

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE WEINER
J.C.
Justice

PART 54

Index Number : 653961/2016
CAPITAL ENTERPRISES CO.
vs.
DWORKAN, ALVIN
SEQUENCE NUMBER : 003
REARGUE/RENEW

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *be* for reargument and renewal ~~is~~ *be* decided in accordance with the court's decision on the record, which ~~motion~~ *motion* shall e-file.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/2/17

[Signature] J.S.P.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 54

-----X
CAPITAL ENTERPRISES CO.,

Plaintiff

- against -

Ind. No.
653961/16

ALVIN DWORMAN

Defendant

-----X

60 Centre Street
New York, New York
March 2, 2017

B E F O R E :

HONORABLE SHIRLEY WERNER KORNREICH

Justice

A P P E A R A N C E S :

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Kathy Y. Jones
Official Court Reporter

1 Proceedings

2 THE COURT: Good morning.

3 MR. SCHARF: Good morning.

4 MR. SULLIVAN: Good morning, your Honor.

5 THE COURT: Okay. This is a motion for
6 reargument and it was a case which involved an old
7 Partnership Agreement and the Court, and this is not being
8 challenged, ruled that since this is under the New York
9 arbitration statute and not an FAA case, the Court would
10 decide the statute of limitation issues and bar those
11 issues from going to the arbitrator.

12 There were what is stated to be three other
13 issues that the Court ruled on as a gatekeeper but I think
14 it's really two.

15 Be that as it may, that's the crux of the
16 reargument.

17 I'll hear you.

18 MR. SCHARF: Thank you, your Honor. David
19 Scharf and the Honorable David Saxe.

20 Judge Saxe has just joined our firm yesterday
21 and he will be working with me on the arbitration that's
22 going to go forward with Judge Fried and since it
23 involves --

24 THE COURT: I must say you're very lucky.

25 Let's continue.

26 MR. SAXE: Thank you, your Honor.

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1 Proceedings

2 MR. SCHARF: We agree.

3 Thank you, your Honor.

4 The two or three issues we believe are issues
5 that organically arise out of the whole Agreement and we
6 have a --

7 THE COURT: Well, will you just describe them
8 because in my mind there are two issues, one dealing with
9 who the manager is. And this is a partnership, am I
10 correct?

11 MR. SCHARF: It is, your Honor.

12 THE COURT: So, it's not an LLC. It's not a
13 corporation. It's a joint venture or partnership that
14 owns several buildings, real estate here in New York.

15 MR. SCHARF: That's correct.

16 THE COURT: Okay. So, two of the issues which I
17 really think should be one issue deals with management; am
18 I correct?

19 MR. SCHARF: I thought two of them, the way I
20 thought that the two you might be grouping together, are
21 the ones relating to the disposition termination of the
22 partnership and the partnership assets.

23 THE COURT: Let me look at what you -- I have it
24 here. For some reason -- okay.

25 Dworman's refusal, you're right, to abide by the
26 terms of the prior agreement for a work out early

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termination and dissolution of the partnership. Partners disagreement concerning disposition including new sale and marketing to third parties of the assets.

So, yes, you're right. I misstated that.

So, one of them deals with basically selling the assets and agreement to selling the assets which your client says was done by handshake and the other one is dealing with?

MR. SCHARF: The management.

THE COURT: So, there are two really.

MR. SCHARF: Yes, your Honor. I think they are subsumed.

I think what we did, your Honor, when we were discussing those issues was respectfully you and I engaged in a back and forth in a colloquy that violated the function of what the Court was supposed to be doing when a motion to compel arbitration was being made by us.

THE COURT: Your argument from what I understand is, as I said during the argument, this is a very broad arbitration clause.

MR. SCHARF: Yes.

THE COURT: And the issues of interpretation of the arbitration clause are to go to the arbitrator.

MR. SCHARF: Yes. However, your Honor excluded, let's call it, this disposition handshake termination

1 Proceedings
2 dissolution issue from going to the arbitrator and
3 finding -- and making a determination as to the merits of
4 that and we had a colloquy and I said the provision
5 requires only consent of the parties. Your Honor said,
6 no, the amendment provision.

