

**WBXB, LLC v Rosswaag**

2020 NY Slip Op 35742(U)

August 21, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 619437/2018E

Judge: James Hudson

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Supreme Court of the County of Suffolk  
State of New York - Part XLVI  
Commercial Part  
Memorandum Decision

PRESENT:

HON. JAMES HUDSON

*Acting Justice of the Supreme Court*

x-----x

WBXB, LLC,

Plaintiff,

against-

GILLA ROSSWAAG, SUSAN LODATO and  
SKIPPERS COTTAGES LLC,

Defendants.

x-----x

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MOT. SEQ. NO.:002-Mot D

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In this Action, Plaintiff seeks to enforce an option to purchase Skippers Cottages on the Bay, located in Hampton Bays, New York. By Order dated May 11<sup>th</sup>, 2020 (Hudson, J.), this Court granted Defendants' motion for partial Summary Judgment declaring that the written option violated the Rule Against Perpetuities ("the Rule") and vacated the Notice of Pendency. The record reveals that Defendants Gilla Rosswaag ("Rosswaag") and Susan Lodato ("Lodato") originally held a one-third (1/3) interest respectively in the premises with non-party Anthony Accetta. Upon Mr. Accetta's ("Accetta") death, Defendants sought to

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purchase the outstanding one-third interest from Accetta's personal representative. At issue is a Contract dated January 10<sup>th</sup>, 2017, wherein Plaintiff lent the sum of \$285,485.48 to Defendant Rosswaag for that purpose. Lodato did not require a loan. Subsequent to receiving the loan, Rosswaag and Lodato purchased the remaining one-third interest and each became 50% (fifty-percent) owners of the premises.

The initial paragraph of the Contract contains the names of the Parties, which included "WBXB, or their assigns." The Contract provided in Paragraph 2 that Rosswaag and Plaintiff agreed that interest would not accumulate until Rosswaag's death, or whenever Plaintiff, or its assigns, exercised their rights to purchase Rosswaag's interest. Paragraph 5 provided that Rosswaag granted Plaintiff the right to purchase her interest in the property during her lifetime, and Paragraph 6 provided that the amount to be paid to Rosswaag would be \$785,485.48. Paragraph 7 provides that upon Rosswaag's death, Plaintiff shall have the continuing right to purchase her interest. Paragraph 8 provides that "plaintiff, or their assigns," shall continue to have the right to reside in cottage 15 and Rooms 5,6,7 and 8 and dock usage during the period of Rosswaag's lifetime and, thereafter, until the purchase option shall be exercised. Rosswaag executed a Note and Confession of Judgment. The record reveals that Rosswaag and Lodato transferred their interest to an LLC called Skippers Cottages, LLC. This Action was commenced on October 4<sup>th</sup>, 2018 with the filing of a Notice of Pendency.

By way of an Order to Show Cause, Plaintiff now moves for a Temporary Restraining Order ("TRO"), for leave to renew the prior motion pursuant to **CPLR 2221 (b)** which, by Order dated May 11<sup>th</sup>, 2020 (Hudson, J.), granted Defendants' motion for partial Summary Judgment striking the purchase option and canceled the Notice of Pendency, and for leave to amend the Complaint. The Order to Show Cause was granted on June 16<sup>th</sup>, 2020 (Hudson, J.).

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Initially, while Plaintiff sought renewal in its Order to Show Cause, the Court finds that its submissions did not set forth any new facts or information not readily available at the time of the original motion, and Plaintiff failed to provide an excuse for not submitting the additional evidence on the original motion (*see CPLR 2221 [c]; Bigun v. Ahmed*, 150 AD3d 1186, 52 NYS3d 896 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 967, 31 NYS3d 97 [2d Dept 2016]; *Ahmed v Pannone*, 116 AD3d 802, 805, 984 NYS2d 104 [2d Dept 2014]), except that it was written by different Counsel.

A motion to reargue pursuant to **CPLR 2221 (d) (2)** shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. Here, the Court construes that Plaintiff in reality seeks reargument, as demonstrated by Counsel's Affirmation stating:

"in some respects this motion seeks re-argument regarding the Court's May 11, 2020 decision to the limited extent that given there were 3 separate provisions regarding a right or option to purchase the real property in question but only 1, ¶ 7, ran afoul of the rule against perpetuities and therefore a limited review is requested."

Thus, that branch of the motion seeking to reargue is granted.

