

WBXB, LLC v Rosswaag

2020 NY Slip Op 35743(U)

May 11, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 619437/2018

Judge: James Hudson

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

GILLA ROSSWAAG, SUSAN LODATO and
SKIPPERS COTTAGES LLC,

Defendants and Third Party Plaintiffs,

-against-

MIA CHRISTIANSON and JOEL CHRISTIANSON,

Third Party Defendants.

x-----x

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MOT. SEQ. NO.:001-MG

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The case at bar, sounding in breach of contract, arises from competing claims to real property located at 256 East Montauk Highway, Hampton Bays, New York ("subject premises"). Doing business under the name "Skippers On The Bay," it consists of several rental cottages, a residence and boat dockage.

Prior to December of 2006 the locus in quo was owned in fee simple by three tenants in common, Gilla Rosswaag, her sister Susan Lodato and Mr. Anthony Accetta. Mr. Accetta passed away and his interest came into the possession of his estate. Ultimately his share was conveyed to his daughter Nannette Stanya. There was a dispute between the three co-tenants

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and litigation ensued. This preceding unrelated lawsuit was settled in 2016 by an agreement with Ms. Rosswaag and Ms. Lodato purchasing the 1/3rd (one-third) interest of Ms. Stanya. In order to buy out their co-tenant, however, the sisters were each obliged to pay Ms. Stanya the sum of \$285,000.00 Dollars. Ms. Lodato had the necessary funds but Ms. Rosswaag found herself in need of capital.

Ms. Rosswaag turned to her daughter and son-in-law, Mia and Joel Christianson. They (along with Mr. Christianson's father, Mr. George Christianson) agreed to loan her the requisite sum and memorialized this understanding in a written Contract on January 10th, 2017 (hereinafter referred to as "The Agreement"). Instead of loaning the money in their personal capacities, Mr. and Ms. Christianson used a company they owned with George Christianson, WBXB, LLC. It is not controverted that Ms. Rosswaag and the Plaintiff, acting through its principals, signed the Agreement.

That Agreement provides that Ms. Rosswaag may continue to reside within the residence at the subject premises during her lifetime, provided that she does not remove herself from the premises for a continuous period of 60 (sixty) days. This Agreement also provides the Plaintiff a right to purchase the 50 (fifty) % interest of Ms. Rosswaag ("Purchase Option"). This portion (paragraphs 5 and 6) of the Agreement specifically detail that:

"Gilla [Defendant Gilla Rosswaag] does hereby grant unto WBXB the right to purchase her interest in the property, which she represents to be 50% of said ownership, during her lifetime, which purchase during her lifetime shall not affect her right to remain in the property...."WBXB shall have the right to purchase that 50% interest for the total sum of \$785,485.48 during the lifetime of Gilla [Defendant Rosswaag]. The amount of the loan plus accumulated interest shall be deducted from said amount."

The Agreement also has a purchase option (paragraph 7) which survives Ms. Rosswaag's passing away. It states:

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“WBXB, upon the death of Gilla [Defendant Rosswaag], shall have the continuing right to purchase her interest, free and clear of any and all liens and encumbrances for \$785,485.48 and deducting from that the amount of said loan [\$285,458.48] and any accrued interest thereon.”

After receiving the loan, Ms. Rosswaag and her sister completed their purchase of Ms. Stanya’s one-third interest. In their conveyance of the realty, however, Ms. Rosswaag and Ms. Lodato structured their new ownership in the following fashion: On January 13th, 2017, Defendants Gilla Rosswaag and Susan Lodato formed the Defendant Skippers Cottages, LLC (hereinafter referred to as “Skippers”). Thereafter, the sisters executed a Deed conveying their respective pre-buyout interests in the subject premises to Skippers. This was followed by Ms. Stanya’s former one-third interest being conveyed to Skippers as well. Ms. Rosswaag and Ms. Lodato each own 50% (fifty-percent) of Skippers.

Plaintiff contends that the conveyance by Defendant Rosswaag of her interest in the subject premises to Skippers Cottages, LLC violates the terms of the Agreement. Specifically, Plaintiff asserts that Ms. Rosswaag’s transfer to Skippers violates the requirement that Defendant Rosswaag own 50% of the realty subject to the Purchase Option of Plaintiff.

Plaintiff filed the instant action to enforce the terms of the Agreement, requesting, *inter alia*, vacatur of the conveyance to Skippers in order to exercise its Purchase Option. The Defendants entered a general denial and assert Twelve Defenses.

