

## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 17

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DANIEL C. DEPASQUALE

-against-

THE ESTATE OF JOSEPH C.  
DEPASQUALE, et al.

x

INDEX NO. 24123/05  
MOTION SEQ. NO. 6  
MOTION DATE: APRIL 23, 2008  
MOTION CAL. NO. 23  
BY: KITZES, J.  
DATED: JUNE 30, 2008

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Plaintiff Daniel C. DePasquale has moved for, inter alia, partial summary judgment on his complaint and for summary judgment dismissing the counterclaims asserted against him. The defendants, the estate of Joseph C. DePasquale, Lillian J. DePasquale, individually and as the executrix of the estate, Debro Manufacturing Corp., Fiesta Realty, Inc., and Summit Enterprises Inc. have cross-moved for, inter alia, partial summary judgment.

The plaintiff alleges the following: Plaintiff Daniel C. DePasquale is the brother of the late Joseph C. DePasquale. The DePasquale brothers organized Fiesta Realty, Inc. to own and manage premises known as 37-01 31<sup>st</sup> Street, Long Island City, New York at which Debro Manufacturing Corp., another company owned by the brothers, conducted its business. The DePasquale brothers also organized Summit Enterprises Inc. to own and manage premises known

as 31-01 37<sup>th</sup> Avenue, Astoria, New York. The brothers were equal 50% shareholders in Debro, Fiesta, and Summit, and they both took an active role in the operation of the companies. However, in or about 2001, Joseph DePasquale requested that Daniel DePasquale transfer his stock in the three companies to him so that the former's purposes regarding his sons could be accommodated. In or about 2003, Daniel DePasquale agreed to his brother's request, and they further agreed to set a nominal value on the former's interest. Daniel DePasquale agreed to his brother's request because the latter was suffering from a brain tumor and because the latter assured him that he would share in the profits when the corporations sold their real estate. On the day before entering into a written agreement for the transfer of the stock, the brothers decided to sign their own handwritten agreement concerning the sale of the corporate property. The August 6, 2003 handwritten agreement states in relevant part: "(a) In regard to the contract of sale dated Aug. 7, 2003, this agreement states that when the property of Fiesta Realty is sold, the difference between \$1,400,000 and the selling price will be divided equally between Joseph DePasquale or his estate and heirs and Daniel DePasquale or his estate and heirs. (b) When the property of Summit Enterprises is sold, the difference between \$100,000 and the selling price will be divided equally between Joseph DePasquale and Daniel DePasquale or their estate and heirs." On or about August 7, 2003, pursuant

to a written agreement, Daniel DePasquale transferred his interest in the three corporations to Joseph DePasquale for \$850,000, a sum which did not express the true value of the corporations. Despite the sale of his stock, Daniel DePasquale continued to work at Debro and continued to loan money to the corporation. On or about March 31, 2004, Joseph DePasquale died, and defendant Lillian DePasquale, his wife, subsequently made false promises to the plaintiff concerning the handwritten agreement. On or about August 10, 2005, Fiesta sold its property for \$12,000,000, and on or about September 23, 2005, Summit sold its property for the unfair price of \$180,000 to Lillian DePasquale's son. Defendant Lillian DePasquale refused to pay to the plaintiff his rightful share of the proceeds from the sale of the Summit and Fiesta properties.

On the other hand, the defendants allege that the handwritten agreement is a forgery, and Lillian DePasquale denies that the purported signature of her husband on the agreement is genuine. The plaintiff, who was represented by an attorney at the signing of the stock transfer agreement, allegedly did not mention the handwritten agreement to anyone. The defendants point out that the plaintiff never showed the handwritten agreement to anyone until the fall of 2005, and Lillian DePasquale denies ever seeing the handwritten agreement until after the plaintiff began this

action. The plaintiff did not produce the document until after Fiesta and Summit sold their realty in August 2005.

