SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

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),

Plaintiffs,

INDEX No. 606048/17

MOTION DATE: 3/14/18
Motion Sequence 003

-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 plaintiffs Kenneth Breslin and Karen Cooper Hess for leave to renew and reargue defendants' motion to dismiss the complaint based upon a defense founded upon documentary evidence, the rule against perpetuities, and failure to state a cause of action, as well as plaintiffs' cross-motion for a declaratory judgment declaring the Weary Option enforceable, is **granted**. Upon renewal and reargument, the court adheres to its November 22, 2017 order.

BRESLIN v FRANKEL **Index No.: 606048/17**

This is an action for a declaratory judgment that an option to purchase an interest in a limited liability company holding title to a number of parcels of 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, defendants 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.

Prior to his death, Frankel owned a chain of stores and was a real estate investor and manager. The decedent and Wilbur Breslin, his partner in a number of real estate companies, 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 (Doc 2 at 3). The reason that the companies were short of cash was tight credit and the high interest rates which were prevailing at that time.

For three or four years prior to Frankel's death, Breslin advanced large sums of money to the real estate ventures. Indeed, in a letter to the Frankel children two weeks after Robert Frankel's death, Breslin claimed that the estate owed him over $10 million. It appears that the balance due ballooned because Breslin charged the ventures compound interest. In any event, Breslin now concedes that the "scorecard" of his loans was "erroneous to a level of magnitude of approximately 62%" (Doc 64 at ¶ 4).

The original co-executors named in Robert Frankel's will were Gerald Deutsch and Stephen Levy. Deutsch had served as chief financial officer, attorney, CPA, and tax advisor to Robert Frankel (Doc 33 at 32; Doc 68 at 3). Despite his role has chief financial officer, Deutsch claims to have remarkably little knowledge as to Breslin's lending to the companies (Doc 33 at 32-33). Although Levy describes himself as a "long-time friend and acquaintance of the decedent," his qualifications as to real estate finance are unclear (Doc 32 at 1). Nonetheless, Levy took at face value Breslin's claim that the estate was $100 million in debt and "these debts and liabilities greatly dwarfed the several million dollars of estate assets" (Doc 32 at ¶ 3).

As co-executors under Robert Frankel's will, Deutsch and Levy owed a fiduciary duty of loyalty to the Frankel children, who were the beneficiaries of the estate. Nevertheless, in violation of their fiduciary duties, Deutsch and Levy appear to have sided with Breslin with respect to the validity of his loans to the companies and his claims against the estate. Although the Frankel children originally consented to the appointment of Deutsch and Levy as executors, defendants subsequently moved in the Surrogate's Court to revoke their consent (Doc. 2 at 2-3).

Pursuant to a purchase and sale agreement dated October 20, 1995, it was agreed among Deutsch, Levy, 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. 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 defendants Wendy Frankel, Richard Frankel, and Lynn Frankel, who executed an operating agreement for the company on December 6, 1995 (Doc. 60).

Pursuant to a settlement agreement dated December 11, 1995, the will was admitted to probate, and Wilbur Breslin, Robert Frankel's partner, became the executor. Although the Frankel children were represented by counsel, the December 1995 settlement was never approved by the Surrogate's Court. Indeed, Surrogate Radigan issued a decision dated December 11, 1995 stating, "The parties are advised that nothing in this decision shall imply or infer court approval of any of the negotiations among the decedent's children, Wilbur Breslin, the outgoing fiduciaries, or the purchaser of 40% of the decedent's children's interest in the residuary estate" (Doc 14 at 3).

On the same date, the original members of Weary Realty executed the "first amendment to operating agreement," which recites that Wilbur Breslin's son, plaintiff Kenneth Breslin, was a 40% member of Weary Realty and the manager (Doc. 61). Sec. 9.2 of the first amendment provides that Kenneth Breslin had the option to purchase the remaining 60% interest in Weary Realty, "exercisable on or after three years from the date hereof." The parties refer to this option as the "Weary Option," and the purchase price was to be determined according to the following formula:

If the Frankel estate was "legally capable" of doing so, Kenneth Breslin was to "cause the estate" to convey to the Frankel children its membership interests in Frankels Garden City, LLC, Frankels Garden City 820 Realty, LLC, Frankels Garden City 840 Realty, LLC, and its stock in Frankels Garden City Realty Corp., subject to liens as of the date of the first amendment; or if the estate no longer held those interests, or was "otherwise incapable of conveying" those interests, Kenneth Breslin would pay the Frankel children $2.5 million (Doc. 61 at 6). Sec. 9.3 provides that if any member of the Frankel group desires to sell his interest to an individual or entity other than Kenneth Breslin, he or she shall give Kenneth Breslin a right of first refusal to purchase the membership interest.