In addition to their denial, the Defendants filed a Third-Party action against Mia and Joel Christianson. The first two Causes of Action allege that Mia and Joel Christianson, as Third-Party Defendants, rented a cottage and rooms at Skippers On The Bay for a number of years and failed to pay rent and docking fees. The total sum of unpaid rent and dockage

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is claimed to be \$128,700.00. The gravamen of the Third Cause of Action is that the Mia and Joel Christianson made intentional misrepresentations to Ms. Rosswaag consisting of assurances that the Agreement was a simple loan and that the Purchase Option was concealed from her. The Third-Party Plaintiffs' further aver that the execution of the Purchase Option will result in unjust enrichment to Mia and Joel Christianson. The Third-Party Defendants deny these claims.

In their Verified Answer, the Defendants' Tenth Affirmative Defense asserts that "The claims are barred, in whole or in part, due to its improper restriction on alienability of title." The Defendants move for Summary Judgment based on the purchase option being in violation of the Rule Against Perpetuities (CPLR 3212; EPTL §9-1.1).

The initial question is whether the interpretation of the Agreement lends itself to summary judgment.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a material issue of fact or where the issue is arguable" (*In re Estate of Beckford*, 280 A.D.2d 472, 473, 720 N.Y.S.2d 176, 177 [2nd Dept.2001]). This extreme relief is the "procedural equivalent of a trial and," "must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable" (*Rivers v. Birnbaum*, 102 A.D.3d 26, 42, 953 N.Y.S.2d 232, 243 [2nd Dept. 2012] quoting *Dykeman v. Heht*, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732 [2nd Dept.2008]). On such a motion, it is not for the Court to weigh evidence and assess the credibility of affiants. Our task is simply "to determine whether such issues exist" (*Gitlin v. Chirinkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 [2nd Dept.2012]; *Dykeman v. Heht*, *supra* at 769, 861 N.Y.S.2d 732; *Tunison v. D.J. Stapleton, Inc.*, 43 A.D.3d 910, 841 N.Y.S.2d 615 [2nd Dept.2007]).

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When CPLR 3212 is applied to an alleged breach of written contract and “...the court can determine the parties’ intent by looking at the agreement, the issue is one of law and should be decided by summary judgment” (*Pharm. Horizons, Inc. v. Sterling Drug, Inc.*, 127 A.D.2d 514, 515, 512 N.Y.S.2d 30, 31 [1st Dept. 1987] citing *805 Third Ave. Co. v. M.W. Realty Associates*, 58 N.Y.2d 447, 461 N.Y.S.2d 778, 448 N.E.2d 445; see, *West, Weir and Bartel v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540, 307 N.Y.S.2d 449, 255 N.E.2d 709]). By contrast, when it is “necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied” (*Evans v. Famous Music Corp.*, 1 NY3d 452, 458; *American Express Bank v. Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept. 1990]; *Castaldi v. Castle Restoration LLC*, 66 Misc. 3d 1214[A] [Sup. Ct. Suffolk Co. 2020]).

In Plaintiff’s Opposition to the motion (mot. seq.001), Counsel argues that there are issues of material fact which render the Defendants’ motion for Summary Judgment premature. We disagree. As correctly pointed out by the Defendants, the instant application is for partial Summary Judgment as to a specific clause in the Agreement involving undisputed facts.

The Defendants seek summary relief solely to the extent of the Court’s striking of the Purchase Option in the Agreement. It is beyond cavil that “[t]he contract documents speak for themselves...” (*Weg v. Kaufman*, 159 AD3d 774, 776, 72 NYS2d 135, 137 [2d Dept 2018]; see *NY Capital Asset Corp. v. F&B Fuel Oil Co., Inc.*, 58 Misc3d 1229[A], 98 NYS3d 501 [Table] [Sup Ct Westchester Cty 2018]; *First Nat. City Bank v. State*, 72 AD2d 762, 421 NYS2d 381 [2d Dept 1979]). The execution of an agreement triggers a presumption that the signors understood the contents of the instrument (*British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg*, 172 AD2d 234, 567 NYS2d 731 [1st Dept 1991]). “...as signatories to [the] contract, [the parties] are presumed to know the contents of the instrument [which they] signed and to have assented to such terms” (*Id.*).