7 So, what we did was, I think we impermissibly
8 got into the area of the arbitrator because the First
9 Department in the Court of Appeals has said that a Court
10 is not supposed to be deciding on whether the merits of
11 the claim is tenable or not and I think we got into that
12 and your Honor said --

13 THE COURT: Well, the question really is does it
14 fall under arbitration --

15 MR. SCHARF: Well --

16 THE COURT: -- or is it a gatekeeping issue?

17 MR. SCHARF: So, I believe, your Honor, and you
18 did say that as well on a number of occasions that we're
19 all in agreement that this is a broad arbitration
20 provision. We know the arbitration agreement has a
21 termination provision in it. We looked at it. We know
22 that there's an amendment provision which requires things
23 in writing. We know there are certain provisions in the
24 Agreement that specifically say notice shall be given in
25 writing, this needs to happen, certain things need to be
26 in writing. However, when we looked at the provision, you

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2 and I were arguing, having a conversation and a colloquy
3 with respect to whether or not the consent, the handshake
4 agreement which was memorialized in a memo that was --

5 THE COURT: A LOI.

6 MR. SCHARF: Your Honor, you want me to stay
7 away from that for a minute.

8 THE COURT: No, no, no. You put this in a memo
9 which the other side says after two years of discovery for
10 some reason all of a sudden shows up. The memo is a memo
11 from the accounting firm.

12 MR. SCHARF: Correct.

13 THE COURT: Who is your client's accounting firm
14 and has been removed because there was bias and there are
15 all kinds of issues with the accountant. So, you're
16 saying that the accountant's writing is sufficient to
17 show -- it's not a writing signed by either party.

18 MR. SCHARF: It's not and I'm not saying that,
19 your Honor. What I'm really saying about -- I understand
20 your Honor is sceptical about whether or not there was --

21 THE COURT: It's not for me to decide whether or
22 not --

23 MR. SCHARF: -- that writing.

24 THE COURT: It's not my job to decide the
25 credibility of whether this writing was done. It isn't my
26 job to at this point because I'm not asked to decide

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2 whether it was hidden by your client's. That's not part
3 of this and I'm not going to opine on that. Okay.

4 MR. SCHARF: Yes. So, before your Honor did
5 say --

6 THE COURT: But it isn't, but we can all agree,
7 it isn't the kind of writing that whether it's an LLC
8 agreement, a shareholders agreement or a partnership
9 agreement, when any of those agreements have a clause that
10 requires a signed writing or writing, this is not the kind
11 of writing we're talking about.

12 Would you agree with that?

13 MR. SCHARF: I would agree with your Honor.

14 THE COURT: Okay.

15 MR. SCHARF: However, there are a couple of
16 things, and again I think we are going down the road in
17 getting into the role of what should properly be before
18 the arbitrator because the dispute as to the termination,
19 Article 5 and whether or not --

20 THE COURT: Wait a minute. It's a dispute.
21 It's really one question. You're saying the dispute is --
22 you're arguing that your client says he had a luncheon
23 meeting with Dworman and your client isn't of course the
24 partner. It's his entity that's the partner. That he had
25 a luncheon meeting with Dworman. They shook hands and
26 decided they were going to divvy up the real estate.

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1 Proceedings

2 MR. SCHARF: Yes.

3 THE COURT: And transfer it or sell it. At the
4 present time, it wasn't decided how, what, where.

5 Subsequently, you submit what looks like some kind of
6 sheet from the accountant laying out all the issues and
7 speaking to the lawyers working on an agreement.

8 MR. SCHARF: Yes.

9 THE COURT: Okay.

10 MR. SCHARF: Yes, but putting aside the memo,
11 Article 5 of the Agreement which requires all disputes to
12 go to arbitration has a provision entitled termination and
13 section 5.1 has a section called events of the termination
14 and it says the partnership shall be dissolved and its
15 affairs wound up on the first to occur the following. And
16 subsection B says a determination of the partners to
17 dissolve.

18 THE COURT: Can I ask you something?

19 MR. SCHARF: Yes, your Honor.

20 THE COURT: So, you're saying. Let's say I have
21 a -- I create a partnership and I'm not saying that
22 happened here but I'm just assuming something. I am going
23 to create a partnership with you. We own three or four
24 buildings, just like this, major buildings of real estate
25 and I put in my partnership agreement when we decide to
26 dissolve we can sell these buildings without a writing in

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violation of the statute of frauds. That would be okay?

Would that be okay, yes or no?

MR. SCHARF: No.

THE COURT: Then I think that answers this.

MR. SCHARF: No, it doesn't. Allow me to tell you why.