Kenneth Breslin claims to have become a 50% member of Weary Realty in 2002, having acquired half of Lynn Frankel's 20% interest when she abandoned it for tax purposes (Doc No. 37 at 9). Breslin's theory is that after Lynn Frankel abandoned her 20% interest, he and the other Frankel children were each 40% members, so he was entitled to acquire half of the abandoned interest. It appears that Wilbur Breslin has administered Robert Frankel's estate, and Kenneth Breslin has managed Weary Realty, to the present time.

On September 12, 2012, Wilbur Breslin filed a judicial accounting in the Surrogate's Court (File No. 2905921). 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. Breslin's children objected to the accounting on the ground that Breslin fraudulently induced the December 1995 settlement by misrepresenting the financial condition of the estate and paid himself over $20 million from the estate by engaging in self-dealing.

By order dated September 30, 2013, Surrogate McCarty denied Breslin's motion for summary judgment dismissing defendants' objections to the accounting based upon the December 1995 settlement agreement. The court determined that there were triable issues as to whether Wilbur Breslin had engaged in self-dealing and overreaching with regard to the stipulation and purchase agreement (Doc 14). The court noted the "gratuitous language" in the settlement agreement that Wilbur Breslin was the "driving force" behind the real estate investments and the further self-serving language that, "It is reasonable to assume that WILBUR BRESLIN is the only person who can maximize and preserve the value of the estate. Without the efforts and participation of WILBUR BRESLIN, it is reasonable to conclude that the estate could be rendered insolvent. The foregoing weighed heavily in the decision of [the Frankel children] to enter into the purchase and sale agreement...as being in the best interests of all those who held an interest in the estate" (Doc 14 at 2, capitalization in original). Judge McCarty's order was affirmed by the Appellate Division (**In re Frankel**, 123 AD3d 826 [2d Dept 2014]).

As part of the accounting, Wilbur Breslin asserted a claim against the estate in the amount of $8,623,683 based upon loans which he had made to business entities owned jointly with Frankel. In a decision dated July 1, 2016, Surrogate Reilly determined that Breslin's $8,623,683 claim against the estate was proper (Doc. No. 2). Judge Reilly found that, as part of a separate agreement between Breslin and the Frankel children on December 6, 1995, Breslin disclosed his conflict of interest and the Frankel children consented to that claim.

However, Judge Reilly denied Wilbur Breslin's motion for summary judgment, seeking a declaration that the Weary Option was valid, without prejudice to commencement of a new action in a proper forum. Judge Reilly determined that Surrogate's Court did not have subject matter jurisdiction to determine the validity of the Weary Option because the option "did not affect the affairs of the decedent or the administration of the estate" (Doc. No 2 at 10). Since Supreme Court and Surrogate's court have concurrent jurisdiction in matters involving decedent's estates, and the issue of the validity of the Weary Option implicates matters within the expertise of the Commercial Division, Judge Reilly properly declined to exercise jurisdiction as a matter of discretion (See, **Rosvold v Rosvold**, 29 AD3d 669 [2d Dept 2006]).

The present action was commenced on June 23, 2017. Plaintiffs Kenneth Breslin and Karen Hess, Kenneth's sister and partial assignee, seek a declaratory judgment that they may "lawfully exercise" the Weary Option. Plaintiffs argue that the alternative price of $2.5 million is applicable, but it should be reduced to $2,088,333.33 because defendants' interest was reduced to 50% after Lynn Frankel abandoned her interest.