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“It is axiomatic that in the absence of ambiguity a contract should be enforced according to its terms. In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract’s meaning” (*Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 NY3d 470, 475, 775 NYS2d 765, 807 NE2d 876 [2004]).

A review of the Agreement shows it to be a comprehensive document, signed by the Parties, which reflects their reasonable intent. As the Case Law above demonstrates, the interpretation of the Purchase Option clause in this contract is “ripe” for Summary Judgment.

In their application, Defendants do not deny having violated the terms of the Purchase Option (The Agreement paragraphs 5, 6 and 7) by attempting to sell the subject premises to a third party. Instead, Defense Counsel, argues that the terms of that portion of the Purchase Option, specifically the language of paragraph 7, violates the Rule against Perpetuities thereby rendering the entire Option invalid.

The Rule against Perpetuities has its roots in English common-law. It was held by Chancery that the practice of encumbering real property with future remote contingent interests which restrict and exclude the property from commerce for long periods of time, constitutes an indirect restraint upon alienation. Such restraint of commerce was considered at common-law to be a public evil. Judicial efforts were made to limit control of title to real property by the dead hand of landowners reaching into future generations (*see Thellusson v. Woodford*, 11 Vesey 112, 32 Eng. Rep. 1030 [1805]; *Low v. Burron*, 3 Williams p. 262; *Duke of Norfolk’s Case*, 3 Ch.Cas. 1 [1682]).

In the *Duke of Norfolk’s Case*, 3 Ch.Cas. 1 [1682], appeal sustained (3 Ch.Cas.54) Lord Nottingham, writing for the Chancery Court opined:

“But what time? and where are the bounds of that contingency?
you may limit, it seems upon a contingency to happen in a life:

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what if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster-Hall stands, where will you stop if you do not stop here? I will tell you where to stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it.”

The *Duke of Norfolk's Case* became the foundation upon which the modern Rule against Perpetuities has been built (John A. Borron, Jr., 3 Simes and Smith the Law of Future Interests, §1213 (3d ed.) [2019]). It is a social compromise “...between the desires of the dead and the demands of the living” (Pock, *The Rule Against Perpetuities-A Comparison of Some Common-Law and Civil Law Jurisdictions*, St. Johns Law Review 1960, Vol.35 No.1 p.78).

In New York the Rule against Perpetuities has been codified since 1830 and is presently found at **EPTL §9-1.1**. This statute relates that:

“(a) (2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

(b) No 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. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.”

In *Metropolitan Trans. Authority v. Bruken Realty Corp.*, 67 NY2d 156, 501 NYS2d 306, 492 NE2d 379 (1986) the Court compared the statutory prohibition under **EPTL § 9-1.1** and its common-law antecedent:

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“The statutory rule prohibiting remote vesting and the common law rule against unreasonable restraints serve the same general purpose by limiting the power of an owner to create uncertain future estates. The statutory rule does so indirectly by limiting the time when future interests must vest. 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. 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. Whether a restraint on the disposition of property is unreasonable is a question of fact depending upon the purpose, duration and, where applicable, the designated method for fixing the purchase price” (*Id.* at 161-162). See *Allen v. Biltmore Tissue Corp.*, 2 NY2d 534, 161 NYS2d 418, 141 NE2d 812)).

In enacting EPTL § 9-1.1 the Legislature intended to adopt the expansive common-law American Rule against remoteness in vesting by including purchase options as well as other interests within its purview (*Buffalo Seminary v. McCarthy*, 86 AD2d 435, 441-442, 451 NYS2d 457 [4th Dept 1982]; *aff'd*, 58 NY2d 867, 460 NYS2d 528, 447 NE2d 76 [1983]). The Court of Appeals in *Buffalo Seminary* held that a purchase option which created an interest “...which may vest beyond the permissible period...” was violative of EPTL § 9-1.1, subd [b] because “...the option contained no limitation on duration nor words suggesting that its creators intended that its life be anything other than indefinite...” (*Id.* at 869). The Purchase Option in the case before us employs similar language to the one found in the *Buffalo Seminary* case. (*Id.* at 868).

Defense Counsel cites to the holding in *Bleeker St. Tenants Corp. v. Bleeker Jones, LLC* 16 NY3d 272, 920 NYS2d 291, 945 NE2d 484 (2011), for the rule that commercial transactions and purchase option are not exempt from the application of the Rule Against Perpetuities. (*Id.* at 276-277, 294). The facts in *Bleeker*, however, involved a discussion of a renewal option to a lease, not a Purchase Option *per se*. (*Id.* at 274).

