SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Dean George Pappas, as the
Executor of the Estate of William Egan, and
Dean George Pappas, individually,

Plaintiffs,

-against-

B & G Holding Co.
d/b/a B & G Holding Company, and
Eugene Leogrande

Defendants.

Index No. 35136/2020E

Hon. Fidel E. Gomez, J.S.C.

Mot Seq. 4

B & G HOLDING CO. D/B/A B & G HOLDING COMPANY AND EUGENE LEOGRANDE'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR A DECLARATORY JUDGMENT

Dated: June 3, 2024

PIANA & GIOE, LLC
Jack Piana
1200 Veterans Memorial Hwy, Suite 360
Hauppauge, New York 11788
Tel. (631) 232-3700
Fax. (631) 232-3702
jpiana@pianagioe.com

Attorneys for Defendants B & G Holding Co. d/b/a B & G Holding Company and Eugene Leogrande

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

Defendants B & G Holding Co. d/b/a B & G Holding Company ("B&G") and Eugene Leogrande ("Mr. Leogrande" and together "Defendants") respectfully submit this memorandum of law in support of their joint motion) seeking an order pursuant to CPLR 3212 granting summary judgment on their counterclaim, directing specific performance of the buyout provision of the Partnership Agreement and directing plaintiffs Dean George Pappas ("Mr. Pappas"), individually, as the Executor of the Estate of William Egan's (the "Estate" and together, "Plaintiffs") to proceed to the closing. In this, the Defendants respectfully request that this Court issue an Order determining that the Partnership Agreement is valid, including its provisions relating the method of determining the value of a deceased partner's partnership interest, that Defendants have furnished an accounting of Mr. Egan's partnership interest to Plaintiffs. Finally, the Defendants respectfully request that this Court deny Plaintiffs' motion seeking a declaratory judgment, which essentially asks this Court to void the B&G's Partnership Agreement.

After the death of Mr. Egan, Plaintiffs were—and still are—required to sell Mr. Egan's partnership interest to B&G's surviving partner, Mr. Leogrande, pursuant to the valuation methodology stated in B&G's Partnership Agreement. In what should have been a simple transaction, Plaintiffs have refused to accept the plain meaning of B&G's Partnership Agreement, opting to advance specious arguments reliant on semantics which contradict established law and the Partnership Agreement. This Court should grant the Defendants' motion for summary judgment on its counterclaim for specific performance, and deny Plaintiffs' motion for a declaratory judgment.

I. The Estate is Required to Sell William Egan's Interest to Mr. Leogrande

The Partnership Agreement requires Plaintiffs to sell William Egan's Partnership interest to Mr. Leogrande. As set forth in Mr. Leogrande's Affidavit, B&G's Partnership Agreement accounted for the contingency of death and proscribed the mandatory methodology to account for the value of the deceased partner's interest.

The language of the Partnership Agreement is clear and unambiguous. In contrast, Plaintiffs refusals to satisfy the mandatory obligations run contrary to established law and the Partnership Agreement itself.

The courts of New York have long observed that partners may include within their written contract "any agreement they wish concerning the sharing of profits and losses, priorities of distribution on winding up of the partnership affairs and other matters". *Urban Archeology Ltd. v. Dencorp Investments, Inc.* 12 A.D. 3d 96 (1st Dep't 2004). And where partners "have entered into a complete partnership agreement, the rights of the partners are fixed and controlled by that agreement." *Urban Archeology Ltd.* quoting *Ayerslee Corp. v. Overlook Sponsor Corp.,* 618 F.Supp 1398, 1403 (1985). Where, as here, the partners have entered into an agreement to meet the contingency of the death of a partner, those agreements are binding. *In re Eddy's Estate* 175 Misc. 1001

The strict adherence to the terms and conditions of partnership agreements is applied impartially. For instance, in *Urban Archeology*, the Appellate Division, First Department reversed a lower court's order that had contradicted the terms of the partnership agreement by granting an extension of the time in which a partner could exercise the option to purchase a former partner's partnership interest. The legislature also took care to preserve the sanctity of partnership agreements by making the default rules in the Partnership Law—including those sections relied

upon by plaintiffs—subject to any agreement made by and between the partners. *See* NYPL 68 and NYPL 74.

Mr. Egan and Mr. Leogrande unequivocally agreed to be bound by the terms and conditions of their Partnership Agreement. Through its express terms, the partners agreed that the valuation method contained in the Partnership Agreement would be the exclusive means to calculate the value of a deceased partner's interest. (Exhibit "E" ¶ 5.C) They further agreed that its terms and conditions would survive termination (Exhibit "E" ¶ 10) and would bind their "respective heirs, executors, administrators, successors and assigns" (Exhibit "E" ¶ 16) Despite this, Plaintiffs seek to up-end the valid agreement between Mr. Leogrande and Mr. Egan.

