal of any parcel; (2) sell the development rights to the parcels and split the profits 75% to plaintiff and 25% to the Karas estate, net of his [plaintiff's] investment; or (3) pay the Karas estate \$160,000 within two years of his death. If, on the other hand, plaintiff pre-deceased Karas, plaintiff's estate would enjoy identical reciprocal rights under the agreement.

The JDA, by its terms, also reflected that it was being executed in addition to [and presumptively in conjunction with] the April 1st and April 23rd, 1997 agreements and to the extent that the language of each was in conflict then the JDA would be deemed controlling. Finally, the contract contained a severability clause and further prohibited modification except by mutual agreement of the parties in writing.

Plaintiff's Causes of Action

By verified complaint dated May 16, 2007, plaintiff commenced the instant action seeking, *inter alia*, the enforcement of the JDA. In relevant part, plaintiff alleges that, commencing around April 1997, he and Donald Karas, now deceased, entered into various agreements to develop certain property owned by Karas in the Town of Goshen sometimes referred to as "Karpytown.", the development of

which included the extraction of potable water from the property.

Plaintiff alleges, in substance, that the agreements of the parties culminated in the execution of the July 11, 1997 JDA pursuant to which he was to provide capital for planning and development, and Karas was obligated to either: (1) convey one-half of his interest in each of the lots to plaintiff; or (2) convey all of his interest in the lots to a third entity to be jointly and equally owned by the parties.

Plaintiff further alleges that Karas was entitled to live rent free in an apartment on one of the lots, and was also entitled to retain the rental income from an office building located on another lot. As apparent security for the JDA, Karas named plaintiff's wife, Connie Antzoulis, as a residuary beneficiary under his will, and agreed not to change his will until the properties were transferred.

Plaintiff further alleges that the JDA also granted plaintiff a two (2) year option to purchase Karas' 50% interest, which option was effective only if Karas died before the properties were conveyed pursuant to the JDA; a contingency, he alleges was satisfied.

Plaintiff further alleges that on or about May 23, 1997, the parties formed Aries, LLC (hereinafter "Aries"); an entity intending to be equally owned by plaintiff and Karas with plaintiff as managing member. Plaintiff alleges that, on or about October

[*10]

15, 1997, Karas conveyed one parcel (Lot No. 11) to Aries in the furtherance of the JDA and thereafter began to develop Lot No. 11 for use as a water well (the "Well Water" project). In the furtherance thereof, the parties engaged environmental consultants for the purpose of formalizing the necessary plans and securing the requisite approvals, the costs of which [alleged to be \$10,000.00] were advanced by plaintiff. Although Karas died before the completion of Well Water project, plaintiff nevertheless alleges that additional acts were undertaken, prior to Karas' death, also in the furtherance of the JDA which included: the construction of a road over one lot to allow access to Lot No. 11; the solicitation of proposals and bids for work concerning the development of the property; obtaining a sewage treatment proposal for the property; obtaining an environmental study of the property; and Karas' execution of a will naming the plaintiff's wife (Antzoulis) as a residuary beneficiary.

Plaintiff also alleges, however, that notwithstanding the foregoing, and commencing shortly after the formation of Aries, Karas embarked upon a course of fraudulent and tortious conduct with the intent of depriving the plaintiff of his rights under the JDA. Specifically, plaintiff alleges that: Karas passed a resolution concerning Aries, without plaintiff's knowledge or consent, naming Natalie Karas (Karas' ex-wife) and Gladys Varney (his longtime bookkeeper) as authorized agents of the LLC; that as

agents thereof they were allowed to and did in fact deplete Aries' bank account without plaintiff's knowledge or consent; and that on or about March 17, 2005, Karas and/or Bloom and Charles Karas attempted to sell Lot Nos. 2, 3, 4, 6 and 11 to a third party (Mazel Properties, LLC) without plaintiff's knowledge or consent, a sale that was ultimately aborted but which resulted in the commencement of litigation by Mazel Properties, LLC; litigation that plaintiff was forced to defend.

In addition, and in the furtherance of Karas' fraudulent and tortious conduct, plaintiff alleges that, just two days prior to his death, Karas changed his will and removed Antzoulis as a residuary beneficiary; a removal and amendment allegedly effectuated in concert with Bloom and Charles Karas. Further, and in violation of the JDA, Karas subdivided Lot No. 6 in 1997 and sold a portion of same; sold Lot No. 1 in 2005, and sold Lot Nos. 14 and 15 in 2005. Moreover, he alleges, after the death of Karas, the defendants, in August of 2006 and without his knowledge and consent, conspired and participated in the sale of Lot No. 13 to Hope Assets, changed the locks to the offices for Aries/Karpytown, took possession of all of its books, records, inventory, and business documents, and refused to return same. Plaintiff also alleges that certain of the Karpytown parcels were taken by eminent domain proceedings and that by virtue of same he is entitled to one-half (½) of the compensation paid, together with one-half

(1/2) of all rental income derived from Lot No. 13.

Predicated upon the foregoing, plaintiff alleges, as a first cause of action, that Karas breached the JDA by, *inter alia*: (1) failing and refusing to convey an interest in the properties to the plaintiff as agreed; (2) refusing to honor his right to acquire the properties through a lump sum payment; and (3) conveying and attempting to convey lots to third parties without his knowledge or consent. Plaintiff derivatively asserts, as his second and third causes of action, that Karas violated the implied covenant of good faith and fair dealing implicit in the JDA, and therefore breached the fiduciary duties and the duty of loyalty owed to plaintiff Stathis.

As a fourth cause of action, plaintiff alleges that all conveyances of the lots, other than those conveyed to him, were done so in derogation of the JDA and thus fraudulent as to him. As a fifth cause of action, the plaintiff alleges that the conduct of Bloom and Charles Karas with respect to the sale of the properties, the amendment of Karas' will and the tampering of Aries internal operation and its assets, constituted tortious interference with the JDA and with the plaintiff's prospective economic advantage. Consistent with the foregoing, plaintiff respectively alleges, as his sixth and seventh causes of action, that by the foregoing conduct defendants aided and abetted a civil conspiracy and converted JDA assets.

As an eighth cause of action, plaintiff seeks replevin of all Aries business records. Finally, as a ninth cause of action, plaintiff seeks rescission of the sale of Lot No. 13, and the imposition of a constructive trust.

The defendants, in response, have denied the material allegations in the complaint and have asserted multiple affirmative defenses and counterclaims. Specifically, and as a first counterclaim, defendants, while not disputing that Karas executed the April 23, 1997 agreement (hereinafter the "April Agreement") nevertheless allege that the Agreement is void and unenforceable on multiple grounds. First, they allege, Sam Stathis did not personally sign the agreement. Rather, it was signed on his behalf. Thus, they argue, he never signed the April Agreement. Second, they allege, the April agreement provided for the development of Lot No. 11 for the sale of water or for any other use upon which the parties might agree and the property was in fact never developed for the sale of water or any other use. Third, they allege, the terms of the April Agreement are so inequitable as to shock the conscience of the court and render the Agreement unenforceable. Finally, they allege, the purchase option embraced within the April Agreement violates the rule against perpetuities and constitutes an unreasonable restraint on alienation.