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The question of whether commercial property Purchase Options were covered by EPTL §9-1.1 was resolved in the affirmative by the Court in *Symphony Space, Inc. v. Pergola Properties, Inc.*, 88 NY2d 466, 646 NYS2d 641, 669 NE2d 799 [1996]. The Court further stated that “...an option containing no limitation in duration demonstrates the parties’ intent that it last indefinitely, and EPTL § 9-1.3 does not permit ‘an extensive rewriting of the Option Agreement so as to make it conform to the permissible period.’” (*Id.* at 482 citations omitted).

The Plaintiff contends that the Purchase Option does not run afoul of the Rule against Perpetuities. Specifically, Counsel states:

“...this provision gives WBXB the right to purchase the property from Ms. Rosswaag’s estate. The right does not extend into perpetuity; rather it must be exercised before the estate is settled; certainly something that is foreseeable within 21 years of her death.” (Plaintiff’s Memorandum of Law p.4).

As will be discussed, *infra*, there is a fatal defect in the wording of the Option Clause since it omits reference to the settling of Ms. Rosswaag’s estate. As regards the certainty of a Probate being concluded within 21(twenty-one) years, we respectfully demur. To demonstrate the fallacy of this view, we need not rely on the fictional case of *Jarndyce v. Jarndyce**. An Estate matter exceeding 21 years of pendency has occurred within this State in recent memory (*In re Lawrence*, 24 N.Y.3d 320, 326, 23 N.E.3d 965, 969 [2014]) and is by no means an unknown phenomenon. As pointed out by Plaintiff’s Counsel, there is a provision of the EPTL which softens the draconian application of the Rule against remote vesting.

EPTL § 9-1.3 provides in relevant part:

“(a) Unless a contrary intention appears, the rules of construction provided in this section govern with respect to any matter affecting the rule against perpetuities;

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(b) It shall be presumed that the creator intended the estate to be valid....; and

(d) Where the duration or vesting of an estate is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax or the occurrence of any specified contingency, it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate.”

The purpose of this saving statute is “...to save from invalidity a disposition limited by reference to a spouse of a named person when the reference might possibly include a person not in being at the time of the creation of the estate” (*In re Williams’ Will*, 41 Misc2d 297, 301, 245 NYS2d 672 [Surr. Ct. Suffolk Cty 1964]). Stated more broadly, **EPTL §9-1.3** requires that a future interest be construed “...in such a way as to avoid invalidating it.” (*Scutti Enters., Inc. v. Wackerman Guchone Custom Bldrs., Inc.*, 153 A.D.2d 83, 88, 548 N.Y.S.2d 967 [4th Dept. 1989] *lv. denied* 75 N.Y.2d 709, 555 N.Y.S.2d 692, 554 N.E.2d 1280 [1990]). The Statute is “designed to prevent the problem ... created by an instrument’s reference to a specified event which ordinarily would take a short time to occur but which theoretically could take more than 21 years.” (*Id.* at 89, 548 N.Y.S.2d 967).

The Plaintiff is arguing for what it considers to be the anticipated application of the Purchase Option rather than a literal reading. To avail itself of the saving Statute, however, the Option must make some reference to a contingency which may theoretically extend beyond a life-in-being plus 21 (twenty-one) years but as a practical matter would be resolved within that time (*see Barnes v. Oceanus Navigation Corp.*, 21 A.D.3d 975, [2nd Dept. 2005] 801 N.Y.S.2d 368]). Unfortunately, however, there is no limiting language in paragraph 7. Indeed, the entire Agreement is devoid of any language which limits the Purchase Option. By its terms, it is “...the continuing right” of Plaintiff and brooks no impediment.

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The aforesaid Option contains no reference to a life in being other than Ms. Rosswaag. Once Ms. Rosswaag passes away there is no reference to a term of years, a Probate proceeding nor any other occurrence restricting the Plaintiff from having its Purchase Option in perpetuity. A review of the other sections of the Agreement provides no succor for the Plaintiff. There is not a paragraph nor statement which further defines or limits that Option. The Plaintiff seeks far more than an interpretation of the Purchase Option. It would constrain the Court to insert favorable language and essentially re-write the Document. This is an impermissible function for the Court (*Marine Assocs., Inc. v. New Suffolk Dev. Corp.*, 125 A.D.2d 649 [2nd Dept. 1986] 510 N.Y.S.2d 175)).