Defendants moved to dismiss the complaint on the ground that the Weary Option was void from its inception under the rule against perpetuities and as an unreasonable restraint on alienation, or had become void by the expiration of time. Plaintiffs cross-moved for a declaratory judgment that the option was enforceable or, alternatively, to transfer the action to Surrogate's court.

By order dated November 22, 2017, the court granted defendants' motion to dismiss the complaint to the extent of issuing a declaratory judgment that the "Weary Option" was of no force and effect. Plaintiffs' cross-motion for a declaratory judgment declaring the option enforceable was denied. The court rejected the construction placed on the option by defendants that Breslin was required to exercise the option within three years of the date of the granting of the option, December 11, 1995. The court similarly rejected 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. 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. Thus, the court was required to determine whether Kenneth Breslin had exercised the option within a reasonable amount of time.

As a threshold matter, the court noted that the complaint did 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 conceded that he had not exercised the option as of November 3, 2014. During oral argument of the original summary judgment motion, Breslin conceded that he did not exercise the option until he tendered the purchase price by paying it into court on August 15, 2017. While not declaring the option void under the Rule against Perpetuities, the court considered the policy considerations underlying the Rule in determining that Breslin had not exercised his option with a reasonable period of time.

In ruling that Kenneth Breslin had failed to exercise his option with a reasonable period of time, the court noted that Wilbur Breslin could seek management fees and commissions, while the beneficiaries of the estate bore the costs, and assumed the market risk, of ownership.

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By notice of motion dated December 18, 2017, plaintiffs move for leave to renew and reargue defendants' motion to dismiss and plaintiffs' cross-motion for a declaratory judgment that the Weary Option is enforceable. Plaintiffs argue that the court overlooked the fact that Kenneth Breslin was the managing member of Weary Realty from the date of the first amendment to the operating agreement in December 1995. Thus, plaintiffs argue that the option should be enforceable by analogy to a buyout provision in a shareholder agreement.

The underlying objective of the Rule against Perpetuities is to "protect the alienability of property" (**Bleecker Street Tenants v Bleecker Jones, LLC**, 16 NY3d 272, 276 [2011]). The Rule is founded upon the principle that it is "socially undesirable" for property to be inalienable for an unreasonable period of time. Promoting the "free and ready transfer" of property ensures 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 (**MTA v Bruken Realty Corp.**, 67 NY2d 156, 160-61 [1986]). The Rule is a legal prohibition, based on public policy; which may not be waived because it is not enacted for the benefit of the parties alone (Id).

Under common law, the Rule against Perpetuities is applicable, not only to testamentary dispositions, but also inter vivos transfers creating options to purchase land (**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). As the court noted in its original order, Wilbur Breslin's 21-year plus estate administration represents the type of restraint on alienation, and prolonged unproductive tenancy, that the rule against perpetuities was intended to prevent.

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 period of "lives in being plus 21 years" has 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.

Defendants argue, and it may be inferred, that the value of the properties is far in excess of the $2,088,333 option price. Nevertheless, absent reliable evidence as to the value of the properties, defendants have not established that $2.088 million is a "token price." Thus, defendants have not established that the Weary Option is void under the rule against perpetuities. The court will proceed to consider whether plaintiff Kenneth Breslin exercised the option within a reasonable time.

"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]). Where an option to purchase real property does not contain a time limit, it must be exercised within a reasonable time (**Savasta v 470 Newport Assoc**, 180 AD2d 624, 626 [2d Dept. 1992]).

Kenneth Breslin argues that his long delay in exercising the Weary Option was reasonable because the parties expressly contemplated that, "[I]t would take many years, if not decades, if at all, before [Wilbur Breslin] might be able to effectively turn around the massively insolvent Estate" (Doc. 29 at ¶ 7). Indeed, Kenneth Breslin maintains that the estate was still insolvent, at least as of September 8, 2017 (Id at ¶ 22).

The problem with this argument is that the insolvency of the estate may largely have been of Wilbur Breslin's own making. Breslin now concedes that the original amount which he claimed that the estate owed him was "erroneous" by "approximately 62%." Moreover, if interest, let alone compound interest, is disallowed, the estate may have been solvent from the time of Wilbur Breslin's first appointment as executor.