In conjunction with the main action, defendants Bloom and Charles Karas, in their capacity as executors of Karas' estate,

[* 4]

commenced a third-party action against third party defendants, Aries and Antzoulis, alleging the following: as their first cause of action that the April Agreement should be declared null and void and unenforceable for the reasons discussed *supra*; as their second cause of action that the invalidity of the April Agreement renders the prior property transfer to Aries null and void thus necessitating that such conveyance be set aside and the property re-conveyed to the Karas estate; and as a third cause of action, that the death of Karas resulted in the dissolution of Aries. Thus, they allege, Aries should be dissolved, its assets distributed and its affairs wound up.

At an examination before trial, the plaintiff testified that his home base was on Canal Street in New York City, and that he was self employed in several business, including, *inter alia*, property development and electrical contracting (Cross Motion, Exh 2). Stathis testified that he first met Karas in 1995 or 1996, when he was in the Goshen area in search of property to purchase. Stathis further testified that Karas owned property in the area, including the property at issue, and disclosed to Stathis that he was having financial trouble, *i.e.*, he was behind on property taxes. The parties discussed embarking upon a joint venture. Their discussions focused on the development of the subject property as a residential/commercial/industrial site. Plaintiff testified that the parties' basic agreement was as follows: The plaintiff would

[* 15]

initially invest \$25,000 and the money needed to stop the property from going into foreclosure, and would bring his financial resources, efforts and experience to developing the natural resources of the property (water, dolomite, etc.) (T 106-07). Plaintiff testified that he believed that the natural resources were the property's chief value (T 106-07). By contrast, he testified, Karas' primary interest was in developing Karpytown for his personal legacy (T 106). Stathis testified that the relationship was mutually beneficial because he knew engineers and consultants to help plan the development of the property, but was from New York City and a stranger to the area; whereas Karas was well known and "connected" in the area, and a "lonely" man looking for something of significance in his final years (T 12-15, 115-120). The overall plan was to develop the approximate 168 acre site in discreet stages (T 16). Initially, the plaintiff was to contribute \$25,000 and pay certain back taxes. Thereafter, it was envisioned that the money needed to develop the property would be derived from the sale of the water extracted and the dolomite mined from the property, together with the revenue generated from the sale of certain lots (T 16-17). It was agreed that Karas would handle the day-to-day operation, and that the plaintiff would oversee the general project and introduce Karas to financial people, developers, and potential tenants. In general, Stathis testified, he was to take care of the "immediate fires" (e.g., back

taxes) and thereafter the parties were to share the future expenses (T 37-38). Further, it was agreed that Karas would pay the day-to-day bills, and that the parties would share some of the bills and the plaintiff alone would pay others (T 49).

The record reveals that the property was never fully developed. Rather, only partial development occurred, i.e., they drilled some wells and did some testing (T 38). Indeed, they "ran into problems with the neighbors," and a potential deal with the Town of City of Goshen to supply water caused additional confusion (T 38). Thus, he testified, the parties' original vision changed from trying to make the water well into a commercially viable business, to limiting its use for the subject property itself (T 39). Plaintiff could not recall the total amount of money he invested and contributed to the project over the years. However, he asserted, most expenditures would be reflected in cancelled checks (T 19-20). He did recall that on April 1, 1997, he gave Karas \$15,000 for drilling; although he had provided funds prior to that date for "legal and accounting stuff" (25-26).

Concerning the April Agreement, Stathis testified that it was signed on his behalf by Anna Rocchio, his "right hand" person (T 24, 30) due to the fact he was out of town at the time (T 31). Stathis further testified that Aries was formed in 1997, was owned by Karas and Antzoulis (plaintiff's wife), and that Karas and Antzoulis had signed an operating agreement (T 40-42). Plaintiff

testified that the origin of the uneven split provided for in the JDA in the event Karas predeceased him (i.e., 75% for the plaintiff and 25% for Karas) emanated from Karas' vision of fulfilling his "dream" of developing Karpytown and his reliance on Stathis' money, and financial resources to do so (T 53). Stathis further testified that over the course of the project he and Karas became personally very close ("family"), and when Karas died in June 2005, "quite a bit" of his dream to develop the property had been realized, i.e., they had built the infrastructure and generated a master plan for the property (T 53-54). They had installed two wells, as well as roads and gardens (T 54). They also improved the office on the property and separated it from the residence (T 55) which the tenant paid for. Concerning the roads, the plaintiff testified that Karas and Aries hired people to cut and excavate, and that he brought in "bulldozers, excavators, and people on [his] payroll to fix some of that work for most of those roads" (T 56).

Concerning the July 11th, 1997 JDA, Stathis testified that he and Karas both signed it together at the offices of Karpytown. He testified that he actually witnessed Karas affix his signature to the document (T 58) and thereafter they made two copies (T 58). Notwithstanding the foregoing testimony, he could not recall making nor did not know how the various dark lines came to be on his copy of the JDA, but that they may have been made by a facsimile machine

(T 87-88). Plaintiff nevertheless testified that his attorney, Gerald Jacobowitz, Esq., told him at one point (the winter of '05 or spring of '06) that he [Jacobowitz] had the original of the JDA in his possession (T 89). Shortly after Karas died, Stathis spoke to Bloom about what should be done with the property "in order to protect everybody" involved (T 93). In response, she told him that Karas did not leave a will (T 96). However, shortly thereafter, she stated that Karas did in fact leave a will, but that neither he nor Antzoulis were named in it (T 94). After having Karas' Last Will and Testament examined, plaintiff thereupon contacted his attorney (Jacobowitz) for the purpose of formulating his prospective course of action.

In attempting to summarize his testimony concerning the totality of his expenditures for the project, Stathis could not provide a total figure, but testified that he spent at least \$100,000 on telephone bills, travel and entertainment alone (T 107). This included time spent with building department personnel, developers and potential investors (T 108). In general, he testified, the income generated by the property was sufficient to pay the taxes (T 115). In concluding his testimony, plaintiff testified, in substance, that over the course of the project, the basic agreement concerning the overall development of the property stayed the same; but the exact manner in which it was to be implemented evolved (T 132-34).

At an examination before trial, Gerald Jacobowitz, Esq. testified that he practiced in the area of land development and land use (Motion Exh. 16). Jacobowitz had known Karas, who he described as a real estate investor and developer, for 30 years and had performed legal work for him (T 5-7). In the late 1970s, Karas expressed an interest in trying to become a water source for Goshen. Jacobowitz represented Karas before the town (T 7-8). Jacobowitz recalled being present at a meeting between the plaintiff and Karas at which they discussed the feasibility of using the well to supply water to both Karpytown and Goshen, and forming an entity to do so (T 11-12). During the course of his deposition testimony, Jacobowitz identified two letters addressed to the plaintiff and Karas concerning the formation of an LLC and the formation of a transportation corporation related to the water well (T 10-11). Jacobowitz assisted in forming Aries (T 24-27). He testified that he never heard the plaintiff or Karas discuss a joint development deal for Karpytown (T 26-27). Concerning the plaintiff's copy of the JDA, Jacobowitz testified, in relevant part, as follows:

Q: Showing you now what was previously marked as plaintiff's exhibit 2 and ask you if you've ever seen that before (handing)?:

A: The one your showing me has a number of kind of lines through the typed portions of it. Are you asking whether I've ever seen it in this particular condition -

Q: No. My question-

A: - with the lines through the print?

Q: My question does not pertain to the condition of the copy. My question would apply to either a nicer copy of the document or the document in the manner it's depicted in this copy.

A: Yes. I did see this at some point that it was signed.

Q: When, to the best of your knowledge, did you first see that?