The Plaintiff also argues that the Purchase Option contained within the Agreement may, if necessary, be excised to eliminate paragraph 7 and survive in limited form. This would provide for a right of purchase during Ms. Rosswaag's lifetime. In support, Counsel draws our attention to the holding in *Inwood Park Apts., Inc. v. Coinmach Industries, Co.*, 6 Misc3d 246, 783 NYS2d 453 [Sup Ct New York Co. 2004]; *Kaiser-Haider v. Battery Place Green LLC*, 85 AD3d 730, 925 NYS2d 557 [2d Dept 2011] and *Maestro W. Chelsea SPE LLC v. Pradera Realty Inc.*, 38 Misc3d 522, 954 NYS2d 819 [Sup Ct New York Co. 2012]). Such reliance is misplaced.

The Court in *Inwood* discussed a preemptive right (as opposed to a Purchase Option) and a lease with internally conflicting language conveying that right. (*Id.* 246-253). *Kaiser-Haider* concerned a contract to purchase new construction property which failed to contain a closing date. The Court noted that the law has long presumed a reasonable closing date in a real estate contract where no closing date is specified (*Id.* at 733). See *Omar v. Rozen*, 55 A.D.3d 705, 705, 867 N.Y.S.2d 458, 459 [2nd Dept. 2008]; *Kirk Assoc. v. McDonald Equities*, 155 A.D.2d 281, 282, 547 N.Y.S.2d 44 [1st Dept. 1989]; *Dahm v. Miele*, 136 A.D.2d 586, 587, 523 N.Y.S.2d 851 [2nd Dept. 1988]).

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A review of *Maestro W. Chelsea* also shows that it is of limited utility. In that case, the issue was whether the Rule against Perpetuities applied to a contract requiring the Defendant to use its “best efforts” to obtain a necessary waiver to complete its sale of air rights. (*Id.* at 522). It is clearly distinguishable from the facts presented herein.

The Plaintiff also posits that since Ms. Rosswaag is still alive, the aspects of the Purchase Option that impermissibly extend its rights after her death (paragraph 7) may be “easily excised” leaving paragraphs one through six enforceable. Plaintiff’s Counsel cites to *U.S. Grown LLC v. Franck*, Misc3d 210 N.Y. Misc LEXIS 3773, * 5 [Sup Ct. Wayne Co. 2010]). Once again, this case is factually distinguishable. *U.S. Grown* concerns an Option clause in a Management and Operations Agreement. That Option had no termination date and thus was held to be void as it violated the rule against remote vesting. (*Id.* at 5). Far from supporting the Plaintiff’s position, the Court finds that it argues for the Defendants’ cause.

The aforementioned Law and uncontroverted facts bring us to the same conclusion as the Court in *Dimon v. Starr*, 299 A.D.2d 313, 749 N.Y.S.2d 78, (2nd Dept. 2002).

“Although the agreement does not violate the rule against perpetuities’ prohibition against suspension of the power of alienation (*see* EPTL § 9-1.1[a][2]) because at all times the plaintiff or [its] assigns and the defendants or those taking from them could have acted together and conveyed a fee absolute in the defendants’ parcel (*cites omitted*), it violates the rule against perpetuities’ prohibition against remoteness of vesting (*see* EPTL § 9-1.1[b]).” (*Id.* at 313).

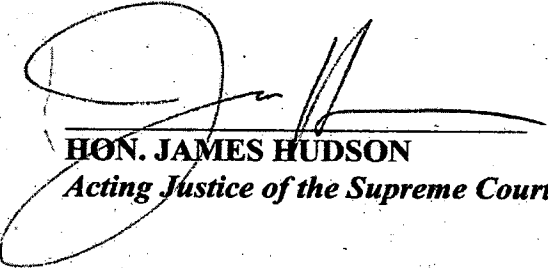
We have considered the Plaintiffs’ remaining contentions and although they have been presented with commendable eloquence, they fail to persuade the Court.

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Accordingly, the Defendants' motion for an Order Declaring the Written Option to Purchase Unenforceable Due to the Rule Against Perpetuities and Vacating the Notice of Pendency is granted in its entirety.

Settle Order

DATED: MAY 11th 2020
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court

* Bleak House, by Charles Dickens