Article 1, we've never looked at this provision before. Article 1 talks about the formation, name and office and subsection B it says about partner's interest in the partnership shall be personal property for all purposes.

THE COURT: Wait a minute. If your answer to me was no, then what was the handshake beyond the transfer to sell these buildings. Was it just an agreement to dissolve?

MR. SCHARF: It was a methodology of how they were going to effectuate because --

THE COURT: What are you asking -- what do you want the arbitrator to decide? That's what I am asking you.

From what I gather, you want the arbitrator to say that each of the parties will keep one building and sell the other. So, they would transfer real estate to each other without a writing. They agreed to that by the handshake.

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What you're telling the Court is to ignore the statute of frauds and let the arbitrator say they agreed to sell real state, transfer real estate without a writing.

On top of that, the writing that your client finally came up with, he specifically speaks to going to lawyers and writing all of this.

We're dealing with two very sophisticated real estate people who know. When you sell buildings, you put it in writing and terms and saying I will give you half my buildings or I will sell the building is not an agreement without material terms such as price, to whom, how you're going to sell, date of contract, date of closing, financing. None of this.

You're saying the handshake was sufficient and the arbitrator should be able to decide -- that I should send that to arbitration, ignoring the statute of frauds, ignoring the sophistication of the these two real estate people and now ignoring the writing you just put in that says this has to be negotiated, we're in the midst of negotiating and this has to go to their lawyers.

MR. SCHARF: Yes, your Honor. And allow me to explain why. Okay. Because what you just said, a determination as to the applicability of the statute of frauds, the applicability of whether or not a

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2 determination of the partners to dissolve needs to be in
3 writing, a determination as to section 5.3, the winding up
4 which says the partners shall wind up the partnership
5 affairs. The assets of the partnership shall be sold
6 within a reasonable amount of time. Those issues are
7 issues for the arbitrator.

8 It is not my burden seeking to compel
9 arbitration to prove a likelihood of success.

10 THE COURT: So, what are you asking?

11 I thought what you're's saying is not -- you
12 know, it's one thing for the arbitrator to make a decision
13 and that could easily go to the arbitrator and probably
14 should happen because this is a broken relationship and
15 they need a commercial divorce. It's one thing for the
16 arbitrator to say they've agreed to dissolve. That I have
17 no problem with.

18 MR. SCHARF: Okay.

19 THE COURT: My problem is your claim they agreed
20 on how to dissolve. That they were going to transfer real
21 property without a writing. That they were going to sell
22 real property without a writing. It's the meanings that I
23 think cannot go to arbitration because it would fly in the
24 face of the statute of frauds.

25 In a sense what this does, and I know manifest
26 disregard is always a questionable thing and it's usually

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2 after an arbitration. You're asking this Court to rule
3 when the law is clear on statute of frauds for the Court
4 to ignore, to manifestly disregard the statute of frauds
5 and send an issue that is black letter law and it's black
6 letter law because of what's happening here.

7 Oh, did these people decide to transfer real
8 property or sell real property without material terms,
9 without a writing and send that to an arbitrator to
10 decide. I think that would basically undermine the law of
11 the state. I think as a gatekeeper, I can't do that.

12 MR. SCHARF: Your Honor, I would like to say two
13 things. I'd like to address your concern about the
14 statute of frauds for a moment although please understand
15 that I believe that while it may be a losing argument and
16 I'm not conceding that but that is not a gatekeeping
17 function for your Honor. That is, once there is a broad
18 arbitration provision and it arises out of the dispute,
19 it's for Judge Fried to decide whether the statute of
20 limitations applies here but let me --

21 THE COURT: You mean -- not the statute of
22 limitations.

23 MR. SCHARF: I am sorry, the statute of frauds.

24 THE COURT: You mean as to the sell of real
25 estate?

26 MR. SCHARF: Yes.

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2 THE COURT: And then you're saying the other
3 side will come back and say that's manifest disregard.

4 I mean, I believe that Judge Fried would
5 probably not do this, but even so, that if he ruled that
6 they could transfer real property, that they agreed to
7 transfer real property, that was sufficient to transfer
8 this real property, that would be okay. And then the
9 other side come back to me and say this is manifest
10 disregard of the law.