A: It would have been after Mr. Karas' passing.

Q: Was it in the same sort of condition with the markings on it or was it a cleaner version, if you understand the question?

A: I think it was a cleaner version.

Q: Who showed it to you?

A: Either Mrs. Bloom or the brother [John Karas].

Q: Did you ever have discussions with [the plaintiff] about Exhibit 2?

A: Not that I recall.

(T 27). After Karas died, Jacobowitz spoke and/or met with the plaintiff (T 28-29). The discussions concerned the condemnation of certain of the lots, and the possibility that Jacobowitz would represent the plaintiff against Karas' estate (T 30); representation he declined due to an apparent conflict of interest (T 31).

The Plaintiff's Motion

Plaintiff now moves for summary judgment to admit his copy of the JDA into evidence and to enforce his purchase option contained

therein. In so moving, plaintiff argues that the best evidence rule is not applicable because he adequately explained his inability to produce the original, i.e., it was kept at the headquarters of Aries/Karpytown in Goshen, that the defendants changed the locks and blocked his access to same and that he proved the identity of his copy to the original through, *inter alia*, the testimony of a disinterested witness (Jacobowitz). Indeed, he asserts, there is a "confluence of memoranda" concerning the JDA, including preliminary and draft versions of the JDA, and the well water agreement, and there was partial performance of the JDA, to wit: (1) he paid back taxes on the property and other development costs in excess of \$50,000 (i.e., for roads, temporary electric services, sewage treatment proposals and environmental studies); (2) the parties formed Aries and transferred title to one lot into Aries; and (3) Karas named the plaintiff's wife (Antzoulis) in his Will. Plaintiff also argues that in any event he would not be precluded from presenting evidence of an oral agreement, because joint venture agreements are not subject to the statute of frauds. Finally, he asserts, the defendants clearly breached the agreement: (1) by passing a purported corporate resolution for Aries naming Karas' ex-wife and bookkeeper as signatories and allowing them to withdraw money from the business; (2) by subdividing, selling and attempting to sell certain of the lots to third parties; (3) by executing a "death bed" will in which Karas omitted Antzoulis; and

(4) by excluding him from the offices of Karpytown/Aries.

Plaintiff further submits his own affidavit in which he asserts that Karas, the plaintiff and the plaintiff's wife bonded as family, and that they worked together to fulfill Karas' dream of developing his tax-burdened, vacant properties into Karpytown. However, given that Karas was in the "twilight" of his life, they entered into the JDA to protect plaintiff's investment and proprietary interest, although Stathis notes that Karas was a "seasoned local real estate developer" and protected his own interests. That is why, plaintiff asserts, Karas was to keep 75% of the proceeds from the sale of any lot at the pre-development stage. Stathis further avers that the parties' ultimate agreement progressed in stages. First, he provided Karas with \$5,000 to develop a water well on the property, a contribution evidenced by the agreement dated April 1, 1997, which also notes the parties' intent to enter into a "more formal arrangement." On April 13, 1997, he avers, he forwarded another \$10,000 to Karas for the same purpose, a contribution evidenced by Karas' handwritten entries on the second document of the two April 1st, 1997 documents. Indeed, the plaintiff asserts, a binding agreement concerning the water well was signed on April 23, 1997, at which point he provided Karas with an additional \$5,000 for development costs. Thereafter, Jacobowitz formed Aries to develop and manage the water well and, on October 15, 1997, Karas conveyed title to Lot No. 11 to Aries.

That same day, the plaintiff avers, Karas provided him with a copy of his will, which named the plaintiff's wife (Antzoulis) as a residuary beneficiary. Thereafter, he asserts, he and Karas exchanged various drafts of the final JDA. Plaintiff further avers that Karas signed the final version of the JDA at the Aries/Karpytown offices in Goshen, and that Karas kept the original and placed it in what the plaintiff believed to be the "corporate book." He never contemplated litigation with his "close friend and co-venturer," and believed that he would always have access to the corporate books. Thus, he avers, he kept only a copy of the JDA which he argues should be admitted into evidence for the reasons discussed *supra* and in particular the disinterested testimony of Jacobowitz, who represented both parties during the course of the negotiations. Indeed, he asserts, he proffered an exact copy of the JDA, he witnessed Karas sign the JDA, and Karas' own bookkeeper testified that Karas' signature on his copy was genuine. Moreover, he asserts, for the eight years that followed the JDA, the parties acted on the JDA, with him investing time and money in the Karpytown project, including personally "fronting" all solicitation costs, including travel expenses and accommodations for the multitude of builders and developers they sought to bring to the project. However, he argues, Karas and the defendants breached the JDA, *inter alia*, by passing a secret resolution for Aries which allowed Karas' wife Natalie Karas and long-time bookkeeper Gladys

Varney to withdraw money from Aries; and by entering into secret negotiations to sell a large portion of Karpytown, including the lot containing the water well. Plaintiff also notes that although the sale eventually fell through, it was nevertheless preceded by the execution of a six million dollar binder and the exchange of draft contracts all of which was punctuated by the commencement of a lawsuit by the prospective purchaser which he was forced to defend.

Moreover, a subsequent breach of the JDA was revealed only after Karas' death, when the defendants proffered a will executed by Karas just two days before his death that omitted both plaintiff and his wife (Antzoulis). Further, the defendants: (1) tried to sell Lot No. 13 to an LLC; (2) changed the locks on Aries' offices; and (3) denied him access to Aries' corporate books and records. In addition, he asserts, defendants refused to honor his option to purchase Karpytown pursuant to the terms of the JDA for \$160,000. In sum, the plaintiff argues, the JDA should be declared valid and binding, and the defendants should be found in breach.

The Defendants' Cross Motion

The defendants cross move to dismiss the complaint, and for summary judgment on their third-party complaint.

In support of their motion, the defendants submit an affirmation from counsel, Richard DuVall, in which DuVall asserts

that he intentionally did not proffer affidavits from either Nancy Bloom or Charles Karas in that each testified that they lacked personal knowledge of the facts concerning the JDA. DuVall notes that the April agreement was signed when Karas was 74 years old and plaintiff was, upon information and belief, in his early to late 40s. The April Agreement, DuVall argues, provides a "dramatic" bonus to the plaintiff should Karas die first, i.e., it, in effect, obligates Karas' estate to purchase the property at 150% of any price offered by the plaintiff. This, DuVall asserts, rendered the parties' presumptive "equal" partnership illusory. Further, he argues, there was no time limit on when this purchase option needed to be exercised. Thus, he asserts, the option violated the rule against perpetuities and against unreasonable restraints on alienation. In addition, DuVall argues, the April Agreement was nothing more than an "agreement to agree", i.e., it was for the development of the Water Well project "or any other use" the parties agreed was appropriate. Thus, DuVall contends, all the plaintiff needed to do to reap the benefits of the "bonus on death" was to disagree with and refuse to fund any proposal until Karas died, "which is exactly what occurred." Indeed, he opines, it is clear from various statements made by plaintiff at his deposition that he was aware that Karas was older and would likely die first. In addition, DuVall asserts, at the plaintiff's examination before trial, he testified that: (1) he never committed to pay any

particular amount toward the project; (2) the property was never developed as a well site; and (3) contrary to the understanding set forth in the April Agreement that the plaintiff would pay all development costs, Karas paid 50% of such costs, in addition to providing the property. DuVall notes that disclosure failed to reveal a signed operating agreement for Aries. Moreover, he asserts, the plaintiff testified that he transferred his interest in Aries to his wife (Antzoulis) shortly after it was formed. Thus, he argues, the plaintiff undertook no obligation as to Aries. He further asserts that, upon Karas' death in June 2005, Aries was dissolved by operation of law. Moreover, he notes, it appears that a law firm in Connecticut filed a certificate of dissolution for Aries on May 15, 2009, although it is not clear who, if anyone, authorized such filing.

