

Breslin v Frankel

2017 NY Slip Op 33221(U)

November 22, 2017

Supreme Court, Nassau County

Docket Number: 606048/17

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

KENNETH BRESLIN, individually, and as Member and Manager of Weary Realty, LLC (a New York Limited Liability Company), and KAREN COOPER HESS (as partial assignee of Kenneth Breslin),

TRIAL/IAS, PART 1 NASSAU COUNTY

Plaintiffs,

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MOTION DATE: 10/10/17 Motion Sequence 001, 002

-against-

WENDY FRANKEL, MARY FRANKEL, as ADMINISTRATOR OF THE ESTATE OF RICHARD FRANKEL, Deceased and LYNN FRANKEL FLEETWOOD (individually, and as a former Owner of a Membership Interest in Weary Realty, LLC),

Defendants.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Reply Affirmation.....X

Motion by defendants to dismiss the complaint for a defense founded upon documentary evidence, the rule against perpetuities, and failure to state a cause of action is **granted** to the extent indicated below. Cross-motion by plaintiffs for a declaratory judgment declaring the option enforceable is **denied**.

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This is an action for a declaratory judgment that an option to purchase an interest in real property is enforceable. The option was granted pursuant to a settlement agreement in the Surrogate's Court.

Robert Frankel died on April 21, 1995, survived by his wife, Adele Frankel-Loeb, and three adult children, Wendy Frankel, Richard Frankel, and Lynn Frankel Fleetwood. Under the terms of the decedent's will, each of the children was a beneficiary and also a 1/3 beneficiary of the residuary estate. Ultimately, pursuant to stipulation, the will was admitted to probate and Wilbur Breslin, the decedent's partner, became the executor.

Prior to his death, the decedent owned a chain of stores and was a real estate investor and manager. The decedent and Wilbur Breslin jointly owned a number of real estate ventures, and had personally and jointly guaranteed related bank debt of approximately \$100 million. At the time of decedent's death, some of these ventures were in financial distress.

Shortly after decedent's death, the preliminary executors, Gerald Deutsch and Stephen Levy, agreed with Wilbur Breslin and the decedent's children that the Breslin family would purchase control over 40% of the decedent's assets for \$2,902,500. The Breslin family reserved the right to purchase the remaining assets for an additional \$2.5 million. This was accomplished by the transfer of the assets of the residuary estate to an entity created for that purpose, Weary Realty, LLC. The original members of Weary Realty were Wendy Frankel, Richard Frankel, and Lynn Frankel Fleetwood, who executed an operating agreement for the company on December 6, 1995.

On the same date, the members of Weary Realty also executed the "first amendment to operating agreement," which provides in sec. 9.2 that Wilbur Breslin's son, Kenneth Breslin, had the option to purchase the remaining 60% interest in Weary Realty for \$2.5 million "exercisable on or after three years from the date hereof." The parties refer to this option as the "Weary Option."

Pursuant to an agreement to settle the probate proceeding, on December 11, 1995, Wilbur Breslin was appointed successor executor, taking over management of the real estate ventures that he had previously jointly owned with the decedent, as well as management of the decedent's assets and properties.

On September 12, 2012, Wilbur Breslin filed a judicial accounting in the Surrogate's Court. The account showed total principal charges of \$18,510,068.89 and income charges of \$6,813,228.50, with total income of \$5,478,074.46 on hand as of March 31, 2010. As part of the accounting, Wilbur Breslin asserted a claim against the estate in the amount of

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\$8,623,683 based upon loans which he had made to business entities owned jointly with Frankel.

On February 25, 2013, Frankel's children filed objections to Breslin's account. Broadly speaking, the objections were 1) Breslin improperly charged, and repaid to himself from estate assets, debts that were not proper debts of the estate, 2) Breslin improperly charged interest to the estate on the debts, and 3) Breslin improperly caused the estate to make payments to himself and/or his partnerships. In a decision dated July 1, 2016, Judge Reilly determined that Breslin's \$8,623,683 claim against the estate was proper (Dkt no. 2)

However, Judge Reilly denied Breslin's motion for summary judgment, declaring the Weary Option to be valid, without prejudice to commencement of a new action in a proper forum. As noted, the Weary Option was in favor of Breslin's son, Kenneth Breslin, who had no interest in Robert Frankel's estate. Judge Reilly held that the Surrogate's Court had no subject matter jurisdiction to determine the validity of the Weary Option because the court's jurisdiction does not extend to "independent matters involving controversies between living persons" (**Matter of Deans**, 68 AD3d 767 [2d Dept. 2009]). Judge Reilly noted that Lynn Frankel Fleetwood had no interest in the estate of Robert Frankel and thus lacked standing to object to the executor's account.

