SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Petition of Rotem Rosen, Derivatively On Behalf of ASRR, LLC, as Creditor of the Estate of

TAMIR SAPIR,

Deceased,

DECISION and ORDER
File No. 2014-4683/B

For Enforcement of the Agreement for the Establishment of A Reserve.

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M E L L A, S.:

In this proceeding by Rotem Rosen derivatively on behalf of ASRR, LLC, Petitioner seeks to enforce a partial settlement agreement (The "Agreement") by and among the parties to litigation in the estate of decedent Tamir Sapir. That litigation, also before this court, involves a proceeding pursuant to SCPA 1809 commenced by Alex Sapir, the Preliminary Executor of the estate of decedent, in which he seeks to disallow a claim by Rosen against the estate (this court's File No.: 2014-4683/A).[1] The claim is in the amount of $102,900,000 and is sought by Rosen also derivatively on behalf of ASRR, for which Alex Sapir and Rosen are each 50% co-managing members and owners. Alex Sapir is decedent's son and Rosen is decedent's former son-in-law.

The Agreement sought to be enforced provides for $55.5 million to be segregated by the Preliminary Executor and then placed in escrow. The purpose behind the segregation of these funds and their placement in escrow was, according to the terms of the Agreement, "to secure in part ASRR's alleged interests in the Claim pending a determination of the Claim." The stated purpose of the Agreement itself was "to resolve the Counterclaims [asserted by Rosen on behalf

[1] In that matter, the court has directed the continuance of a motion for summary determination filed by the Preliminary Executor in order to allow the completion of certain discovery.

of ASRR in the SCPA 1809 proceeding] on the terms and conditions set forth in [the] Agreement without resorting to further litigation."

Under Section 2(A) of the Agreement, the Preliminary Executor promised to create the above-mentioned cash reserve and to place it in escrow with an agreed-upon escrow agent within three days of the execution of the Agreement by all parties, including the guardian ad litem appointed to represent the interests of an infant who is a party to the 1809 proceeding and the guardian of the property of another infant party.[2] Under Section 3(A) of the Agreement, once the funds had been placed with the escrow agent, ASRR would discontinue the counterclaims with prejudice. Rosen and ASRR also promised, under Section 3(B), not to bring any type of proceeding seeking the removal of the Preliminary Executor or challenging his appointment as fiduciary of the estate and further promised not to seek an accounting from Alex Sapir in his fiduciary capacities with respect to decedent or his estate and not to bring any claim "arising from the administration of [decedent's] Estate."

Notwithstanding the Preliminary Executor's initial confirmation that the funds had been segregated, by letter dated September 22, 2020, and citing the financial impact that the COVID-19 pandemic had on the commercial real estate market, his counsel informed the court and the other parties that the Preliminary Executor "no longer believe[d] that it is in the best interest of the Estate to set aside an all-cash reserve to secure the claim asserted by Rosen on behalf of ASRR" and that he had "chosen to exercise the right he reserved under the Settlement Agreement

[2] All parties except the guardian ad litem executed the Agreement in November 2019. The Agreement contemplated that the guardian ad litem and the property guardian would seek permission from the court to enter into the Agreement. In the case of the property guardian, permission was sought retroactively, because she had signed the Agreement already. By decision dated May 22, 2020, this court granted such permission. The guardian ad litem, the last party to execute the Agreement, signed it on September 14, 2020.

not to fund the escrow account, which will render the Settlement Agreement null and void according to its terms."

A few days later, Rosen filed the instant petition asking the court to enforce the Agreement and "declar[e] that the Preliminary Executor must fulfill his obligations under the Settlement Agreement by placing $55,500,000 in escrow within three (3) calendar days of [the Court's] issuing its Order."

In his Verified Answer and Response, the Preliminary Executor requests the denial of the petition on the ground that, pursuant to the provisions of Section 7, the Agreement is null and void as a result of his own failure to place the funds in escrow. That Section reads in its entirety:

> "**Effective Date**. This Agreement shall become immediately effective on the first date when it has been executed by all Parties other than the [guardian ad litem] and the Property Guardian, subject only to the approval of the Court and execution by the [guardian ad litem] and the Property Guardian in accordance with the provisions of Sections 4 and 5 above. In the event that Petitioner fails to fund the Escrow Funds as provided herein, this Agreement and the Stipulation of Discontinuance shall be deemed null and void. It is understood and agreed by the Parties hereto that this Agreement and the Stipulation of Discontinuance are binding on and inure to the benefit of the Parties hereto, and, to the extent applicable, their respective heirs, legal representatives, successors and assigns, and no Party may purport to withdraw or amend this Agreement absent an agreement in writing executed by all other Parties who have then executed this Agreement."

Rosen filed a reply emphasizing the legal arguments in support of his petition and, on the December 11, 2020 return date of the Order to Show Cause that served as process in this proceeding, on the record, the parties agreed to submit to the court's determination of this petition based on the filings already before the court.