On or about November 9, 2005, Daniel DePasquale began this lawsuit against his brother's estate, Lillian DePasquale as executrix of the estate and individually, Fiesta, Summit, and Debro. The first cause of action in the second amended complaint is for breach of contract concerning the August 6, 2003 handwritten agreement, the second cause of action is for an accounting of the proceeds of sale from the real estate owned by Fiesta and Summit, etc., the third cause of action is for unjust enrichment from the stock transfers made by the plaintiff and from the sale of the corporate real estate, etc., the fourth cause of action is for the imposition of a constructive trust, the fifth cause of action is for the recovery of not less than \$400,000 loaned by the plaintiff to Debro, the sixth cause of action is for fraud regarding representations allegedly made by Lillian DePasquale concerning the handwritten agreement, the seventh cause of action is for punitive damages, and the eighth cause of action is for breach of Lillian DePasquale's fiduciary duty as the executrix of the estate.

In an order entered June 1, 2006, the IAS court granted those branches of a motion by the defendants pursuant to CPLR 3211(a)(1) and (a)(7) which were to dismiss the second, fourth, and fifth causes of action in the original complaint, and in an order entered December 19, 2006, the IAS court dismissed the

second, fourth, and fifth causes of action in the amended complaint. The plaintiff appealed, and on October 2, 2007, the Appellate Division, Second Department, dismissed the appeal from the order entered on June 1, 2006 as academic and modified the order entered on December 19, 2006 by reinstating the fourth and fifth causes of action. The Appellate Division held in regard to the second cause of action in the amended complaint that the plaintiff could not offer proof of an oral agreement which would contradict the terms of the contract for the sale of stock. The Appellate Division held in regard to the fourth cause of action for unjust enrichment that the defendants had failed to produce documentary evidence which was dispositive of the plaintiff's claim for loans made to Debro. The Appellate Division held in regard to the fifth cause of action that the plaintiff had adequately alleged a cause of action for the imposition of a constructive trust upon sums of money loaned to Debro. (DePasquale v Estate of DePasquale, 44 AD3d 606.) On November 30, 2007, the Appellate Division denied a motion by the plaintiff for leave to reargue which sought clarification concerning the scope of the reinstated claims.

That branch of the plaintiff's motion which is for summary judgment dismissing the fifth affirmative defense based on the rule against perpetuities is denied. EPTL 9-1.1[b] provides in relevant part: "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.” (See, Barnes v Oceanus Navigation Corp., Ltd., 21 AD3d 975.) The rule is applied on a what might have happened basis, not on what actually happened, as in the case at bar where Summit and Fiesta sold their realty in August 2005, well within the permissible period. (See, Symphony Space, Inc. v Pergola Properties, Inc., 88 NY2d 466.) Although the handwritten agreement between the DePasquale brothers is not necessarily void merely because it contains language binding on estates and heirs (see, Reynolds v Gagen, 292 AD2d 310), it is true that a contract for the sale of real property which violates the rule against perpetuities is void (see, Dimon v Starr, 299 AD2d 313), and an option to purchase may also violate the rule against perpetuities. (See, Symphony Space, Inc. v Pergola Properties, Inc., supra; Barnes v Oceanus Navigation Corp., Ltd., supra.) In the case at bar, the handwritten agreement is not free from ambiguity concerning whether it is a contract for the sale of realty, or some form of option, or an agreement of another nature. The handwritten agreement is also not free of ambiguity concerning the parties’ intent about when the realty would be sold, and the contract may not embody all of the terms allegedly agreed upon by the brothers. These ambiguities and the apparent incompleteness of the document raise issues of fact which may not be resolved on this motion for

summary judgment. (See, Henrich v Phazar Antenna Corp., 33 AD3d 864; DiLorenzo v Estate Motors, Inc., 22 AD3d 630.)