Limited Liability Company Law § 611 provides, "Except as may be provided in the operating agreement, a member may lend money to...the limited liability company and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a member." Thus, unless prohibited by the operating agreement, a member may charge interest on loans to the limited liability company.

While Sec 3.7 of the Weary Realty operating agreement makes reference to loans from members, it makes no provision for interest. Moreover, sec 7.6 provides that, "No member shall be entitled to interest on his, her, or its capital contribution..., except as specifically set forth in this agreement." The first amendment to the operating agreement makes no mention of interest. Thus, it is far from clear that the Weary Realty operating agreement permits interest on loans from members. Surrogate Reilly's July 1, 2016 finding that defendants consented to the loan charge of $8,623,683 does not preclude this determination.

Although Breslin refers to a "scorecard" of loans, he does not disclose the interest rates which he charged to the companies. Nevertheless, on oral argument of the present motion, plaintiffs represented that Breslin's attorney, Wachtell, charged him 14% interest on the loan which he made to enable Kenneth Breslin to purchase the residuary estate. It may be inferred that Breslin did not charge Weary Realty a lower interest rate. Even assuming that Weary's operating agreement permits members to charge interest on loans to the company, Breslin was under a fiduciary duty to reduce the interest rates which he charged as rates declined in subsequent years. There is no evidence that rates were reduced by Breslin in this manner. In these circumstances, the supposed insolvency of the estate provides no basis for Breslin's long delay in exercising his option.

Breslin next suggests that his long delay in exercising the option was reasonable because the option was actually for defendants' benefit. Thus, Breslin claims that defendants requested an "upside kicker," of $2.5 million, in the "unlikely event that my father [was] able to successfully turn around the Estate (Doc. 29 at ¶ 6). However, the plan that Breslin would purchase the assets of the estate was conceived by Joseph Katz, who represented the preliminary executors, Gerald Deutsch and Stephen Levy, with whom defendants were in an adversary relation. Katz was assisted in implementing that plan by William Wachtell, an attorney who represented Wilbur Breslin and lent him the $3 million to fund the acquisition of the estate assets (Doc. 7 at ¶ 8; Doc. 68 at ¶ 3, 10). As Katz described the plan to the Breslin children at the time, "Breslin would effectively control 100% of the estate assets to do with them whatever he wanted and whatever was most advantageous to him, without any obligation to account to the Frankel children so long as he paid them their potential "upside kicker" of $2.5 million...." (Doc 68 at 5). Thus, it is far from clear that the "upside kicker" was for defendants' benefit.

Breslin stresses that the Weary Option was granted in the context of an amendment to the operating agreement, and thus argues, by analogy to shareholder agreements, that his long delay in exercising his option was reasonable. Typically, shareholder agreements contain "buy-back" provisions, which are triggered by specific events, such as the death or retirement of a shareholder. Moreover, shareholder buy-back provisions typically contain a price formula, such as book value or a multiple of net earnings. Thus, buy-back provisions are designed for the "benefit of both parties," by avoiding costly and lengthy litigation as to the "fair value" of a minority shareholder's shares (**Gallagher v Lambert**, 74 NY2d 562, 567 [1989]).

The Weary Option contains a "price formula," i.e. $2,500,000 for a 60% interest. However, Breslin's option to purchase was not triggered by any contingent event, but rather was exercisable in Breslin's sole discretion. Thus, it appears that the option benefitted only Breslin, and not the Frankel members of the company. In any event, plaintiffs have not established that their long delay in exercising the option was reasonable because the Weary Option benefitted defendants. The court concludes that the Weary Option is invalid because Breslin did not exercise it within a reasonable amount of time.

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Accordingly, plaintiffs' motion for leave to renew and reargue is **granted**. Upon renewal and reargument, the court adheres to its November 22, 2017 order. The court issues a declaratory judgment that the so-called "Weary Option" is of no force and effect. In view of this disposition, and because the Surrogate's Court has ruled that it lacks subject matter jurisdiction, plaintiffs' alternative motion to transfer this action to Surrogate's Court is **denied**.

If there is any conflict between this order and the court's order of November 22, 2017, this order shall control.

So ordered.

Date: 19 March 2018

Stephen A. Bucaria
J.S.C.

ENTERED
MAR 20 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE