Supreme Court of the State of New York
Bronx County

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.

Memorandum of Law

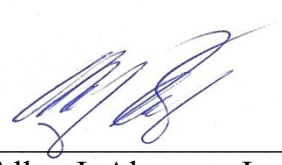
Index No.: 35136/2020E

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A DECLARATORY JUDGMENT

Dated: Warwick, New York
June 28, 2024

THE AHEARNE LAW FIRM, PLLC



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PRELIMINARY STATEMENT

Defendant's cross motion for summary judgment should be denied because Defendant Leogrande's affidavit is (i) inadmissible as improper parol evidence where no claim of fraud, duress or mutual mistake has been made (ii) is precluded from consideration under the Partnership Agreement merger clause, and (iii) is barred from consideration under the Dead Man's Statute, CPLR § 4519. Additionally, the cross motion improperly argues to make a contract reformation claim where no counterclaim for reformation was timely filed and no basis for reformation can be shown. Further, the cross motion misconstrues the Estates, Powers and Trusts Law (EPTL) and Defendants' referenced case law, citing cases from 1899 that are off point and decided decades before the applicable EPTL statute was enacted. And finally, Defendants' cross motion fails to submit any evidence in admissible form and thereby fails to establish a prima facia entitlement to judgment as a matter of law.

Additionally, Defendant's cross motion has failed to rebut Plaintiff's motion for a declaratory judgment Order. Accordingly, Plaintiff's Motion should be granted in its entirety.

Respectfully, as provided herein, and upon Plaintiff's Motion papers submitted, this Court should enter a declaratory judgment Order holding that (i) there are no waivers of the right to make testamentary bequests in the Partnership Agreement that (ii) the deceased was free to make a specific bequest of his Partnership interests, that (iii) the deceased did make a specific bequest of his Partnership interests to the Plaintiff, that (iv) as a matter of law, title in the deceased's Partnership interests vested at death immediately in the Plaintiff, and that therefore (v) under the EPTL, the deceased's Partnership interests passed outside of the deceased's estate, and (vi) there are no valuation provisions in the Partnership Agreement that apply to Partnership interests that pass outside of a partner's estate to a specific devisee.

DISCUSSION OF LAW

I. NEW YORK LAW AS TO SUMMARY JUDGMENT.

It is well settled in New York that the proponent for a Motion for Summary Judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact.

New York Courts have held: "As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. [citations omitted]." *Alvarez v. Prospect Hosp.*, 501 N.E.2d 572 (1986).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form." *Zuckerman v. City of NY*, 404 N.E.2d 718 (1980).

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citation omitted]." *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 324 (1986).

Defendants have failed to submit any evidence in admissible form that supports their cross motion for summary judgment. Correspondence between counsel does nothing to reform the terms of the Partnership Agreement, nor do the pleadings. Additionally, as shown below, Defendant Leogrande's affidavit is (i) inadmissible as improper parol evidence where no claim of fraud, duress or mutual mistake has been made (ii) is precluded from consideration under the Partnership Agreement merger clause, and (iii) is barred from consideration under the Dead Man's Statute, CPLR § 4519.

Accordingly, Defendants' cross motion for summary judgment is nothing more than an attorney affirmation to which the pleadings, the Partnership Agreement and correspondence are attached, and a memorandum of law in which counsel misconstrues the EPTL and the ancient and off point case law cited therein.

Counsel's misreading of the Partnership Agreement seeks to glean meaning from missing words and where no language exists. That misreading forms the basis upon which the cross motion seeks to reform ¶ 4.A. of the Partnership Agreement to add a waiver of the right to make testamentary bequests where no such waiver exists. That misreading further forms the basis upon which the cross motion seeks to reform the Partnership Agreement, posthumously, and thereafter bind the deceased to the reformation.

Defendants' argument does not establish a basis to grant summary judgment. Rather, the Partnership Agreement was drafted clearly and says what is says. The personal representative is compelled to sell to the surviving partner those partnership interests held by the estate. Nothing more. (NYSCEF Doc. # 127, ¶ 4.A). No waiver of the right to make testamentary bequests was included in the Partnership Agreement. Specific bequests pass outside of the estate as a matter of law. The Agreement is uncontroverted. The law is the law.

II. THE PAROL EVIDENCE RULE FORBIDS PROOF OF EXTRINSIC EVIDENCE TO CONTRADICT OR VARY THE TERMS OF A WRITTEN INSTRUMENT.

It is well settled in New York that extrinsic evidence is inadmissible to modify a written agreement and that where there is no claim of fraud, duress or mutual mistake, written agreements must be construed from within the four corners of the document alone. The Partnership Agreement at issue here is no different. The Defendants make no claims of fraud, duress or mutual mistake. There are no claims to support a basis to consider extrinsic evidence in construing the Partnership Agreement. There is no ambiguity in the Partnership Agreement.