Motions made for Summary Judgment permit a party to show through affidavits and other evidentiary showings that there is no issue of fact to be determined, and that judgment may be directed as a matter of law. *Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004) Here, there is no genuine question of fact that would prevent this Court from issuing a judgment directing Plaintiffs to comply with the Partnership Agreement.

Specific performance is a remedy available when seeking to enforce buyout provisions in partnership Agreements, and "strict adherence to those buyout provisions will be "ordinarily" directed. *Urban Archeology Ltd. v. Dencorp Investments, Inc.* 12 A.D. 3d 96 (1st Dep't 2004). As set forth in the Affidavit of Eugene Leogrande, Mr. Leogrande followed the required procedure of the Partnership Agreement to invoke his right to purchase Mr. Egan's partnership interest. The language of the Partnership Agreement is clear and unambiguous. Accordingly, the Court should grant summary judgment in favor of Mr. Leogrande and direct that the Plaintiffs proceed to the sale called for in the Partnership Agreement, at the price as calculated pursuant to the methodology in the Partnership Agreement.

II. Plaintiffs' Motion for a Declaratory Judgment Should be Denied

Plaintiff now seeks to have this Court, pursuant to CPLR 3001 declare that B&G's partnership be controlled by a series of inapplicable legal theories. This relief is sought for the first time on motion[1].

The point of a declaratory judgment action is to declare respective legal rights based on a given set of facts, and not to declare aa finding of fact. *Thome v. Alexander & Louisa Calder Found.,* 70 A.D.3d 88, 890 N.Y.S.2d 16 (2009). Here, Plaintiffs seek to have this Court declare that the value of Mr. Egan's partnership interest is not governed by the Partnership Agreement.

Central to this claim is Plaintiffs' fundamentally incorrect conclusion that specific bequests are not part of a testator's estate. Plaintiffs suggest that because the Partnership Agreement references the surviving partner's purchase from "the deceased partners estate", the Buyout Provisions are inapplicable to Mr. Pappas, and the default rules under the NYPL control. While it is arduous to unpack their position, it is axiomatic that a decedent's estate includes all assets subject to probate. To this, the Court of Appeals has stated that "A specific legacy is a bequest of a specified part of a testator's personal estate distinguished from all others of the same kind." *Crawford v. McCarthy* 159 N.Y. 514 (1899) Emphasis added. In light of this foundational principle, Plaintiffs' semantic argument rings hollow.

Yet, Plaintiffs seem to suggest that this Court should treat the partnership interest gifted to Mr. Pappas as a non-probate asset, passing outside Mr. Egan's estate, by operation of law, to the designated beneficiary named on the non-probate instrument[2]. The inherent characteristic of a non-probate instrument is the designation of a named beneficiary appearing on its face.

---

[1] Plaintiffs' sole cause of action remaining in the Complaint is one for an accounting.
[2] For instance, a life insurance policy naming a designated beneficiary, or the deed to real property naming co-tenants with right of survivorship.

Naturally, Mr. Pappas is not named as a beneficiary in the Partnership Agreement. Nor does the Partnership Agreement permit the creation of such a designation, as it prohibits, among other things, the assignment of a partnership interest without agreement by the other partner. (Exhibit E § 2).

Plaintiffs cite to EPTL 1-2.17 (definition of specific gift) and EPTL 1.1(b)(5) (inherent powers of personal representative), without a clear purpose. For instance, Plaintiffs maintain that because Mr. Egan's will made a specific bequest of his partnership interest to Mr. Pappas, that Mr. Egan's interests passed outside of the Estate and vested in the Plaintiff immediately upon death, citing (EPTL § 1-2.17) and § 11-1.1(b)(5). Neither statute supports this assertion. And Plaintiffs' statement incorrectly conflates the principles of "title vesting" and assets passing outside of the estate one and the same. Additionally, the fact that Mr. Egan's Estate is a Plaintiff in this action contradicts Plaintiffs' principal contention (that Mr. Egan's Estate plays no role in this process.)

Plaintiffs further contend that the Partnership Agreement is not controlling here because it does not set forth a methodology related to "specific bequests". This position ignores a fundamental principle of the right to form partnerships on the terms set by the partners. Following Plaintiffs' arguments, a partner would be able to change the nature of a buyout agreement, unbeknownst to the other partners, through their will simply because that (now deceased) partner elected to gift the value of their partnership interest to a specific person. To the contrary, Mr. Egan's partnership interest, and the value thereof, is determined exclusively by the Partnership Agreement. He was always free to gift that value to anyone he pleased, but that does not change the fact that the value was always set by the terms of the Partnership Agreement. As such, the partners of B&G determined how the interest of a deceased partner's interest would be

valued. It is agreed that Plaintiffs are entitled to the value of Mr. Egan's partnership interest, as determined by the methodology in the Partnership Agreement.

Plaintiffs quote various off-point decisions—most of which are from lower courts sitting outside the First Department— involving subject matter unrelated to the instant case. For instance, Plaintiffs quote from the decision in *Keoseian v. Von Kaulbach*, 763 F. Supp. 1253 (S.D.N.Y 1991) (case heard in the Southern District of New York applying *German* law, involving rights of the specific devisee of a painting to assign title to the painting.) In making this argument, Plaintiffs again confuse the concept of the "vesting of title" in a specific gift at the time of a testator's death, with non-probate assets passing outside of the will.

Plaintiffs quote *Matter of American Comm. v. Dunn,* 10 N.Y.3d 83, 92 (2008) to assert that renouncing a subsequent testamentary instrument requires indisputable evidence. The Court in *Matter of Comm* had before it the issue of whether a correspondence to a charity constituted a binding agreement sufficient to bind a decedent's estate to a promised donation. Additionally, Plaintiffs cite *Matter of Burke* 492 N.Y.S. 2d 892 (a Cattaraugus County Surrogate matter involving an executor's lack of authority to make repairs to real property specifically bequeathed.)

Plaintiffs quote the decision in *Harris v. Harris*, 2020 N.Y. Slip Op 31570 (Sup. Ct. 2020). It assumed that Plaintiffs cite to *Harris* to argue that renouncing the power to make future testamentary disposition must be clearly stated. This presumed argument does not bear on the issue before the Court. Notably, the lower court's decision that Plaintiffs cite here was reversed by the Appellate Division, First Department in *Harris v. Harris* 193 A.D.3d 457 (1st Dept. 2021).

The cases cited by Plaintiffs do not support their semantic argument. For example, Plaintiffs cite to *Matter of Seviroli,* 31 A.D.3d 452, 455-456 (2 Dept 2006). There the Court said: "…the property passes to the devisees *subject to the execution of the power to sell by the executor*".

Emphasis added. Here, Mr. Pappas is entitled to receive the monetary value of Mr. Egan's partnership interest, as determined by the Partnership Agreement's methodology, upon its sale by Mr. Egan's Personal Representative to Mr. Leogrande pursuant to the Partnership's buyout provision.

Plaintiffs miss the fundamental principle: the value of Mr. Egan's partnership interest was determined by the Partnership Agreement. When he died, an automatic option to purchase Mr. Egan's interest vested with Mr. Leogrande. The Partnership Agreement stated clearly the restrictions on transfers and other dispositions. It is conceded that Mr. Pappas was not a partner in B&G. Therefore, the controlling fact remains: 100% of Mr. Egan's partnership interest, as Plaintiffs assert entitlement to, is that which is set by the Partnership Agreement.

III. B&G has Accounted to the Estate as to the Value of Mr. Egan's Interest

Accompanying the instant application is a statement of Account prepared by the surviving partner Eugene Leogrande. The accounting sets forth the methodology of determining Mr. Egan's partnership interest, and provides the all supporting documentation necessary to independently perform the calculations. This is consistent with NYPL § 74 which states: "The right to an account of *his interest* shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary." *Emphasis added.*

The accounting calculates, as of the date of dissolution (Mr. Egan's death) the precise value of Mr. Egan's interest. As such, Defendants have satisfied their obligation.

CONCLUSION

It is respectfully submitted that Defendants B&G and Mr. Leogrande's motion seeking summary judgment on their counterclaim for specific performance be granted, and Plaintiffs' motion seeking declaratory relief be denied in all respects, and for such other relief that the Court deems just and proper.

Dated: June 3, 2024
Hauppauge, New York

PIANA & GIOE, LLC.

By: /s/
JACK PIANA, ESQ.
Attorneys for Defendants
1200 Veterans Memorial Hwy, Suite 360
Hauppauge, New York 11788
(631) 232-3700
JPiana@PianaGioe.com

To: All Parties VIA NYSCEF

CERTIFCATION PURSUANT TO UNIFORM CIVIL RULE 202.8-B

Jack Piana, an attorney, hereby certifies that the above memorandum of law complies with 22 NYCRR § 202.8-b in that it is 2587 words in length, inclusive of the cover page and this certification.

Dated: Hauppauge, NY
June 3, 2024

s/ Jack Piana
Jack Piana