The present action was commenced on June 23, 2017. Plaintiffs Kenneth Breslin and Karen Hess (as a partial assignee of Kenneth Breslin) seek a declaratory judgment that they are entitled to exercise the option at a price of \$2,088,333.33. Plaintiffs have named Wendy Frankel, Mary Frankel (Richard Frankel's administrator), and Lynn Frankel Fleetwood as defendants.

By notice of motion dated August 9, 2017, defendants move to dismiss the complaint on the ground that the option is void under the rule against perpetuities, as an unreasonable restraint on alienation, by the expiration of time, and because of the dissolution of Weary Realty. Defendants argue that when an option contains no time limit, it must be exercised within a reasonable time. Defendants argue that the option became exercisable in December 1998 and has now expired. Alternatively, defendants argue that Weary Realty dissolved automatically when Lynn Frankel Fleetwood abandoned her interest in the company by letter to the Internal Revenue Service on December 27, 2002.

In opposition, plaintiffs argue that the option is for a fixed and reasonable duration. Plaintiffs argue that the option may be exercised at any time during Kenneth Breslin's lifetime, in similar fashion to a buyout provision in a shareholder agreement which may be exercised during the life of a shareholder.

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“An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date” (**Jarecki v Shung Moo Louie**, 95 NY2d 665, 668 [2001]). “The optionee must exercise the option in accordance with its terms within the time and in the manner specified in the option” (**Kaplan v Lippman**, 75 NY2d 320, 325 [1990]).

From the plain meaning of the language of the first amendment to the operating agreement, Breslin could exercise the option any time *after* three years from December 6, 1995. The court rejects the construction placed on the option by defendants that Breslin was required to exercise the option within three years of that date. The court similarly rejects, based on plain meaning; the interpretation placed on the option by Breslin that he was required to exercise the option during his lifetime. The language of the option contains no such limitation; indeed by the terms of the option Breslin could exercise it even after death by means of a power of appointment.

Generally speaking, rules restricting future dispositions of property are founded upon the principle that it is “socially undesirable” for property to be inalienable for an unreasonable period of time (**Bleecker Street Tenants v Bleecker Jones, LLC**, 16 NY3d 272, 276 [2011]). The underlying objective of the rule is to “protect the alienability of property” (Id). The rules limiting the right of owners to indefinitely control title to property developed because of the “natural antagonism” between society’s interest in promoting the “free and ready transfer” of property and the desire of property owner’s to control the “future disposition” of their holdings (**MTA v Bruken Realty Corp**, 67 NY2d 156, 160-61 [1986]). Originally intended to restrict “family disposition,” by royalty or “landed gentry,” the rules were intended 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 (Id at 161). The rules are legal prohibitions, based on public policy; thus they may not be waived because they were not enacted for the benefit of the parties alone (Id). When an owner attempts to exert control over the transferability of property for “too long a time,” the courts will “step in,” invalidate the restricting provision, and permit transfer to take effect uninhibited by the restraint (Id).

The statutory rule prohibiting remote vesting (EPTL § 9-1.1) and the common law rule against unreasonable restraints on alienation serve the same general purpose by limiting the power of an owner to create “uncertain future estates” (**MTA v Bruken Realty Corp**, 67 NY2d at 161). The statutory rule operates indirectly by limiting the time when future interests must vest to lives in being at the time of creation of the estate, plus 21 years (Id). The rule against unreasonable restraints on alienation does so directly by forbidding owners to impose conditions on conveyances which block the grantee from freely disposing of the property (Id). While the statutory rule is inflexible, measured solely by the passage of time, the common law rule is applied by considering the “reasonableness of the restraint” (Id). Whether a

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restraint on the disposition of property is unreasonable is a question of fact, depending upon the purpose and duration of the restraint, and where applicable, the designated method for fixing the purchase price (Id at 162). In the present case, the unlimited duration of the restraint renders the option unreasonable as a matter of law.