Defendant Leogrande's affidavit is improper extrinsic evidence, is submitted in contravention of the parol evidence rule and should not be considered.

Though inadmissible, Leogrande's affidavit concedes that he believes the Partnership Agreement was executed after the parties had consulted with legal counsel and had ample time for mutual discussions. Indeed, Leogrande's affidavit states: "From the beginning, William and I made every effort to put our agreements in writing because wanted our arrangement to be clear to each other and the outside world." (Leogrande's affidavit, ¶ 5).

Accordingly, Leogrande's affidavit, though inadmissible as to his purported agreements with the deceased, would support a finding that the Partnership Agreement is drafted exactly as the parties intended.

Further, because Defendants make no claim of fraud, duress or mutual mistake, and because there is no ambiguity in the Partnership Agreement, there is no basis to consider extrinsic evidence such as Leogrande's affidavit. Accordingly, as a matter of law, Leogrande's affidavit should be precluded from consideration.

If considered, Leogrande's affidavit does not support his motion. Leogrande concedes that there was no fraud, duress or mutual mistake in the making of the Partnership Agreement. Leogrande states that the Agreement reflects "our mutual understanding about how we would conduct business and deal with one another" (Leogrande's affidavit, ¶ 6). He adds: "The Partnership Agreement details our agreement regarding all partnership matters." (Leogrande's affidavit, ¶ 7). Finally, Leogrande states: "The agreement Mr. Egan and I made was clear and it should be enforced." (Leogrande's affidavit, ¶ 26).

These statements confirm that the Defendants make no claims of fraud, duress or mutual mistake, and that the Defendants concede that the Partnership Agreement is binding and complete "as is" and must be construed from within the four corners of the document alone. Further, the Defendants concede that there is no basis to consider extrinsic evidence, such as Leogrande's affidavit. Likewise, because the Agreement is not ambiguous, it needs no further clarification from Leogrande. The Partnership Agreement speaks for itself.

Additionally, the Partnership Agreement merger clause states that the Agreement is the entire agreement and supersedes and cancels all prior agreements, written and oral, and that the Agreement cannot be modified other than by written agreement signed by both partners. (NYSCEF Doc. # 127, ¶ 11). Accordingly, the merger clause expressly precludes Leogrande's affidavit from consideration.

New York Courts Have Long Precluded Extrinsic Evidence

New York Courts have long precluded extrinsic evidence from consideration in contract construction proceedings where there is no claim of fraud, duress or a showing by clear and convincing evidence of a mutual mistake in the agreement.

New York Courts have held as follows:

> The parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument and, accordingly, one who seeks, in a breach of contract action, to *enforce* an oral representation or promise relating to the subject matter of the contract cannot succeed. *Sabo v. Delman*, 3 N.Y.2d 155, 161 (1957).
>
> The provision to which we above referred — that no verbal undertakings or conditions not contained in the writing were to be binding on either party — sometimes termed a merger clause, merely furnishes another reason for applying the parol evidence rule. (*Id*. at 161).
>
> It is well settled that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *WWW Assocs. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990).
>
> Parol evidence — evidence outside the four corners of the document — is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement. This rule gives "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses ... infirmity of memory ... [and] the fear that the jury will improperly evaluate the extrinsic evidence". [citation omitted]. Furthermore, where a contract contains a merger clause, a court is obliged "to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" [citation omitted]. *Schron v. Troutman LLP*, 20 N.Y.3d 430, 436 (2013).
>
> Courts and commentators addressing the substantive and procedural aspects of New York commercial litigation agree that the purpose of a general merger provision, typically containing the language found in the clause of the parties' 1995 Agreement that it "represents the entire understanding between the parties," is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing [citation omitted]. The merger clause accomplishes this objective by establishing the parties' intent that the Agreement is to be considered a completely integrated writing [citation omitted]. A completely integrated contract precludes extrinsic proof to add to or vary its terms [citation omitted]. *Primex Intl Corp. v. Wal-Mart*, 89 N.Y.2d 594, 599 (1997).

Respectfully, given the foregoing, this Court should disregard Legrande's affidavit and preclude same as being in contravention of the parol evidence rule. Additionally, this Court should find that Leogrande's affidavit is barred from consideration by the Agreement's merger clause. (NYSCEF Doc. # 127, ¶ 11).