DuVall further asserts that he determined, from documents submitted by the plaintiff, that Stathis contributed \$36,734.21 to Aries and Karas contributed \$10,911.52 (in addition to transferring a 16 acre parcel). DuVall also notes that, although there is no contemporaneous appraisal of the property for 1997, the property was assessed by the town at \$47,600. Thus, he contends, given the equalization rate of 27.16%, the parcel actually had a fair market value of approximately \$175,257. Accordingly, DuVall argues, Karas actually contributed approximately \$186,000 to Aries, as compared to the plaintiff's \$36,734.21 and thus under the default provisions

[* 27]

of the New York Limited Liability Company Law, the property of the LLC, upon dissolution, would be divided based upon the percentages of ownership. Here, he argues, Aries should be dissolved and, based on each party's contributions, Karas should be awarded 84% of the assets, and the plaintiff 16%. In sum, DuVall argues, the April agreement should be declared null and void, and any putative joint venture set forth therein deemed dissolved. Indeed, DuVall asserts, to give the plaintiff a 75% windfall based on the April agreement would be unconscionable. DuVall also challenges the existence and validity of the proffered JDA. DuVall notes that the plaintiff has yet to produce a "clean" copy of the same, despite a promise to do so, or an original copy. Further, he notes, in a letter from the plaintiff to Karas in 1999 (purportedly discussing the parties' relationship), the plaintiff makes no mention of the JDA. Rather, he mentions only the April 1st and April 23rd agreements. In addition, DuVall asserts, looking at the alleged drafts of the JDA, no logical editing process would have resulted in the purported final document. All of the these factors, DuVall argues, raise significant suspicions about the authenticity of the JDA itself. In any event, DuVall asserts, the JDA is not enforceable because it is an effort by the plaintiff to "steal" equity in the Karpytown properties without any commitment on his part. In support, DuVall notes that on page one of the JDA, it states that a transfer of title to any such lot will occur [only]

when a permit is issued or work commenced on such lot. Here, he asserts, no permit was ever issued nor work ever commenced. Moreover, he avers, there is no evidence that the plaintiff ever demanded transfer of title to any lot. Further, the JDA states that planning and work will proceed expeditiously once a "water deal is signed," and no water deal was ever signed. Similarly, DuVall notes, the JDA recognized the potential for delays, and provided that the parties should be prepared to "explore other options." He nevertheless asserts, plaintiff was not obligated to expend money unless the parties reached a "mutually agreeable contract with a third-party user" or income was generated from water sales, both of which were at the whim of the plaintiff. Moreover, DuVall notes, if in fact the plaintiff did pay out any development costs, such costs were to be repaid prior to the division of any profits. Thus, the plaintiff would receive both the return of any investment and a 50% windfall without any real risk to his capital. In addition, DuVall avers, the business entities contemplated by the JDA were never formed and, thus, there was never any business for the plaintiff to "manage." Conversely, he notes, the JDA precludes Karas from negotiating with any third parties concerning the properties.

Concerning Karas' Will, DuVall notes that Antzoulis, not the plaintiff, was named in the earlier will. Further, he asserts, Antzoulis testified at a deposition that she gave no consideration

for the same, but was named mostly due to the fondness and closeness of the parties. DuVall asserts that Karas signed five wills subsequent to the Will naming Antzoulis, and that none of them named Antzoulis. In addition, he argues, the purchase option of the JDA was an invalid attempt to make a testamentary disposition and its unlimited duration violated the rule against perpetuities and the rule against unreasonable restraints on alienation. In rebuttal to plaintiff's argument that the joint venture agreement was not subject to the statute of frauds, DuVall asserts that plaintiff has demanded real property, not rights in a joint venture, thus bringing it within its purview.

In addition, DuVall asserts that, contrary to the terms of the JDA, which obligated the plaintiff to pay for the development costs associated with the property, the parties each paid for one-half of the infrastructure improvements, i.e., for rough roads, two wells and certain gardens thus rendering the parties' conduct inconsistent with the explicit terms of the JDA itself. Moreover, he contends, the JDA was impermissibly vague.

In sum, DuVall argues, the conclusion to be drawn from the record is that the plaintiff fraudulently prepared the JDA and that neither the April agreements nor the JDA are enforceable because they are unconscionable, lack consideration, are vague, and are the product of overreaching. Further, the purchase options contained therein constitute invalid testamentary dispositions and violate

the rule against perpetuities and against unreasonable restraints on alienation. Indeed, DuVall asserts, the plaintiff is seeking to purchase approximately \$4 million worth of property for \$160,000, and waited until Karas was dead to exercise such right, thereby precluding Karas from telling his side of the story. Thus, DuVall argues, the plaintiff is guilty of "unconscionable laches."

In reply, plaintiff argues that the defendants' "kitchen sink" attack against plaintiff's action should not be permitted to obscure the basic facts, i.e., that the plaintiff's investment in the vacant and tax-burdened properties saved them from a piece-meal fire sale and allowed the cash strapped Karas to live rent free and develop the property for almost a decade and that Karas was a "shrewd" real estate investor who was willing to mortgage the defendants' inheritance to realize his dream of developing Karpytown. Moreover, the plaintiff argues, although the defendants try to paint Karas as an elderly man who was taken advantage of by a younger, sophisticated investor, the reality of the situation is much different, as is shown by, *inter alia*, an appended newspaper article on Karas which notes that Karas owned and operated a highly successful cabinet making business that employed 80 workers, and was a pre-eminent real estate developer who first started investing in the 1970s. Otherwise, the plaintiff argues, the defenses raised by the defendants are either inapplicable or invalid. Finally, the plaintiff notes, it appears that a recent fire at the offices of

[* 31]
Karpytown/Aries destroyed the original of the JDA.

Discussion and Legal Analysis

It is well settled that a grant of summary judgment is appropriate only where the Court determines there are no material or triable issues of fact. Issue identification, not issue determination is controlling. Therefore, it is incumbent upon the proponent of a summary judgment motion to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers. See, *Weingard v. New York University Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]; *Stillman v. Twentieth Century Fox Film Corporations*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 [1957]; *Giammarino v. Angelo's Royal Pastry Shop, Inc.*, 168 A.D.2d 423, 562 N.Y.S.2d 547 [2nd Dept. 1990].

Correspondingly, it is equally well settled that in defeating a motion for summary judgment, the opposing party must produce evidentiary proof, in admissible form, sufficient to require a trial of material questions of fact or must demonstrate [an acceptable] excuse for his or her failure to do so. See, *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986];

Marine Midland Bank, N.A. v. Brown, 115 A.D.2d 523, 496 N.Y.S.2d 53 [2nd Dept. 1985]; *City of New York v. Grosfeld Realty Company*, 173 A.D.2d 436, 570 N.Y.S.2d 61 [2nd Dept. 1991].

Here, application of the above referenced standard when applied to the substantive elements necessary to be established, requires denial of the total relief which each party seeks.

