| **Incorporated Vil. of Mastic Beach v Mastic Beach Prop. Owners Assoc., Inc.** |
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| 2014 NY Slip Op 31788(U) |
| July 7, 2014 |
| Supreme Court, Suffolk County |
| Docket Number: 11-9188 |
| Judge: Jerry Garguilo |
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INDEX No. 11-9188

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

***PRESENT:***

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 1-15-14 (#004)
MOTION DATE 1-8-14 (#005)
ADJ. DATE 4-2-14
Mot. Seq. # 004 - MD
# 005 - MD

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INCORPORATED VILLAGE OF MASTIC BEACH,

Plaintiff,

- against -

MASTIC BEACH PROPERTY OWNERS ASSOCIATION, INC.,

Defendant.

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Upon the following papers numbered 1 to 40 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10, 15 - 27 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 30 - 34 ; Replying Affidavits and supporting papers ___; Other memoranda of law 11 - 12, 13 - 14, 28 - 29, 35 - 36, 37 - 38, 39 - 40 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that these motions are hereby consolidated for purposes of this determination; and it is further

***ORDERED*** that the motion by defendant Mastic Beach Property Owners Association, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's amended complaint is denied; and it is further

***ORDERED*** that the motion by the plaintiff Incorporated Village of Mastic Beach for an order pursuant to CPLR 3212 dismissing the defendant's affirmative defenses and granting summary judgment in its favor is denied.

This is an action to enforce a deed dated July 30, 1940 and recorded on August 9, 1940 (the deed) conveying certain real property (the property) to the defendant subject to a provision that, upon the

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formation of an incorporated village of Mastic Beach, the property was to be conveyed or dedicated by the defendant to said village. It is undisputed that the plaintiff was incorporated on September 16, 2010 as the Incorporated Village of Mastic Beach (plaintiff or Village). Thereafter, the plaintiff made a written request to the defendant to transfer title to the property to the Village, which was rejected. The plaintiff then commenced this action alleging, among other things, that the subject provision constitutes a covenant, and that it is entitled to obtain title to the property and money damages resulting from the defendant's breach of the covenant and failure to timely convey title.

The defendant now moves for summary judgment on the grounds that the provision is not a covenant, that the provision violates the rule against perpetuities, and that its obligation to convey title to the property has not yet been "triggered," because the "neighborhood formerly known as Mastic Beach has yet to incorporate." The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the defendant submits the affirmation of its attorney, the pleadings, and the affidavit of a licensed land surveyor which includes a certified map of the property. In his affirmation, counsel for the plaintiff avers that the plaintiff mistakenly contends that said provision constitutes a covenant, and that the provision is a condition subsequent which is void and unenforceable due to its violation of the rule against perpetuities.

It is undisputed that the property was granted to the defendant by the grantor, a corporate developer of the property, in the deed, which includes the following provisions:

> THIS CONVEYANCE is made upon the express covenant and condition to which the grantee Association by the acceptance of this deed agrees that it will pay all taxes and assessments levied ...
>
> * * *
>
> The said Association will at all times ... keep and retain for the benefit of the lot owners of Mastic Beach the park areas hereinbefore described ...
>
> * * *

> Upon the formation of an incorporated village of Mastic Beach, the grantee Association agrees that it will convey or dedicate without consideration to the said Village, such part of the within described property as may be included within the described corporate limits of such Village, subject to a covenant and agreement, however, that any premises so conveyed will be kept and maintained for the use and benefit of the residents of such Village.
>
> * * *
>
> The covenants and conditions above stated shall be deemed to be covenants running with the land with the right of re-entry to the party of the first part, its successors or assigns for the breach of any covenant affecting any particular parcel herein described, provided however, that such right of re-entry shall not be available against any municipal corporation or sovereign authority.