11 You know, I think that you're opening a can of
12 worms.

13 MR. SCHARF: Your Honor, you're never really
14 giving me the opportunity to try my case in front of Judge
15 Fried which I would like to but I want to try to give you
16 a level of comfort that we're not heading into a circle
17 where we'll be back before you with a manifest disregard
18 if Judge Fried decides that the statute of frauds somehow
19 is not implicated here.

20 Your Honor, I agree the statute of frauds is
21 implicated here. However, your Honor needs to remember
22 one other thing. The entities, we have a master
23 partnership that manages the partnership -- the
24 properties. The properties, if there is going to be a
25 swap of partnership interests, those swap of partnership
26 interests don't necessarily need to be in writing. Okay.

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2 And because there is a writing already in section 5.3 that
3 says the parties agree to sell the properties. If they
4 are going to swap their partnership interests, okay,
5 instead of selling to a third party, they have already
6 agreed in writing that all three buildings need to be sold
7 to a third party in the event of dissolution.

8 THE COURT: As I said earlier, I have no problem
9 with the issue of whether they agreed to dissolve the
10 partnership going to the arbitrator. I think that's fine.
11 My problem is the mechanics of it. The agreement that
12 certain property would be sold, certain property -- parts
13 of property would be transferred. This is real property.
14 You need a writing.

15 Moreover, you also need terms which is
16 acknowledged by the writing you've now submitted, your
17 client has now submitted. You can't just handshake the
18 transfer and sale of real estate in New York.

19 There are not even material terms in writing.
20 There was nothing.

21 I think I would be -- by allowing that to be
22 determined that a handshake is okay for the transfer and
23 sale of real property, to me that's undermining basic law.

24 MR. SCHARF: Your Honor, the statute of frauds
25 in particular as it relates to transfer of real property.

26 THE COURT: What exactly do you want the

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2 arbitrator to decide, that they agreed to divest
3 themselves of half a building and they agreed to sell the
4 third building? Is that what you want the arbitrator to
5 decide?

6 MR. SCHARF: I want the arbitrator to be able to
7 decide a multitiered and multilayered issue. Number one,
8 did the parties agree to part ways.

9 THE COURT: That's fine. I have no problem with
10 that.

11 MR. SCHARF: I would also like the opportunity
12 to present to the arbitrator whether there are any
13 exceptions to the statute of frauds so that the issue of
14 whether or not we needed a writing and the handshake or
15 there was partial performance because your Honor will
16 remember partial performance is one of the exceptions that
17 the Appellate Division has said appropriate.

18 You are not giving me an opportunity by saying
19 I'm clamping down. I'm only allowing you to present the
20 following evidence to the arbitrator.

21 We have a broad arbitration provision. One of
22 the issues relates and arises from the Agreement. You've
23 got to trust Judge Fried to do it right and give me an
24 opportunity to put on my case once we have decided that
25 the issue arising from Article 5, termination and the
26 winding up and the distribution can --

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2 THE COURT: So, you want him to determine
3 whether that handshake was an agreement to transfer half
4 of each building to the other and sell the third building?

5 MR. SCHARF: To transfer partnership from among
6 partners and whether they can do that in accordance with
7 either the statute of frauds, the Partnership Agreement.

8 THE COURT: I don't understand what terms --
9 there were no terms. It was a handshake and your client
10 is saying the terms were this. The other side says no.

11 MR. SCHARF: The other side hasn't said, no,
12 these weren't the terms, your Honor. The other side has
13 not -- has simply walked away from what was negotiated.

14 THE COURT: But the point is they walked away
15 from what you claim was negotiated and the negotiation,
16 the crux of the negotiation is the sale of three large
17 real estate buildings in New York without a writing,
18 without material terms.

19 MR. SCHARF: I think you're wrong, your Honor,
20 in the following three ways:

21 With respect to the third piece of property that
22 was agreed to be sold, the actual Partnership Agreement
23 says that that's what they're supposed to do. So, you're
24 right. That was the third property that everyone agreed
25 would be conveyed, outright title, fee simple to somebody
26 else. We all know that that needs to happen and we all

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2 know when there is a buyer for that property, the third
3 party, that that property is going to have a written
4 contract and a deed to transfer in order to make that
5 happen. We're not arguing about that.

6 THE COURT: So, with the third property,
7 although from what I recall, the deal that you were
8 arguing was that one of them would buy the third
9 property --

10 MR. SCHARF: It would be --

11 THE COURT: -- or that it would be sold
12 outright, correct?

13 MR. SCHARF: Sure.

14 THE COURT: And I don't know. There was no
15 agreement as to price. There was no --

16 MR. SCHARF: There was a methodology that was
17 agreed to that you can see in the memo but let's talk
18 about the other two.