Upon reargument, Plaintiff contends that although Paragraph 7 violates the aforementioned Rule, the balance of the Agreement is enforceable. In support, Plaintiff claims that this Contract is clear and unambiguous and should be enforced according to its terms and plain meaning, citing *Signature Realty, Inc. v Tallman*, 2 NY3d 810, 811, 781 NYS2d 259 [2004]; *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570, 750 NYS2d 565, 570 (2002); and *Fiore v Fiore*, 46 NY2d 971, 973, 415 NYS2d 826 [1979]). Plaintiff

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also cites, *inter alia*, *Evans v Famous Music Corp.*, 1 NY3d 452, 458, 775 NYS2d 757 [2004], *Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460, 463 [1982]; and *Cappello v Cappello*, 286 AD2d 360, 729 NYS2d 175 [2d Dept 2001]), which hold that “it is settled that, in the absence of some patent defect or illegality, courts should refrain from granting any relief inconsistent with the clear provisions of an otherwise valid and enforceable agreement.” Plaintiff further urges the Court to divide the Contract and contends that there are several discreet agreements under this Contract, which are freestanding promises that are valid and enforceable, and could be severed from Paragraph 7. Plaintiff states that there is “clearly mutual assent, the agreement is precise, definite and supported by adequate consideration. Therefore, Plaintiff claims that in the event this Court invalidates the option agreements represented in Paragraphs 5 and 6, Defendant Rosswaag and Skippers Cottages, LLC are unjustly enriched inasmuch as they escape accountability for repaying the loan and transferring her 50% (fifty-percent) interest in the property.

In Opposition, Defendants contend that Plaintiff’s purchase option violates the Rule. In any event, Plaintiff is not without a remedy. It would be entitled to money damages in the amount of the loan balance. Defendants rely upon *Symphony Space v Pergola Props., Inc.*, 88 NY2d 466, 484, 646 NYS2d 641 [1996]; and *Buffalo Seminary v McCarthy*, 86 AD2d 435, 446, 451 NYS2d 457 [4th Dept 1982]), *aff’d* 58 NY2d 867 [1983]), which hold that options that could be exercised later 24 (twenty-four) years later, or having an indefinite duration are invalid.

The broad prohibition against remote vesting contained in **New York Estate Powers and Trusts Law (“EPTL”) § 9-1.1 (b)**, covers independent options to purchase real property (*Morrison v Piper*, 77 NY2d 165, 565 NYS2d 444 [1990]). The inclusion in the Contract of “or their assigns” produces measuring lives in being which are not limited to their

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lifetimes and violates this Statute, since the future right may last indefinitely beyond the perpetuities period. Such failure to impose tightly drawn limitations on who may exercise the purchase option enlarges the option and renders the right invalid under the Rule. (*Id.*). Under this Statutory rule against remote vesting, an interest is invalid “unless it must vest, if at all, not later than 21 (twenty-one) years after one or more lives in being” (EPTL 9.1-1 [b]; *Symphony Space v Pergola Props., Inc.*, 88 NY2d 466, 484, 646 NYS2d 641 [1996]). The Court would be precluded from determining the validity of an interest based upon what actually occurs during the perpetuities period. (*Id.*). The Rule prohibits the Court from taking a “wait and see” approach (*In Re Fischer’s Will*, 307 NY 149, 157, 307 NYS 149 [1954]).

Applying these principles, a plain reading of the first sentence in the Contract reveals the use of the terminology “or their assigns” upon which the Parties have failed to place limiting language. While it is true that Paragraphs 5 and 6 provide that the option to purchase Rosswaag’s 50% (fifty-percent) interest in the premises would be limited to her lifetime, there was no provision in the Contract limiting the exercise of the option to Plaintiff’s “assigns” (*Harrington v Gage*, 43 AD3d 1393, 843 NYS2d 745 [4th Dept 2007]; *Dimon v Starr*, 299 AD2d 313, 313, 749 NYS2d 78 [2d Dept 2002]). Without a time limitation on the duration of the Agreement, “the conclusion could be made that the parties intended the future right of the Plaintiff, or their assigns, to last indefinitely” (see *Dimon v Starr*, *supra* at 313; see also *Symphony Space v Pergola Props., Inc.*, *supra* at 484; *Morrison v Piper*, *supra*; *Metropolitan Transp. Authority v Bruken Realty Corp.*, 67 NY2d 156, 501 NYS2d 306 [1986]), and the Contract could violate the above-stated rule against remote vesting. The saving Statute, EPTL § 9-1.3 is ineffective to save the purchase option from invalidation under the Rule since the option does not contain a time limitation restricting Plaintiff’s assigns to purchase the premises (*Barnes v Oceanus Nav. Corp., Ltd.*, 21 AD3d 975, 801 NYS2d 368 [2d Dept 2005]). Under these circumstances, the Court