Under common law, options to purchase land are subject to the rule against remote vesting (**Symphony Space v Pergola Properties**, 88 NY2d 466, 476 [1996]). The option holder's "contingent, equitable interest" creates a disincentive for the landowner to develop the property and hinders its alienability (Id at 477).³ However, as the Court of Appeals noted in **Symphony Space**, subjecting options given in commercial real estate transactions to the rule against perpetuities has been criticized because arms-length transactions ordinarily do not impede the development of property and the periods of "lives in being" or 21 years are have no specific relevance to business transactions. (Id). Moreover, it has been argued that "preemptive rights," i.e. rights of first refusal, actually encourage the use and development of land, outweighing any minor impediment to alienability (Id at 479). Nevertheless, in **Symphony Space v Pergola Properties**, the Court of Appeals struck down a 24 year option to purchase a commercial building in Manhattan under the rule against perpetuities. Since the option holder could purchase the property for a "token price," far below market value, it discouraged the owner from investing in improvements to the property and, as a practical matter, rendered the property inalienable.

As a threshold matter, the court notes that the complaint does not explicitly allege when Kenneth Breslin purported to exercise his option. In an affidavit given in the Surrogate's Court on November 3, 2014, Kenneth Breslin stated "[T]he Breslin Option has not been exercised yet..because it is still being disputed and litigated...whether or not the Estate ever became solvent" (deft's ex C , ¶ 4). Thus, Breslin concedes that he had not exercised the option as of November 3, 2014. During argument, Breslin conceded that he did not exercise the option until he tendered the purchase price by paying it into court on August 15, 2017 (see Breslin affidav of September 8, 2017 at ¶ 9; plaintiff's ex F).

Although we no longer have "landed gentry" in the United States, we continue to have family-held real estate companies. Indeed, the Frankel children represent the type of passive owners, and Breslin's 21-year plus estate administration represents the type of prolonged unproductive tenancy, that the rule against perpetuities was intended to effect. On the other hand, since Robert Frankel was already deceased at the time the Weary option was given, the original "owner's" right to control the disposition of his property is not implicated.

The estate beneficiaries were represented by counsel when they granted Kenneth Breslin a lifetime option. However, the December 1995 agreement cannot be considered a true "arm's length" commercial transaction because Wilbur Breslin had a pre-existing equity interest in the properties, as well as superior knowledge as to their financial condition.

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Additionally, the estate was supposedly insolvent, and Breslin assumed a fiduciary duty by agreeing to serve as the executor.

Kenneth Breslin argues that the purpose of the option was to see whether “[M]y father, as executor of the estate of defendants’ late father, might successfully turn around their father’s estate...” (Affidav of Sept 8, 2017 at ¶ 10[c]). It may well be that the purpose of the option arrangement was actually to allow Breslin to operate the property and earn management fees and commissions, while the estate bore the costs, and assumed the market risk of ownership, until the properties were ripe to purchase for a tax loss. Even if the purpose of the option was originally to promote the development, or at least the profitability, of the properties, after 22 years, the option has not had that effect. Although the real estate market does tend to fluctuate, given the real estate expertise of Wilbur Breslin, Kenneth Breslin should have known long ago whether his father was able to “turn the properties around.” In any event, the court concludes that Kenneth Breslin failed to exercise his option to purchase the remaining interest in Weary Realty within a reasonable time. Plaintiffs’ analogy to a shareholder agreement is inapt because Kenneth Breslin was not a member of Weary Realty. Because plaintiff did not exercise the option within a reasonable time, the court need not decide whether, in view of the rule against perpetuities, the option was void from its inception.

Accordingly, defendants’ motion to dismiss the complaint is **granted** to the extent of issuing a declaratory judgment that the so-called “Weary Option” is of no force and effect. Plaintiffs cross-motion for a declaratory judgment declaring the option enforceable is **denied**.

Any argument not addressed herein is deemed to be without merit.

So ordered.

Date: 22 November 2017

Stephen A. Bucaria
J.S.C.

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