19 THE COURT: Wait a minute. The memo is from
20 your own accountant?

21 MR. SCHARF: From the partnership accountant.

22 THE COURT: It isn't signed.

23 MR. SCHARF: I agree with you. I agree with all
24 of this, your Honor. We don't have a dispute on the
25 facts.

26 What I am asking you to allow me to do is to

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2 present the facts and arguments at an arbitration because
3 it arises, the dispute arises from this issue.

4 With respect to the two -- with respect to the
5 two buildings where they were going to swap partnership
6 interests, in essence, we have a provision that says the
7 partnership interest is not to be treated as realty. It
8 is to be treated as personal property. I would like to
9 try to convince Judge Fried that that provision is
10 dispositive and therefore it is outside --

11 THE COURT: You just said to me that you cannot,
12 even if the partnership said that you can sell or transfer
13 real property without a writing, you just said to me
14 earlier that that would not -- that would not hold because
15 that would be in violation of the statute of frauds.

16 MR. SCHARF: I said that if this was deemed to
17 be a transfer of real property, we have a statute of
18 frauds issue that I can present exceptions to the statute
19 of frauds including the one that the First Department and
20 the Court of Appeals has carved out.

21 THE COURT: There is no reliance here. I mean,
22 you don't have an estoppel here.

23 MR. SCHARF: Your Honor, you're not allowing me
24 to present that issue to Judge Fried. Why can't I do
25 that?

26 I don't have to prove -- I mean, if I can read

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to your Honor from an opinion which we cited in our papers.

THE COURT: You know what, let me hear from the other side.

Why don't you have a seat and let's hear from the other side on this issue.

MR. SULLIVAN: Your Honor, I will be very brief. Thank you.

Chris Sullivan for Mr. Dworman.

The standard, as I'm sure your Honor is aware, from a motion on reargument is whether a Court overlooked or misapprehended the fact or the law.

Counsel just informed the Court that the facts are set forth correctly in your Honor's rendition. So, we're really talking about the law here.

I read Mr. Scharf's papers carefully to see what he said about the law. If your Honor does the same, you will see that he mentions the statute of frauds once at the very end of his memorandum of law in the context of a quote that says arbitration should be liberally construed in the State of New York and that includes the statute of frauds and then he cites to three cases. They don't mention the statute of frauds.

I also looked to see whether he mentions Section 15-301 of the general obligation law which is the no oral

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2 modification provision in which the First Department has
3 very emphatically stated that you cannot circumvent a no
4 oral modification clause in a partnership agreement in
5 exactly the circumstances of this case. And there is no
6 mention, your Honor, of that.

7 Finally, I looked to see whether counsel ever
8 addressed the issue of why his client doesn't want to
9 invoke the exclusive remedy in the Partnership Agreement
10 for dividing up the property. Why are we going to some
11 mysterious handshake agreement years ago that no one
12 agrees to and believe me --

13 THE COURT: You have no problem then going to
14 Judge Fried and dissolving this partnership that is
15 suffering and following the arbitration agreement?

16 MR. SULLIVAN: Your Honor, we will certainly
17 follow the Partnership Agreement. What we have said
18 consistently --

19 THE COURT: I meant the Partnership Agreement.

20 MR. SULLIVAN: What we have said consistently is
21 until we learn how much money Mr. Palin has stolen from
22 his entity, we're hard pressed to resolve the issue. It's
23 very relevant to the issue of invoking the buy sell clause
24 in the Partnership Agreement.

25 So, to sum up very quickly, your Honor, there is
26 no law in their papers because the Court did not

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misapprehend or overlook the law. They've taken an expedited appeal to the First Department of your Honor's decision.

They initially attempted to persuade Justice Fried that all issues are before him until we corrected the record.

We're back here in front of your Honor. There is absolutely nothing in their presentation that suggests the Court should change its decision.

MR. SCHARF: Let me correct him. We haven't taken an appeal from your Honor's decision as relates to this case.

THE COURT: I have no problem.

MR. SCHARF: I believe Mr. Sullivan has mis-spoken.

THE COURT: Now, let's deal with the second.

MR. SCHARF: Can I just --

THE COURT: You had a long time.

MR. SCHARF: I appreciate just one word on the issue.