The arguments advanced by the Preliminary Executor to avoid the Agreement are unavailing. First, he argues that Section 7 allows him to invoke his own breach as the basis for

nullification of the agreement. But this proposed construction of Section 7 would mean that the Preliminary Executor had no obligation under the Agreement: he could choose to comply with its terms or not and if he chose not to comply, the Agreement would be void. This lack of obligation on the part of a party to the Agreement would make it illusory (*Lend Lease [US] Const. LMB Inc. v Zurich American Ins. Co.*, 28 NY3d 675, 684 [2017]). Contracts should be interpreted by courts to give effect to their general purpose and an interpretation that makes the contract illusory and thus unenforceable should be avoided (*Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]; *Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 265-266 [1st Dept 1995]; *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994] [courts must give agreements construction most equitable to both parties instead of construction which will give a party an unfair or unreasonable advantage over the other]). As aptly put by the Appellate Division, First Department, "A provision that allows either party [to a contract] by [its] own breach to excuse [its] own performance is a commercial absurdity" (*Indovision Enterprizes, Inc. v Cardinal Export Corp.*, 44 AD2d 228, 230 [1st Dept 1974]). The court will not assume that the parties here intended such absurdity and concludes, instead, that the intention behind the middle sentence of Section 7 was to afford the victim of a breach of the Agreement the right to choose rescission as its remedy, that is, to be released from its own obligations rather than to enforce the Preliminary Executor's.[3]

[3] The parties agree that the sentence in Section 7 providing for the nullification of the Agreement if the Preliminary Executor failed to fund the escrow account was drafted by and inserted at the request of Rosen's counsel. Having determined that the provision in question was inserted for Rosen's protection, the court need not address the Preliminary Executor's argument that it should be construed against Rosen.

The Preliminary Executor's argument that Rosen is not entitled to specific performance of the Agreement because he has not shown that ASRR has been harmed by the breach fares no better. To begin, the court disagrees with the contention that ASRR has an adequate remedy at law, *i.e.*, to prosecute its counterclaims, upon the nullification of the Agreement. Such contention overlooks that Rosen on behalf of ASRR bargained for security and, by definition, only security can provide security. Having the ability to prosecute its counterclaims for removal of the Preliminary Executor and to compel him to account can hardly be said to provide security in case ASRR's claim is determined to be valid.

Additionally, contrary to the Preliminary Executor's position, absence of injury or harm on the part of ASRR is not a ground to avoid enforcement of the Agreement. A fundamental premise of the law of contracts is that the victim of a breach is in the best position to determine the value of the rights it obtained through the agreement. That is why, when dealing with applications to enforce contracts, courts start their analysis with the proposition that "[g]enerally, parties may contract as they wish and the courts will enforce their agreements without passing on the substance of them. Their promises are unenforceable only when statute or public policy dictates that the interest in freedom to contract is outweighed by an overriding interest of society" (*New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74, 81 [1989]). Before deciding to refrain from enforcing an agreement as written, the court must balance "the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties" (*id*). The Preliminary Executor has not identified any public policy or provision of law that would call for a departure in this case from the well-settled principle that courts should

enforce contracts without second-guessing their terms or the wisdom behind them. As our Court of Appeals has advised:

> "Freedom of contract is a 'deeply rooted' public policy of this state and a right of constitutional dimension (U.S. Const. art. I, § 10[1]). In keeping with New York's status as the preeminent commercial center in the United States, if not the world, our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law. Thus, '[f]reedom of contract prevails in an arm's length transaction between sophisticated parties . . . , and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain.' We have cautioned that, when a court invalidates a contractual provision, one party is deprived of the benefit of the bargain. By disfavoring judicial upending of the balance struck at the conclusion of the parties' negotiations, our public policy in favor of freedom of contract both promotes certainty and predictability and respects the autonomy of commercial parties in ordering their own business arrangements."

(*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 359–60 [2019], *reargument denied*, 33 NY3d 1136 (2019] [internal citations and footnote omitted]).

Finally, the argument that here the "[e]quities [w]eigh [h]eavily [a]gainst [g]ranting [s]pecific [p]erformance" because the estate beneficiaries' ability to receive cash distributions would be compromised if such a significant cash amount is placed in escrow ignores the fact that the Preliminary Executor struck a bargain with ASRR and, absent a showing of fraud, duress, coercion or unconscionability in the creation of the Agreement, a showing that he has failed to make in this case, the contractual promises of the parties are enforceable (*Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173, 182 [1995]). The Preliminary Executor had no choice but to fulfill his obligations under the Agreement, and the court now has no choice but to enforce it. In any event, this argument is in direct contradiction to the Preliminary Executor's assertion that the estate is worth "many times the value of the claim" and that, therefore, there is no evidence that the claimant will not be able to recover if the claim is determined to be valid.

The court concludes that the Agreement is enforceable and thus the petition to enforce its terms is granted.

Settle decree.

Clerk to notify.

Dated: July 12, 2021

Rita Mella F.
SURROGATE