The construction of a deed is generally a question of law for the court (see RPL 240[3]; ***Blangiardo v Horstmann***, 32 AD3d 876, 822 NYS2d 545 [2d Dept 2006]; ***Spencer v Connolly***, 25 AD3d 832, 808 NYS2d 789 [3d Dept 2006]; ***Iulucci v James H. Maloy, Inc.***, 199 AD2d 720, 606 NYS2d 59 [3d Dept 1993], subject to ordinary rules of construction applicable to other instruments (***Loch Sheldrake Assoc. v Evans***, 306 NY 297, 118 NE2d 444 [1954]; ***People v Call***, 129 Misc 862, 223 NYS 257 [Sup Ct. Hamilton County 1927]). The paramount rule of construction is that the intention of the parties governs (RPL 240[3]; ***De Paulis Holding Corp. v Vitale***, 66 AD3d 816, 889 NYS2d 191 [2d Dept 2009]; ***Universal Broadcasting Corp. v Incorporated Vil. of Mineola***, 192 AD2d 518, 596 NYS2d 111 [2d Dept 1993]: to the extent that the parties' intent can be gathered from the whole instrument and is consistent with the rules of law (RPL 240[3]; ***Schwab v Schwab***, 280 AD 139, 112 NYS2d 354 [4th Dept 1952]; ***Van De Carr v Schloss***, 277 AD 475, 101 NYS2d 48 [3d Dept 1950]). Here, the subject language is ambiguous as the grantor has used the terms "condition" and "covenant" without distinguishing the legal meanings between them. In addition, particular words are not determinative of the issue before the court (***Munro v Syracuse, Lake Shore & N.R.R. Co.***, 200 NY 224, 93 NE 516 [1910]; ***Post v Weil***, 115 NY 361, 22 NE 145 [1889]; ***Towle v Remsen***, 70 NY 303 [1877]; *see also* ***Suffolk Bus. Ctr. v Applied Digital Data Sys.***, 78 NY2d 383, 576 NYS2d 65 [1991]).

Here, despite the contentions of the parties to this litigation, the deed unambiguously provides for the grant to the plaintiff of a future estate subject to a condition precedent. This is the case whether the grant is considered a remainder or an executory interest. "A future estate subject to a condition precedent is an estate created in favor of one or more unborn or unascertained persons or in favor of one or more presently ascertainable persons upon the occurrence of an uncertain event" (EPTL 6-4.10). Prior to the enactment of the EPTL, such an interest was traditionally called a contingent remainder and it was necessary that the condition precedent occur within the period permitted for the suspension of the power of alienation and the rule against perpetuities applicable at the time of the making of the deed (*see* ***Mott v Ackerman***, 92 NY 539, 549 [1883]; ***Walker v Marcellus & & Otisco Lake Ry. Co.***, 226 NY 347, 123 NE 736 [1919]; ***Edward John Noble Hosp. of Gouverneur v Board of Foreign Missions of***

***Presbyt. Church in U.S. of Am.***, (13 Misc2d 918, 176 NYS2d 157 [Sup Ct, St. Lawrence County 1958]).

The conveyance herein cannot be a future interest on condition subsequent, as asserted by the defendant, as the language indicates that the grantor did not intend to reserve a right of reentry to reacquire the property in the event of a failure of the defendant to convey the property to the plaintiff upon its incorporation.[1] It is well settled that a grantor's retention of a right of reentry, currently called a right of reacquisition, "is one of the clearest and strongest manifestations supporting a finding of intent to create a future interest on a condition subsequent" (***Suffolk Bus. Ctr. v Applied Digital Data Sys.***, 78 NY2d at 388-389, 576 NYS2d at 67-68 [1991] citing ***Munro v Syracuse, Lake Shore & N. R.R. Co.***, *supra*). Putting aside any ambiguity as to who might be included therein, it is beyond cavil that the intent of the parties was that the property be used for the lot owners of Mastic Beach. Thus, absent a failure by the defendant to so use the property, and considering the grantor's waiver of the right of reentry against any municipality incorporated in the future, it would be contrary to that intent for the grantor or its successors to reacquire the property.