That branch of the plaintiff's motion which is for summary judgment dismissing the twelfth affirmative defense is granted. This court does not construe the appellate opinion (DePasquale v Estate of DePasquale, supra) as limiting the plaintiff's claims for unjust enrichment and the imposition of a constructive trust to loans made by him. The Appellate Division did not write expressly about relatively minor aspects of the plaintiff's case and at the same time dismiss sub silentio claims involving the valuable real estate owned by Fiesta and Summit. Indeed, the Appellate Division expressly noted that the plaintiff would not have to elect his remedies with respect to the handwritten agreement since "there is a bona fide dispute as to the existence of an express contract\*\*\*." (DePasquale v Estate of DePasquale, supra, 607.)

That branch of the plaintiff's motion which is for summary judgment dismissing the first counterclaim is denied. Summary judgment is precluded by an issue of fact concerning whether the plaintiff breached a warranty he made in the stock transfer agreement about the realty owned by the corporations. (See, Alvarez v Prospect Hospital, 68 NY2d 320.)

That branch of the plaintiff's motion which is for summary judgment dismissing the second counterclaim is granted.

The second counterclaim does not adequately state a cause of action for the intentional infliction of emotional distress. (See, Andrews v Bruk, 220 AD2d 376.)

That branch of the plaintiff's motion which is for summary judgment dismissing the third counterclaim is denied. Paragraph 8 of the stock transfer agreement provided a basis for the signatories to seek indemnification from each other, including for attorney's fees. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'\*\*\*." (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777, quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153.) Contractual indemnification can include attorney's fees, expenses, costs, and disbursements. (See, Seney v Kee Associates, 15 AD3d 383; Ingargiola v Waheguru Management, Inc., 5 AD3d 732; Dominguez v Food City Markets, Inc., 303 AD2d 618.) The plaintiff did not show on this motion that Lillian DePasquale as the executrix of the decedent's estate is not entitled to enforce the indemnification clause.

That branch of the plaintiff's motion which is for summary judgment dismissing the fourth counterclaim is denied. The plaintiff did not demonstrate a prima facie entitlement to summary

judgment on the defendants' counterclaim for fraud. (See, Alvarez v Prospect Hospital, supra.)

The remaining branches of the plaintiff's motion are denied.

Those branches of the defendants' cross motion which are for partial summary judgment and for a declaration that the handwritten agreement is void are denied. First, there is no merit in the defendants' argument that the plaintiff's causes of action should be dismissed because none of the defendants are bound by the handwritten agreement dated August 6, 2003. The handwritten agreement is a shareholder's agreement pertaining to the division of proceeds from the sale of corporate property which the corporations themselves did not have to sign. Moreover, a cause of action based on contract survives the death of an individual and may be maintained by and against the personal representative. (See, EPTL 11-3.1; DiScipio v Sullivan, 30 AD3d 660.) Second, summary judgment is precluded by issues of fact pertaining to, inter alia, whether the handwritten agreement violated the rule against perpetuities. Third, the defendants' remaining arguments for summary judgment lack merit. For example, breaches of warranty made by the plaintiff in the stock transfer agreement, if any, do not void the handwritten agreement as a matter of law, but merely raise issues of fact and credibility pertaining to the plaintiff's causes of action which are inappropriate for resolution on a

summary judgment motion. (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v DeSetto, 237 AD2d 219.)

That branch of the cross motion which pertains to the Deadman's Statute (CPLR 4519) is denied with leave to the defendants to raise appropriate objections at the trial of this action.

That branch of the cross motion which is for an order limiting the third and fourth causes of action to loans made by the plaintiff is denied. The defendants have misconstrued the appellate opinion in DePasquale v Estate of DePasquale (supra).

That branch of the cross motion which is for an order striking the plaintiff's demand for a jury trial is denied. The plaintiff's causes of action primarily seek monetary damages (see, Miller v Doniger, 293 AD2d 282), and the equitable relief sought is incidental to the monetary relief. (See, Decana Inc. v Contogouris, 45 AD3d 363.) The "over-all nature and character of the case" (Schlick v American Business Press, Inc., 246 AD2d 450, 450) is legal, not equitable.

The remaining branches of the cross motion are denied.  
Settle order.

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J.S.C.