THE COURT: I have three other motions.

MR. SCHARF: I know. I know. I will be very brief.

The statute of frauds is an affirmative defense to our claim. If we have a claim that arises from the

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2 Agreement and it's right in Article 5, we get to go there.

3 They have an affirmative defense that they can put on.

4 The First Department in Shazo versus Hirschler,

5 which is a case I believe the Court may have overlooked in

6 its decision, says the right of a party to relief under

7 substantive provision of the contract -- that's what we're

8 talking about -- is not a proper consideration for the

9 court upon an application to stay arbitration.

10 THE COURT: I don't think we're dealing with

11 substantive provisions of the contract.

12 You're asking me to in a sense undermine the law

13 of this state as to statute of frauds. I just can't and I

14 think -- I think the statute of frauds has to be upheld

15 when it comes to real estate.

16 MR. SCHARF: Your Honor, the statutes of frauds

17 is not an Article 75 like the statute of limitations.

18 THE COURT: Counsel, please.

19 MR. SCHARF: Yes, I will be quiet.

20 THE COURT: Let's move on to the next issue and

21 as to this issue I stand on this ruling.

22 MR. SULLIVAN: I don't think there is another

23 issue, your Honor.

24 THE COURT: Yes, there is Dworman's revocation

25 of his authorization for Capital Enterprises to act as

26 day-to-day manager.

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1 Proceedings

2 That's the other issue?

3 MR. SCHARF: Yes, it is, your Honor.

4 THE COURT: I'm not sure what that issue is.

5 Why don't you explain it to me.

6 What is his authorization? It was never a
7 writing or anything else.

8 MR. SCHARF: There is. Your Honor, the
9 Partnership Agreement with the authorization of Capital --

10 THE COURT: It made Dworman the general manager.

11 MR. SCHARF: That's correct.

12 THE COURT: And it required writing to change
13 that and there was no writing. Yes.

14 So, what are you asking here?

15 MR. SCHARF: We are asking your Honor --

16 THE COURT: I wasn't sure.

17 MR. SCHARF: Sure. That the day-to-day
18 management issue since it was being carried out by Carard
19 which was specifically authorized in the Agreement to do
20 so.

21 THE COURT: Right.

22 MR. SCHARF: There was an historical morphing of
23 the right to act as manager which Dworman had and which
24 right which he gave up and if you look --

25 THE COURT: I think there was -- it was
26 distinguished from what I recall. Unfortunately, I have

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2 so many motions on today, I didn't re-read the Agreement

3 this time but I had read it last time and from what I

4 recall there was one general manager and then there was a

5 day-to-day management company.

6 MR. SCHARF: Yes.

7 THE COURT: And Carard which was owned by Palin

8 I believe --

9 MR. SCHARF: Correct.

10 THE COURT: -- was the day-to-day management

11 company and Dworman was the general manager.

12 MR. SCHARF: Correct.

13 THE COURT: That was in the Agreement.

14 MR. SCHARF: Correct.

15 I'll go through the provisions quickly.

16 Major decisions, Dworman as managing partner

17 shall not be empowered without the prior written consent

18 with Palin to do any act in contravention of this

19 Agreement.

20 One of the provisions that Dworman can't do in

21 contravention of this Agreement even though he's the

22 manager is section 4.3. The partners hereby agree to

23 engage Carard Management Company or any other affiliated

24 company which your Honor said it can go --

25 THE COURT: Let me tell you why I'm confused.

26 This is an issue for the arbitrator. Carard was removed

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2 by the Court.

3 MR. SCHARF: Yes.

4 THE COURT: Which is not -- and now temporarily
5 or it will be up to the arbitrator to decide what happens
6 in the future.

7 MR. SCHARF: Okay.

8 THE COURT: But they came to court because they
9 said -- they presented forensic proof that Palin was
10 taking money out, you know, improperly taking money from
11 the partnership, whatever.

12 MR. SCHARF: And we'll arbitrate that issue.

13 THE COURT: And that Carard was involved in
14 this, et cetera. The Court then put in a temporary
15 managing company that the two parties agreed to.

16 MR. SCHARF: Yes.

17 THE COURT: So, I don't understand what this
18 third thing is.

19 MR. SCHARF: Okay. I thought it was -- listen,
20 when I read your Honor's ruling when your Honor
21 excluded -- on page 26 Mr. Sullivan was going through the
22 issues and he said Dworman's revocation of his
23 authorization to Capital Enterprises to act as day-to-day
24 manager of the properties. The Court then said this isn't
25 an issue because there was no written amendment. So, that
26 doesn't exist.