In addition, it is determined that the provision requiring the defendant to convey the property to the plaintiff upon its incorporation is not a covenant as it is more than "a promise to do or refrain from doing certain things with respect to real property" (***Suffolk Bus. Ctr. v Applied Digital Data Sys.***, *supra*). There are two types of covenants involving real property. The first being real covenants which run with the land, and the second being personal covenants (see ***Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank***, 278 NY 248, 15 NE2d 793 [1938]; ***Arroyo v Rosenbluth***, 115 Misc2d 655, 454 NYS2d 610 [Civ Ct, Kings County 1982]). Real covenants bind the covenantor, and any and all subsequent grantees as well (***Arroyo v Rosenbluth***, *id.*). Personal covenants generally bind only the covenantor (***Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank***, *supra*). Here, any interest created in the plaintiff by the subject provision cannot bind any subsequent grantee and does not involve the use of the property but the fee itself. In any event, as discussed below, it is determined that, even if the provision is found to be a covenant of either type, said provision would impose a burden in perpetuity upon the property and it would be unenforceable (*see* ***Eagle Enters. v Gross***, 39 NY2d 505, 384 NYS2d 717 [1976]; *see also* ***City of New York v Delafield 246 Corp.***, 236 AD2d 11, 662 NYS2d 286 [1st Dept 1997]; ***Adler v Simpson***, 203 AD2d 691, 610 NYS2d 351 [3d Dept 1994]).

At the time of the making of the deed, the courts had already adopted two fundamental principles governing whether or not there is a violation of the rule against unlawful suspension of the power of alienation. The first is that the validity of the interest in question must be determined by the circumstances as they exist on the effective date of the instrument creating the interest, and not from later events (***Matter of Wilcox***, 194 NY 288, 87 NE 497 [1909]; ***Matter of Roe***, 281 NY 54, 24 NE2d

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[1] In light of the determination that the grantor did not retain a right of reentry or possibility of reverter regarding the subject provision, the defendant's contention that the grantor's failure to file a declaration of intention to preserve said right pursuant to RPL 345 extinguished the plaintiff's right to recover herein is without merit. In addition, the grantor's right of reentry or the possibility of reverter regarding other provisions in the deed are not before the Court.

322 [1939]; ***Matter of Grace***, 232 AD 76, 248 NYS 543 [4th Dept 1931], *affd* 261 NY 502, 185 NE 712 [1933]; ***In re Jarvie's Trust***, 73 NYS2d 246 [Sup Ct, New York County 1947]; *see also* ***Symphony Space v Pergola Props.***, 88 NY2d 466, 646 NYS2d 641 [1996]). The second is that, for the conveyance of the future interest to be found valid, the interest must vest within the statutory period under every possible sequence of events (***Schettler v Smith***, 41 NY 328 [1869]; In re Perkins' Estate, 245 NY 478, 157 NE 750 [1927]; ***Matter of Shehan***, 157 Misc2d 904, 597 NYS2d 1017 (Sur Ct, Erie County 1993]; ***Matter of Isganaitis***, 124 Misc2d 1, 475 NYS2d 699 [Sur Ct, Kings County 1983]). Thus, under the applicable law, the test whether an interest violates the rule against perpetuities is not whether under any contingency the interest vests within the prescribed period, but rather whether under any contingency it will not vest within the prescribed period (*see* ***In re Morgan's Will***, 101 NYS2d 550 [Sur Ct, Westchester County 1950]). It has been held that the statutory period under the rule against perpetuities is 21 years where the parties to an agreement are corporations and no measuring life or lives are stated in the subject instrument (***Metropolitan Transp. Auth. v Bruken Realty Corp.***, 67 NY2d 156, 501 NYS2d 306 [1986]; ***Bleecker St. Tenants Corp. v Bleeker Jones LLC***, 65 AD3d 240, 882 NYS2d 42 [1st Dept 2009]).