The Plaintiff's Motion

The plaintiff argues that he should be granted summary judgment on the issues that the JDA is valid and enforceable, and that he validly exercised his option thereunder to purchase the Karpytown property for \$160,000. The grant of such relief, he asserts, would render all other issues in the action moot. Having reviewed the record presented, the Court concludes, that although the plaintiff's copy of the JDA may be admitted into evidence, the enforcement of the purchase option which he seeks is nevertheless barred.

The Best Evidence Rule

As a threshold issue, the defendants have challenged the admissibility of the plaintiff's copy of the JDA as being presumptively barred by the best evidence rule. This argument lacks merit.

The Court of Appeals has discussed the best evidence rule as

follows:

The oft-mentioned and much misunderstood best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven. At its genesis, the rule was primarily designed to guard against "mistakes in copying or transcribing the original writing." Given the technological advancements in copying, in modern day practice the rule serves mainly to protect against fraud, perjury and inaccuracies * * * which derive from faulty memory.

Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence, and has not procured its loss or destruction in bad faith. Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original. Indeed, the more important the document to the resolution of the ultimate issue in the case, "the stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence." In other words, the court should give careful consideration to the possible motivation for the non-production of the original in determining whether the foundational proof of loss was sufficient.

Such a mitigating principle is necessary since a strict requirement of the original writing would serve to extinguish otherwise valid legal claims or defenses where a party has, through no mischief or bad faith, lost or destroyed an original. As stated by one commentator, the failure to excuse the loss of an original "would in many instances mean a return to the bygone and unlamented days in which to lose one's paper was to lose one's right." [Now, once the loss of the original is excused], all competent secondary evidence is generally admissible to prove its contents, provided that its admission does not offend any other exclusionary rule or policy. No categorical limitations are placed on the types of secondary evidence that are admissible. Nonetheless, the proponent of such derivative proof has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the

proffered evidence is authentic and "correctly reflects the contents of the original" before ruling on its admissibility. For example, when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, "substantially and with reasonable accuracy" all of its contents. Once a sufficient foundation for admission is presented, the secondary evidence is "subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact. Placement of this heavy foundational burden on the proponent of secondary evidence to prove its accuracy as a derivative source of proof serves to reduce the dangers of fraud and prejudice identified by Judge Simons in his dissent * * *. Indeed, those same dangers exist any time an original document is lost- even when the writing is a contract or lease- and a witness is called upon to recount its terms. In other words, the opponent is always at a disadvantage when cross-examining a witness about a lost document * * *. Additionally, the proponent of secondary evidence will naturally be discouraged from introducing "less convincing secondary evidence" because "an opponent may cause the jury to draw an unfavorable inference from such a strategy."

(Schozer v William Penn Life Ins. Co. of New York, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994) [internal citations omitted]).

Here, plaintiff has met his threshold burden of sufficiently explaining the unavailability of the primary evidence (the original copy of the JDA), and demonstrating that he neither procured its loss nor its destruction in bad faith. Since plaintiff has met his threshold burden, it then became incumbent upon the defendants to rebut the same, which they have failed to do. Indeed, they have offered no testimony or any other evidence, from a party with personal knowledge of the facts, which would establish that a diligent search was made of the offices of Karpytown/Aries (or any other location) and that the original copy of the JDA was not

found. Significantly, none of the defendants submitted an affidavit in opposition to plaintiff's motion, although presumptively having personal knowledge of plaintiff's contentions, including plaintiff's apparent lock out from the Karptown/Aries offices. Nor do defendants offer or identify any possible motivation for the plaintiff's non-production of the original copy. Accordingly, the plaintiff has met his threshold burden of demonstrating the unavailability of the primary evidence (the original copy of the JDA).

Plaintiff has likewise met the additional heavy burden of establishing that his copy of the JDA is an accurate copy of the original. Although plaintiff testified that his copy was an exact copy of the original document signed, such testimony is nevertheless precluded, as defendants' correctly point out, by the application of the Dead Man's Statute (see CPLR 4519; *Glatter v. Borten*, 233 A.D.2d 166, 649 N.Y.S.2d 677 [1stDept.1996]; cf., *In re Carrington*, 163 A.D. 544, 148 N.Y.S. 952 [2ndDept.1914]). However, such preclusion may be overcome where plaintiff produces other competent evidence establishing that his copy of the JDA is an accurate copy of the original (see, *Johnson v. Pollack*, 261 A.D.2d 585, 690 N.Y.S.2d 691 [2ndDept.1999]; *Berger v. Estate of Berger*, 203 A.D.2d 502, 611 N.Y.S.2d 246 [2ndDept.1994]); a requirement satisfied by plaintiff's introduction of the disinterested testimony of attorney Jacobowitz, who testified that he saw a

clean, signed JDA, which was provided by Bloom or Karas' brother. Moreover, the JDA is consistent with prior agreements between the parties, and there is some evidence of partial performance. In sum, plaintiff demonstrated, *prima facie*, the admissibility of his copy of the JDA.

In opposition, defendants argue that the plaintiff failed to adequately explain the "interlineations" throughout the JDA. However, the black line-like markings on the JDA cannot be accurately described as interlineations. Rather, the systemic and mechanical nature of the markings, which permeate every line of the document, are more consistent with the manner in which the document was reproduced. Indeed, there has been no foundational testimony from which the Court could reasonably conclude that the parties mutually struck out every single line on the document, including the signatures, rather than, for example, destroying the document or merely refusing to sign it.

Secondly, the defendants argue, the plaintiff failed to explain discrepancies between initial drafts and the final JDA. However, none of the discrepancies identified concern substantive provisions of the agreement itself. For example, defendants note that a prior draft of the JDA had a signature line for Karas, whereas the final version did not; and that a prior draft had a signature line for a witness, whereas the final did not; issues that relate to the document's form not substance.

Third, the defendants argue, the plaintiff testified that he left the signing with a clean copy of the document, but never produced such a copy. However, given that the testimony establishes that the copy proffered is an exact copy of the original, coupled with the absence of any forensic or other evidence suggesting alteration, such argument is unpersuasive and fails to raise significant issues concerning the authenticity of the JDA.

Fourth, the defendants argue, even if the JDA is authentic, it is unenforceable by its terms because the conditions precedent to the transfer of property set forth in the JDA never occurred, i.e., the issuance of permits, the commencement of construction on each parcel, the signing of a water deal or the demand for the conveyance of the properties. However, whether such events were conditions precedent to its enforcement, and whether the JDA was substantially complied with, are issues of fact best left for trial.

Finally, the defendants argue that the agreement is unconscionable; an argument that lacks merit. An unconscionable contract is one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms" (*Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1,10, 537 N.Y.S.2d 789 (1988), quoting 1 Corbin on Contracts, § 128, p. 400).

The doctrine of unconscionability, which is rooted in equitable principles, is a flexible one and a concept intended to be sensitive to the realities and nuances of the bargaining process itself (see, *Gillman v. Chase Manhattan Bank, supra*) and as such requires a showing that the contract was both procedurally and substantively unconscionable when made- i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus therefore is on such matters as the size and commercial setting of the transaction itself, whether deceptive or high-pressure tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power (*Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 537 N.Y.S.2d 789 [1988]). Here, defendants have failed to show any demonstrable basis from which the Court could reasonably conclude, either directly or inferentially, that the JDA was procedurally or substantively unconscionable when made. Indeed, the uncontradicted testimony suggests that plaintiff rescued the property from almost certain foreclosure, and the plan as set forth in the JDA was for joint ownership of the property once developed. Conspicuously absent from defendants' submissions

is any evidence which suggests that the conditions that existed at the time the agreements were forged were anything but that which plaintiff purports them to be (e.g., the introduction of business and tax records). Nor did the defendants present any detailed evidence as to exactly what development occurred on the property itself. Rather, the defendants' arguments, in the main, focus on the purchase option of the JDA which, as discussed *infra*, is not enforceable. Finally, there is no support in the record for the suggestion, implicit throughout the defendants' pleadings, that Karas was somehow physically and/or mentally infirm (presumably based solely on his age), or that he was naive and inexperienced in business and investment matters. .