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2 THE COURT: Right. You know, Mr. Dworman is the
3 managing member.

4 MR. SCHARF: But, however, we have a right to
5 contest the action by Mr. Dworman to seek the relief that
6 he obtained from this Court to seek to replace Carard.

7 THE COURT: The relief he obtained from this
8 Court was temporary.

9 MR. SCHARF: I think we just need to be clear on
10 that, your Honor.

11 THE COURT: Absolutely.

12 MR. SCHARF: Okay.

13 THE COURT: That all is going to the arbitrator.
14 It's up to the arbitrator to make a decision as to whether
15 or not there was this alleged stealing from the company or
16 if there were, I guess if it was a corporate entity under
17 an LLC, we talk about waste. All of this is for
18 arbitration.

19 MR. SCHARF: That's fine. I felt that I was
20 going to be -- your Honor said please send this to the
21 arbitrator.

22 THE COURT: You know what, I do so much orally
23 off the bench, I do 70 or 80 percent like this off the
24 bench.

25 MR. SCHARF: We appreciate that, your Honor.

26 THE COURT: Often there are piles of paper.

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2 That the record was not that clear here, I understand and
3 I'm glad you came forward and now it's clarified.

4 MR. SCHARF: Thank you, your Honor.

5 MR. SULLIVAN: If I may, your Honor, on that
6 point, Carard, of course, is not a party to the
7 Partnership Agreement or the arbitration.

8 THE COURT: Absolutely, that's a different case,
9 and I haven't stated because it's Palin's son and other
10 people who now own Carard and there is a different case
11 involving them which is not stayed because it has nothing
12 to do with this Partnership Agreement.

13 MR. SULLIVAN: That's exactly my point, Judge.

14 THE COURT: Absolutely. Yeah, there are three
15 different cases here.

16 MR. SULLIVAN: Obviously, it's critical.

17 THE COURT: And we're talking here only about
18 the two partners and I use the name Palin but Palin isn't
19 even a partner. It's his entity that's a partner.

20 MR. SCHARF: Capital Enterprises.

21 THE COURT: Right?

22 MR. SCHARF: Yes, your Honor.

23 THE COURT: So, I stand on the issue of the
24 statute of frauds.

25 I don't think you can just do away with the
26 statute of frauds. It's like entering into an agreement

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and extending a statute of limitations. I think it's against public policy. You just cannot say we'll sell property in New York without any writing. It just can't happen.

I mean, it's like saying to the Court, you should not -- manifest disregard but by you the Court. I just can't do it.

In terms of the other, I hope that's clarified.

MR. SCHARF: Thank you, your Honor.

MR. SULLIVAN: Thank you, your Honor.

THE COURT: Mr. Scharf, can you order the order and efile it. I'm going to say decided according to the record.

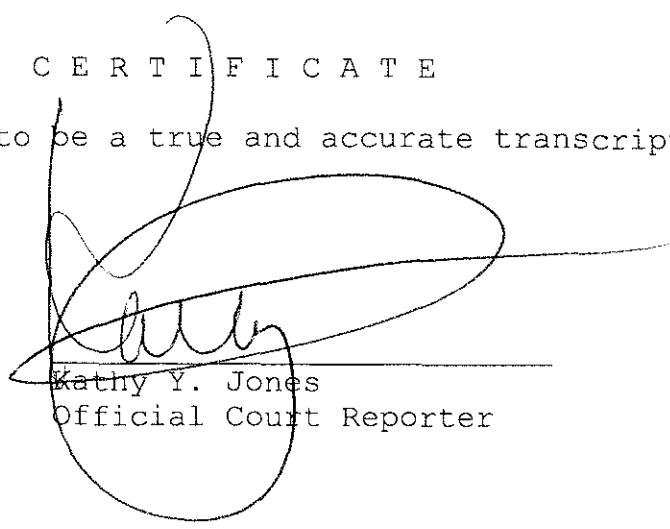
MR. SCHARF: The record.

THE COURT: My decision on the record. Okay.

MR. SCHARF: Yes.

C E R T I F I C A T E

Certified to be a true and accurate transcript of the proceedings.



Kathy Y. Jones
Official Court Reporter

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