Here, the condition precedent and/or the contingency vesting the plaintiff's future interest in the property, its incorporation as a village, was not certain to occur within 21 years of the making of the deed on June 21, 1940. Thus, the language used by the grantor discloses his intention to limit the bequest upon a condition precedent, the performance of which is unrestricted as to time and permits the suspension of the power of alienation and of absolute ownership beyond the statutory period making the conveyance of the interest void (***Matter of Kennedy***, 151 Misc 193, 271 NYS 126 [Sur Ct, New York County 1934]). In fact, said incorporation did not occur within the statutory period of the rule against perpetuities. However, it has been held that a gift to a charitable organization yet to be formed does not violate the rule against perpetuities notwithstanding the possibility that the corporation might not be organized within the statutory period (***Maynard v Farmers' Loan & Trust Co.***, 208 AD 112, 203 NYS 83 [1st Dept 1924], *affd* 238 NY 592, 144 NE 905 [1924]; ***In re Duprea***, 6 NYS2d 555 [Sur Ct, Franklin County 1938]). In addition, towns and villages have been held to be proper recipients of charitable or benevolent dispositions of property including, among other things, public park lands (***Matter of Shatford***, 18 Misc2d 953, 188 NYS2d 411 [Sur Ct, Columbia County 1959]; *see also* ***Matter of Neher***, 279 NY 370 [1939]; ***Smith v Incorporated Vil. of Patchogue***, 285 AD 1190, 141 NYS2d 244 [2d Dept 1955]; ***Matter of Faxton***, 18 Misc2d 192, 184 NYS2d 735 [Sup Ct, Oneida County 1959]).

Here, the defendant has failed to establish its entitlement to summary judgment on the ground that the subject provision violated the rule against perpetuities. As discussed below, there is an issue of fact regarding whether the plaintiff is the "municipal corporation or sovereign authority" to which the grantor intended to grant a future interest in the property. That is, whether this plaintiff is entitled to the benefit of the exception to the rule against perpetuities for dispositions to charitable or benevolent entities.

In his affidavit, Joseph M. Petito (Petito) swears that he is a land surveyor licensed in the State of New York, that he has reviewed, among other things, the deed and the subdivision boundary maps dated 1926 to 1938 "depicting properties including the original ten subdivisions comprising Mastic Beach,

which is described in the ... deed." He states that he has attached as an exhibit to his affidavit a copy of a map that he created and certified depicting the ten subdivisions described in the deed "completely contained within a greater area which was recently incorporated as the Village of Mastic Beach." Petito further swears that the plaintiff "as defined in 2010 after a referendum was passed to incorporate" included the entirety of the ten subdivisions "plus additional areas not originally within the confines of the original Mastic Beach."

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984] *citing* ***Cassano v Hagstrom***, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.*** *supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2nd Dept 1988]). Here, to the extent that Petito's affidavit attempts to render an expert opinion as to what constitutes the limits of the area known as Mastic Beach, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). More importantly, as discussed below, it begs the question as to what the grantor considered to be the limits of the area of Mastic Beach, and its intent in the disposition of the future interest contained in the deed.

In his affirmation, counsel for the defendant avers that "any potential obligation of [the defendant] to convey the properties described within the Deed has yet to be triggered ... [because] the Deed conveyed certain properties and lands within ten specific subdivisions entitled Mastic Beach, for the use of residents solely living within those ten specific subdivisions." He states that the plaintiff was formed "encompassing an area much larger than those specific ten subdivisions," enabling residents living outside of those ten subdivisions to access and utilize the properties conveyed "in direct contradiction of the intention of both the original grantor and [the defendant]." Counsel for the defendant further contends that because those ten subdivisions have not yet incorporated as a village, the defendant has no obligation to convey the property set forth in the deed.

In summary, the deed provides for the conveyance of parkland, lots or parcels of real property which cannot be developed, title and interests in the bottom of streams, lots or parcels of real property to be used as playgrounds, recreational fields, or for "any other purpose for the use and benefit of lot owners at Mastic Beach," and the right title and interest in all streets, roads, avenues and drives, all as described within ten subdivision maps filed in the Suffolk County Clerk's Office between 1926 and 1938. The map created and certified by Petito indicates that there are large areas of the Village that lie outside of the ten subdivision maps set forth in the deed.