The Rule Against Perpetuities and the Rule Against Unreasonable Restraints on Alienation

Defendants further argue, even if the plaintiff's copy of the JDA is found admissible, the purchase option contained therein violates the Rule Against Perpetuities and the rule against unreasonable restraints on alienation and, therefore, is not enforceable. In evaluating defendants' contentions, the Court concludes, and so finds, that defendants' contentions have merit.

In so finding, the Court is guided by the Court of Appeals holdings in which it has stated:

The Rule against Perpetuities evolved from judicial efforts during the 17th century to limit control of title to real property by the dead hand of landowners reaching into

future generations. Underlying both early and modern rules restricting future dispositions of property is the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time. These rules thus seek "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."

The traditional statement of the common-law Rule against Perpetuities was set forth by Professor John Chipman Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest" (Gray, *The Rule Against Perpetuities* § 201, at 191 [4th ed. 1942]).

*

*

*

The New York's Rule against Perpetuities is to be found in EPTL 9-1.1 (a) which declares void . . . any estate in which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years. The prohibition against remote vesting is contained in subdivision (b), which states that "[n]o 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." This Court has described subdivision (b) as "a rigid formula that invalidates any interest that may not vest within the prescribed time period" and has "capricious consequences." Indeed, these rules are predicated upon the public policy of the State and constitute non-waivable, legal prohibitions.

(*Symphony Space, Inc. V. Pergola Properties, Inc.*, 88 N.Y.2d 466, 646 N.Y.S.2d 641 (1996) [internal citation omitted]; see also *Buffalo Seminary v. McCarthy*, 86 A.D.2d 435, 451 N.Y.S.2d 457 [4th Dept.1982] *affd.* 58 N.Y.2d 867). In general, the Rule is applicable to option and preemptive (right of first refusal) contracts (*Symphony Space, Inc. V. Pergola Properties, Inc.*, *supra*; *Buffalo Seminary v. McCarthy*, *supra*).

In addition to the Rule Against Perpetuities, New York also

retains the more flexible common-law rule against unreasonable restraints on alienation. Unlike the statutory Rule against Perpetuities, which is strictly applied and measured exclusively by the passage of time, the common-law rule against unreasonable restraints evaluates the reasonableness of the restraint based on its duration, purpose and designated method for fixing the purchase price (see *Symphony Space, Inc. v. Pergola Properties, Inc.*, *supra*; *Buffalo Seminary v. McCarthy*, *supra*; *Wildenstein & Co., Inc. v. Wallis*, 79 N.Y.2d 641, 584 N.Y.S.2d 753 (1992); *Metropolitan Transp. Authority v. Bruken Realty Corp.* 67 N.Y.2d 156, 501 N.Y.S.2d 306 [1986]). It is generally said that the reason for the common-law rule is that ownership of property cannot exist in one person and the right of alienation in another (see *Metropolitan Transp. Authority v. Bruken Realty Corp.*, *supra*). Despite their differences, both the statutory and common-law rules strive to strike a balance between society's interest in the free alienability of property and the rights of owners to direct future transfers (see *Wildenstein & Co., Inc. V. Wallis*, *supra*). In applying the common-law rule to preemptive rights (i.e., rights of first refusal) and option rights, the courts have found the method by which the price is set can be critical in determining whether a preemptive right unlawfully restrains transfers. When the holder has a right to purchase at a fixed price, or at a price less than that offered in the market, it is likely to involve a sacrifice by

the owner if he wishes to transfer the property, thus becoming a far more serious interference with alienability. A preemptive right, however, will typically not be deemed unlawful when conditioned on payment of market value or a sum equal to a third-party offer. Market value, in some instances, may be less than sale price, but a market value fixed by arbitrators compelled to consider the price a willing seller would accept from a willing buyer at the time of sale can hardly be unreasonable (see *Metropolitan Transp. Authority v. Bruken Realty Corp.*, *supra* ; *Herrmann v. AMD Realty Inc.*, 8 A.D.3d 619, 779 N.Y.S.2d 560 [2ndDept.2004]).

In asserting the applicability of the Rule Against Perpetuities, defendants note that the JDA purports to be binding upon the parties, their heirs, successors and respective estates. Further, there is no time specified for the exercise of the purchase option right. Thus, the defendants argue, the option need not necessarily be exercised within a life in being plus 21 years, i.e., it may be exercised by the parties' estates more than 21 years after both parties have died (see, e.g., *Buffalo Seminary v. McCarthy*, *supra*); an argument that has merit with respect to the first two options afforded under the JDA- i.e., obtaining an appraisal and paying the estate 25% of the same; and (2) selling the parcels and dividing the parcels 75%/25% net of the plaintiff's investments. Indeed, the plaintiff does not dispute such. However,

the third provision/option, the option which plaintiff seeks to exercise (i.e., the right to purchase the property for \$160,000) is not similarly infirm. On the contrary, this option must be exercised within two (2) years of Karas' death, and thus, by its terms, within 21 years after the measuring life in being at the time of its creation (i.e., Karas'). Accordingly, the Court concludes, and so finds, that the purchase option at issue does not violate the Rule Against Perpetuities.

However, enforcement of the option is nevertheless precluded as an unreasonable restraint on alienation. In availing himself of the two (2) year option to purchase the Karpytown property for \$160,000 Stathis could, in effect, restrain the sale of the property for a full 2 years, and the estate would be powerless to accelerate such election, even if a prospective buyer were available. Neither the terms of the JDA nor the evidentiary record presented adequately explain the ostensible purpose purportedly served by the inclusion of the two year option; an option that brought the development of the property to a complete halt. Moreover, it is unclear how allowing the plaintiff to purchase the property for the apparently nominal sum of \$160,000 (i.e., approximately \$100 per acre) for up to two years after Karas' death would protect this investment. For example, the purchase price [as expressly provided for in the JDA] is neither tied to plaintiff's expected investment nor his anticipated profits. Nor does the

record support such a finding. Rather, the potential profit to plaintiff from the purchase would appear to far exceed the same, i.e., there is some evidence in the record [including the Surrogate Court records which the Court takes judicial notice of] that the property is currently worth millions. Thus, there was, in effect, no "method" for fixing the purchase option price. Finally, it is noted, had the property been developed as planned, the plaintiff's ownership interest would have been limited to 50%. Thus, in a very real sense, the purchase option operated as a disincentive for not only the sale of the property but for the plaintiff [and correspondingly a prohibition imposed upon the Estate] to pursue development. In sum, based on all of the facts and circumstances, the purchase option at issue constituted an unreasonable restraint on alienation and is therefore unenforceable.