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declines to rewrite the option agreement within the Contract so as to make it conform to the permissible period (*Symphony Space v Pergola Props., Inc., supra* at 482, quoting *Buffalo Seminary v McCarthy*, 86 AD2d 435, 446, 451 NYS2d 457 [4th Dept 1982], *aff'd* 58 NY2d 867 [1983]). To simply sever Paragraph 7 will not render the remainder of the Contract valid and enforceable pursuant to EPTL 9-1.1 (b).

Therefore, Plaintiff has failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in determining the prior motion (*see, CPLR 2221 [d] [2]; Jaspur Holdings, LLC v Gotham Trading Partners #1, LLC*, 2020 N.Y. App. Div. LEXIS 4550, 2020 NY Slip Op 04467 [2d Dept August 12, 2020]). Nor has the Plaintiff demonstrated new facts or a change in the law that would change the prior determination (*see, CPLR 2221 [e] [2]; Navarette v Alexiades*, 50 AD3d 873, 855 NYS2d 649 [2d Dept 2008]). Accordingly, upon consideration of the Defendant's motion to dismiss, the Court adheres to its original determination.

That aspect of the motion seeking a preliminary injunction is also denied. A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers (*William M. Blake Agency, Inc. v Leon*, 283 AD2d 423, 424, 723 NYS2d 871 [2d Dept 2001]). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor (*Neos v Lacey*, 291 AD2d 434, 737 NYS2d 394 [2d Dept 2002]). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court (*Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1073, 857 NYS2d 229 [2d Dept 2008]). Here, under the present circumstances, the Court, in its discretion, finds that Plaintiff has failed to show a likelihood of success on the merits.

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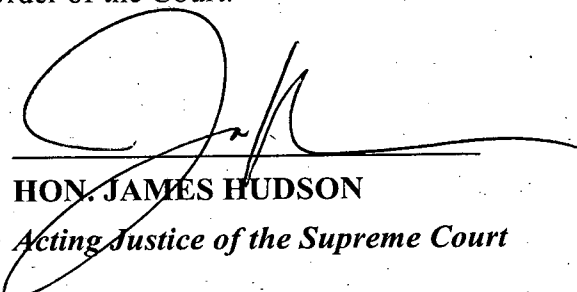
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That branch of the motion seeking leave to amend the Complaint to assert three causes of action is denied. Leave to amend a Complaint is to be freely granted, provided that the proposed amendment does not prejudice or surprise the Defendant, is not patently devoid of merit, and is not palpably insufficient (*see CPLR 3025 [b]; Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1120, 858 NYS2d 660 [2d Dept 2008]; *Kinzer v Bederman*, 59 A.D.3d 496, 873 N.Y.S.2d 692 [2d Dept 2009]). Contrary to Defendants' contention that Plaintiff is barred by *res judicata*, this doctrine has no applicability to the proposed causes of Action since they are not being asserted in a subsequent or different Action (*MBIA Ins. Corp. v J.P. Morgan Sec., LLC*, 144 AD3d 635, 41 NYS3d 506 [2d Dept 2016]). However, inasmuch as the Court determined that the purchase option is invalid, the proposed causes of Action lack merit (*see Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 981 NYS2d 84 [1st Dept 2014]; *Ran v Weiner*, 170 AD3d 425, 93 NYS3d 562 [1st Dept 2019]). Therefore, the Court, in its discretion, declines to grant leave to amend the Complaint.

Accordingly, Plaintiff's motion is granted solely to the extent of reargument, and is otherwise denied. The Parties are directed to appear in Commercial Division Part XLVI at the New York State Supreme Court of Suffolk County, One Court Street, Riverhead, NY ("Accetta") on **Thursday, October 1<sup>st</sup>, 2020, at 9:30 am.**

This Memorandum also constitutes the Order of the Court.

**DATED: AUGUST 21<sup>st</sup>, 2020**  
**RIVERHEAD, NY**

  
**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*