Here, the initial question is whether it was the grantor's intent at the time of the making of the deed, as well as the intent of the defendant, to define the limits of the unincorporated village or hamlet of Mastic Beach, and to restrict the use and enjoyment of the property conveyed therein to those residents in the ten subdivisions as opposed to all residents of the local area. "[E]very instrument ... transferring ... an estate of interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law" (RPL 240[3]; ***Phillips v Iadarola***, 81 AD3d 1234, 917 NYS2d 392 [3d Dept 2011]; ***De Paulis Holding Corp. v Vitale***, 66 AD3d 816, 889 NYS2d 191 [2d Dept 2009]; ***Universal Broadcasting Corp. v Incorporated Vil. of Mineola***, 192 AD2d 518, 596 NYS2d 111 [2d Dept 1993]). Where the language of the deed is ambiguous or uncertain a court may consider the surrounding circumstances, the situation of the parties, and the general subject matter of the transaction (***Pepe v Antlers of Raquette Lake, Inc.***, 87 AD3d 785, 927 NYS2d 732 [3d Dept 2011]; ***Blangiardo v Horstmann***, 32 AD3d 876, 822 NYS2d 545 [2d Dept 2006]; ***Spencer v Connolly***, 25 AD3d 832, 808 NYS2d 789 [3d Dept 2006]). Here, it is determined that the use of the term "Mastic Beach" in the deed is ambiguous as it is not defined therein, and the defendant has failed to submit any evidence as to its intent or that of the grantor at the time of the making of the deed. In addition, as set forth above, this ambiguity calls into question whether the plaintiff is the village to which the grantor intended to grant a future interest in the property for charitable or benevolent purposes. Thus, there are issues of fact which require a denial of the defendant's motion for summary judgment.

The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the defendants motion for summary judgment is denied.

Turning to the plaintiff's motion for summary judgment dismissing the defendant's affirmative defenses and granting judgment in its favor on the ground that the subject provision is a covenant, not subject to the rule against perpetuities, which required the defendant to convey or dedicate the property to it upon its incorporation on September 16, 2010. In support of its motion, the plaintiff submits, among other things, the pleadings, proof of its incorporation, the deed, copies of local newspaper articles dated prior to, and shortly after, the recording of the deed, and portions of unauthenticated publications which indicate that they were published by the defendant. The newspaper articles relied on by the plaintiff are plainly inadmissible and they have not been considered by the Court in making this determination (***Young v Fleary***, 226 AD2d 454, 640 NYS2d 593 [2nd Dept 1996] [newspaper articles submitted on summary judgment motion constitute inadmissible hearsay]; *see also* ***P & N Tiffany Props. Inc. v Maron***, 16 AD3d 395, 790 NYS2d 396 [2d Dept 2005]; ***Platovsky v City of New York***, 275 AD2d 699, 713 NYS2d 358 [2d Dept 2000]). The defendant has not objected to the admissibility of the documents allegedly published by it in 1994 and 2003. The earlier document is entitled "The History of Mastic Beach," and the later is apparently a program from the 75th anniversary Installation Ceremony of the association. The 1994 publication contains a map which depicts the 10 subdivisions in the deed and the map created by Petito, the defendant's expert. However, neither publication includes any information bearing upon the issues of fact which preclude a grant of summary judgment to the defendant, nor do they resolve those issues in the plaintiff's favor.

The plaintiff has failed to submit evidence which would entitle it to a dismissal of the defendant's affirmative defenses. In addition, the plaintiff has failed to establish as a matter of law that it is the intended recipient of the future interest contained in the deed, and that it is entitled to the exception to the rule against perpetuities for charitable or benevolent uses. Accordingly, the plaintiff's motion for summary judgment is denied.

Dated: July 7, 2014

J.S.C.
**HON. JERRY GARGUILO**

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**