In so determining the first two purchase options afforded under the JDA violate the Rule Against Perpetuities [which plaintiff concedes] and the third purchase option constitutes an unreasonable restraint on alienation, any argument regarding the April 23rd, 1997 Agreement (the "April Agreement") and the purported post death purchase options afforded thereunder have been rendered moot due to the integrated nature of the April 1st, April 23rd and July 11th, 1997 writings themselves.

"A fundamental tenet of contract law is that agreements are to be construed in accordance with the intent of the parties and the

best evidence of that intent is what they express in their written contract". See, *Goldman v. White Plains Center for Nursing*, 11 N.Y.3d 173,176, 867 N.Y.S.2d 27 (2008); *Innophos, Inc. v. Rhodia, S.A.*, 10 N.Y.3d 25,29, 852 N.Y.S.2d 820 (2008). Accordingly, a written agreement that is otherwise complete, clear and unambiguous on its face is entitled to be enforced, according to its terms, and the language contained therein is to be accorded its plain meaning. Here, the parties evinced a clear intent [as expressed in the JDA] that the April 1st, April 23rd and the July 11th, 1997 JDA [and all rights afforded thereunder] were to be viewed and interpreted as one integrated document. In relevant part, the JDA provided for the following:

"This agreement is in addition to our agreement of April 1, 1997 and April 23, 1997 [sic] if any language or provision conflict, the language in this agreement hereby supersedes."

The JDA, by its terms, provided for three post mortem purchase options each of which were discussed *supra*. These options, by virtue of their conflicting terms, superseded the operative post mortem purchase options provided for and afforded to the parties under the April Agreement thus rendering such provisions moot.

The Purported Invalid Testamentary Disposition

Although rendered academic by the analysis *supra*, the defendants did not demonstrate that the purchase option of the contract was an invalid testamentary disposition (see, *In re*

[* 46]

Hillowitz Estate, 22 N.Y.2d 107, 291 N.Y.S.2d 325 (1968); *Heller v. Heller*, 216 A.D.2d 355, 628 N.Y.S.2d 177 [2ndDept.1995]). The clear thrust of the provision in the JDA was to provide security for plaintiff's investment "until all parcels [had] been sold or transferred into an entity owned equally by [Karas] and [Stathis or his assignee]". Moreover, the thrust of such allegations, in plaintiff's complaint, was to buttress his breach of contract claim not, as referenced in defendants' "Eighth Affirmative Defense", to contest the admissibility of Karas' Last Will and Testament to probate. Defendants' Eighth Affirmative defense must be dismissed.

The Laches Argument

The defendants also argue that, even if the court were to find the plaintiff's copy of the JDA admissible, the plaintiff should be barred from enforcing the same based on laches. This argument lacks merit.

Laches serves as an equitable bar to recovery based on a lengthy neglect or omission to assert a legal right coupled with resulting prejudice to the adverse party. The mere lapse of time, without more and particularly without a showing of prejudice, will not sustain a defense of laches (see *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654 (2003); *White v. Priester*, 78 A.D.3d 1169, 912 N.Y.S.2d 127 [2ndDept.2010]). Prejudice may be demonstrated by a showing of injury, change of

position, loss of evidence, or some other disadvantage resulting from the delay (see, *White v. Priester, supra*). Here, the defendants presented no evidence that the plaintiff engaged in any lengthy neglect or failure to act which resulted in prejudice to Karas or for that matter to them. In fact, it is unclear from the record just when any developmental activity, relevant to the Karpytown property, ceased or whether it ceased prior to Karas' death. Suffice to say, Karas' death, and plaintiff's delay in exercising the option, without more, is not sufficient to warrant a finding of laches. Thus, defendants' Third Affirmative Defense must be dismissed.

The Statute of Frauds Defense

Defendants also argue that evidence of an oral joint venture agreement between the plaintiff and Karas should be barred by the statute of frauds. In light of the determination *supra*, that the plaintiff's copy of the JDA is admissible, this argument is academic. In any event, it lacks merit.

As plaintiff correctly points out, a joint venture agreement is not subject to the statute of frauds (see *Ackerman v. Landes*, 112 A.D.2d 1081, 493 N.Y.S.2d 59 [2ndDept.1985]; *Barash v. Estate of Sperlin*, 271 A.D.2d 558, 706 N.Y.S.2d 439 [2ndDept.2000]; *Chalmers v. Eaton Corporation*, 71 A.D.2d 721, 419 N.Y.S.2d 217 [3rdDept.1979]; *Weinser v. Benensen*, 275 A.D. 324, 89 N.Y.S.2d 331

[* 48]

[1stDept.1949]). Thus, the statute of frauds is inapplicable to and does not render void an oral joint venture agreement dealing in real property since the interest of each partner is deemed personalty, not an interest in real property (see *Plumitallo v. Hudson Atlantic Land Co., LLC*, 74 A.D.3d 1038, 903 N.Y.S.2d 127 [2ndDept.2010]). Thus, defendants' First Affirmative Defense must be dismissed.

The Standing Issue

Lastly, defendants argue that the plaintiff lacks standing to enforce any rights as to Karas' will because Antzoulis, not the plaintiff, was to be the purported beneficiary. However, the promise to name Antzoulis as a beneficiary in Karas' will was made to the plaintiff in the JDA, presumptively as an inducement to his participation in and contribution to the joint venture as well as affording security until the parcels were sold or transferred into an entity equally owned by Stathis and Karas. Thus, he is aggrieved by a breach of that promise and has the requisite standing to enforce same.

The Defendants'/Third Party Plaintiffs' Cross Motion

The defendants/third-party plaintiffs not only cross move for summary judgment dismissing the complaint but also with respect to on their third-party complaint. In the main, their arguments

concern the admissibility and enforceability of the plaintiff's copy of the JDA, and the enforceability of the April 23, 1997, agreement. As discussed *supra*, the plaintiff's copy of the JDA is admissible and enforceable to the extent indicated. Thus, to the extent that the defendants/third-party plaintiffs' cross motion relies on a contrary conclusion, it is denied. Consequently, the analysis herein will focus on the April 23, 2007, agreement (the "April Agreement") and the third-party action.

The April Agreement

The defendants/third-party plaintiffs argue that the April Agreement is unenforceable because it constitutes no more than an agreement to agree, *i.e.*, the plaintiff agreed only to fund development costs if and when a suitable use of the property was identified. Thus, if there was no agreement on a use, there never would have been an advancement of any funds. Moreover, they argue, there was no minimum amount that the plaintiff agreed to provide and thus, they assert, Karas gave up his right to a substantial amount of property in exchange for, in effect, nothing. Accordingly, they argue, there was a lack of consideration, a lack of mutuality and no meeting of the minds. Finally, they assert, the April agreement was unconscionable. However, these arguments lack merit.

Initially, the defendants/third-party plaintiffs' arguments

Concerning the April agreement are not rendered academic by the determination supra that the plaintiff's copy of the JDA is admissible, given that the main relief sought by plaintiff thereunder - the exercise of the purchase option- has been denied. Thus, the relevance of the April Agreement cannot be finally determined at this time, although its significance to the ultimate outcome of the pending litigation, in this Court's view, has been significantly undercut due to the Court's determination that the post mortem buyout provisions of the April Agreement have been superseded and thus rendered moot by the integrated nature of the April 1st, April 23rd and July 11th, 1997 writings. Accordingly, the defendants/third-party plaintiffs' arguments concerning the same will be addressed on the merits to the extent they retain their vitality.

If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract. Thus, a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (see *Teutel v. Teutel*, 79 A.D.3d 851, 912 N.Y.S.2d 664 [2ndDept.2010]; *Joseph Martin, Jr. Delicatessen v. Schmacher*, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247 [1981]). Here, the April Agreement cannot be properly categorized as a mere agreement to agree. Rather, the parties specifically agreed to develop the property as a water well, and to ultimately transfer ownership of the property to a LLC to be owned jointly by

[* 51]

the parties. The mere fact that every detail of the joint venture agreement was not spelled by the parties is not necessarily fatal to its validity, especially given the uncertainty of the prospective development costs and the timetable for approval. Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance; a covenant that embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits and benefits of the contract (see *Atlas Elevator Corp. v. United Elevator Group, Inc.*, 77 A.D.3d 859, 910 N.Y.S.2d 476 [2ndDept.2010]; *Lonner v. Simon Property Group, Inc.*, 57 A.D.3d 100, 866 N.Y.S.2d 239 [2ndDept.2008]; *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 639 N.Y.S.2d 977 [1995]). Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion and the implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement (*Atlas Elevator Corp. v. United Elevator Group, Inc.*, *supra*; *Lonner v. Simon Property Group, Inc.*, *supra*). The implied covenant of good faith encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included

in the agreement, and prohibits either party from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (*Atlas Elevator Corp. v. United Elevator Group, Inc., supra*). Here, this implied covenant bound each party to act in a manner which advanced the stated objective of the April agreement to develop the Well Project. Indeed, the plaintiff testified that the development of the well project advanced at least to some degree, and that he paid substantial sums toward the same. The exact nature of the events is a matter for trial. In sum, the April Agreement was not a mere agreement to agree. For the same reasons, the defendants/third-party plaintiffs did not demonstrate that the April Agreement was not supported by adequate consideration, that there was a lack of mutuality or that there was no meeting of the minds. Indeed, the parties appear to have acted on the April Agreement for a number of years after its execution. Finally, and for the same reasons discussed *supra*, the defendants/third-party plaintiffs did not demonstrate that the April Agreement was unconscionable. For all of the foregoing reasons, defendants' Fourth Affirmative Defense must therefore be dismissed.

The defendants/third-party plaintiffs also argue that the purchase option provision of the April Agreement violates the Rule Against Perpetuities and the rule against unreasonable restraints on alienability. However, the plaintiff is not seeking to exercise

that provision of the April agreement. Rather, the plaintiff is seeking to exercise the purchase option of the JDA. Moreover, the relevance of the provision has been rendered moot by the superseding language of the JDA itself. However, the provision, if reached, would violate the Rule Against Perpetuities and the rule against unreasonable restraints on alienability.

The April agreement purports to be binding upon the parties, their heirs, successors and respective estates. Further, there is no time specified in the April agreement for the exercise of the purchase option. Thus, the option need not have been necessarily exercised within a life in being plus 21 years, i.e., it could have been exercised by the parties' estates more than 21 years after both parties have died (see *Buffalo Seminary v. McCarthy*, *supra*). For the same reason, the option provision constitutes an unreasonable restraint on alienation. Thus, the purchase option of the April agreement is not enforceable.

Aries

The defendants/third-party plaintiffs' arguments concerning Aries are less defined. However, in its third-party action, it alleged three causes of action, each of which will be discussed in *seriatim*.

In their first cause of action, the defendants/third-party plaintiffs argue that the April Agreement should be declared null

and void and unenforceable for the reasons discussed *supra*. However, the April Agreement is valid and enforceable to the extent and within the confines previously discussed . Similarly, the defendants/third-party plaintiffs, in their second cause of action, argue that the invalidity of the April Agreement renders the transfer of the property to Aries null and void, that the transfer should be set aside and the property re-conveyed to the Karas estate. However, again, the April Agreement is valid and enforceable to the extent set forth *supra*.

As a third cause of action, the defendants/third-party plaintiffs allege that the death of Karas resulted in the dissolution of Aries. Thus, they argue, Aries should be dissolved and its affairs wound up. However, in relevant part, Limited Liability Corporation Law § 704(b) provides: "Unless otherwise provided in the operating agreement, the death * * * of any member * * * shall not cause the limited liability company to be dissolved or its affairs to be wound up * * *. Here, there is no evidence of an operating agreement. Thus, the death of Karas did not result in the automatic dissolution of Aries. Moreover, based upon the current record presented, even the most basic questions concerning Aries cannot be determined, i.e., whether Aries was validly formed and, if so, who are its members, what are its assets and the extent to which, if at all, it has been dissolved. Thus, the insufficiency of the current record precludes the awarding of

any such relief at this time. For all of the foregoing reasons, summary judgment on the third-party action is denied.

Further Orders, Procedural Matters and Scheduling

Parenthetically, if not inexplicably in light of the pending litigation, Surrogate Court records reveal that the Estate of Donald Karas a/k/a Donald G. Karas a/k/a Karpy was formally closed by Co-Executors and party defendants, Nancy Bloom and Charles Karas, without judicial settlement, by way of the filing of Affidavits of Completion of Estate Proceeding on October 29th, 2010. Consistent with the foregoing, executed and acknowledged "Receipts and Releases", were also filed; Receipts and Releases executed by Nancy Bloom and Charles Karas, in their capacity as *Co-Trustees of the Marital Trust Under the Will of Donald G. Karas*, which Receipts and Releases acknowledge the Trust's receipt [and presumptive funding] of \$2,905,000.00 in real property; real property presumptively embraced within and forming the subject of the pending litigation. [see, Surrogate File No. 450/2005 which the Court takes judicial notice of]. Neither Bloom nor Karas have been joined as party defendants in their capacity as Trustees.

In view of the foregoing and the Court's, decision, the parties are therefore directed to appear, through respective counsel, for a settlement/pre-trial conference on March 29th, 2011 at 10:30 A.M. at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

Accordingly, and in accordance with the foregoing, it is

ORDERED, that Plaintiff's motion for partial summary judgment is granted insofar as he seeks the admissibility of the copy of the July 11th, 1997 Joint Development Agreement (the "JDA"), which the Court determines is admissible and enforceable in accordance with its terms, subject to the un-enforceability of the post-mortem buy out provisions as hereinafter enumerated; and it is further

ORDERED, that Plaintiff's motion for partial summary judgment is further granted insofar as it seeks the dismissal of Defendants' First, Third, Fourth, and Eighth Affirmative Defenses which are hereby dismissed; and it is further

ORDERED, the Defendants' cross-motion for summary judgment is granted insofar as it seeks to invalidate the post mortem buyout provisions contained in the JDA, and referenced therein as options i, ii and iii, which options are deemed, and are hereby declared to be, un-enforceable as violating the Rule Against Perpetuities and/or as constituting an unreasonable restraint on alienation but which are nevertheless severable from the remainder of the JDA; and it is further

ORDERED, that all other applications, not specifically addressed herein, are deemed denied, without prejudice to renew.

The foregoing constitutes the decision and order of the court.

Dated: February 25 , 2011
Goshen, New York

E N T E R



HON. ROBERT A. ONOFRY, A.J.S.C.

TO: Tarshis, Catania, Liberth, Mahon & Milligram, PLLC
Attorneys for Plaintiff Stathis
One Corwin Plaza, PO Box 1479
Newburgh, NY 12550

McCabe & Mack, LLP
Attorneys for Defendants Bloom and Karas
63 Washington Street
PO Box 509
Poughkeepsie, NY 12602-0509