Moreover, because Defendants have failed to submit any evidence in admissible form in support of their cross motion for summary judgment, this Court should deny the cross motion and grant Plaintiff's motion for a declaratory judgment Order, in its entirety.

III. LEOGRANDE'S AFFIDAVIT IS BARRED FROM CONSIDERATION UNDER THE DEAD MAN STATUTE (CPLR § 4519).

The First Department has held that under the Dead Man's Statute (CPLR § 4519), evidence that would be excluded at trial is not admissible in support of summary judgment. No doubt, because Leogrande is acting in furtherance of his own interests, and because William is now deceased, Leogrande's testimony as to William's state of mind, William's statements and the sum and substance of discussion that he had with William concerning the terms of the Partnership Agreement would not be admissible at a trial.

As such, Leogrande's testimony by way of his affidavit submitted in support of summary judgment must also be deemed inadmissible under CPLR § 4519 and thereby precluded from consideration.

On this issue, New York Courts have held:

> Unquestionably, "evidence excludable under the Dead Man's Statute should not be used to support summary judgment." [citation omitted]. *Acevedo v. Audubon Mgt.*, 280 A.D.2d 91, 95 (1st Dept. 2001).
>
> The First Department rule finds numerous applications at Special Term [citation omitted]. Emphatically, evidence excludable under the Dead Man's Statute should not be used to support summary judgment; but that is another matter [citation omitted]. *Phillips v. Kantor & Co.*, 31 N.Y.2d 307, 313 (1972).

Moreover, because Egan is now deceased, and unavailable to testify, Leogrande's affidavit is entirely self-serving and improper and cannot be considered as submitted in violation of the Dead Man's Statute.

However, the First Department has held that there is an exception to the rule that permits Plaintiff to submit an affidavit in opposition to summary judgment and to testify as to transactions with the decedent.

> Under the so-called "dead man's statute", an exception allows the representative of the estate to testify as to transactions with the decedent to protect the estate against unfounded claims (CPLR 4519). *Moyer v. Briggs*, 47 A.D.2d 64, 66 (1st Dept. 1975).
>
> It has also been noted that evidence excludable under the "dead man's statute" may be used to defeat a motion for summary judgment, but not in support thereof [citation omitted]. (*Id*. at 66).

Here, Plaintiff Pappas has submitted an affidavit that is admissible under CPLR § 4519 and rebuts Leogrande's claims. Pappas' affidavit supports a finding that the deceased understood the Partnership Agreement to permit him to make a specific bequest by testamentary instrument of his partnership interests to Pappas. Further, Pappas' affidavit supports a finding that William knowingly did exactly that in his Last Will and Testament. (See, Pappas Affidavit attached, and NYSCEF Doc. # 125, ¶ FOURTH).

Respectfully, given the foregoing, Leogrande's affidavit is inadmissible under CPLR § 4519 and should be barred from consideration, and further, Pappas' affidavit is admissible under CPLR § 4519, and supports a finding that (i) William knowingly declined to waive his right to make a testamentary bequest, and (ii) understood the Partnership Agreement to permit him to make a specific bequest by testamentary instrument of his partnership interests to Pappas.

Respectfully, given the foregoing, this Court should preclude Leogrande's affidavit from consideration as barred under CPLR § 4519, and deny Defendants' cross motion for summary judgment.

IV. DEFENDANTS' CROSS MOTION SHOULD BE DENIED AS AN UNTIMELY AND IMPROPER CONTRACT REFORMATION CLAIM.

Defendants' cross motion is effectively an improper contract reformation claim. Defendants argue that the Partnership Agreement was intended to mean something other than what it says. The Defendants argue to modify the Agreement to posthumously add a waiver of William's right to make testamentary bequests. This is an improper contract reformation claim.

A contract reformation claim must first arise from a claim of fraud or mutual mistake. Defendants have made no such claim, nor can they establish any such claim. Indeed, Leogrande has waived these claims by his affidavit.

Moreover, a contract reformation claim must be made within 6 years of the date of the mistake or be forever barred as untimely.

> The Statute of Limitations for a claim of reformation based upon mistake is six years, accruing on the date of the mistake (CPLR 213 [6] [citation omitted]. That limitations period applies to scrivener's errors [citation omitted]. The IAS Court found the action to be time barred, a conclusion that we do not disturb. Although we have recognized, though did not apply, a two-year date of discovery accrual for reformation claims based on mistake [citation omitted], under CPLR 203 (g), the requisite diligence necessary to thus toll the limitations period is not present here, when the lender possessed the very document containing the mistake. *FED DEPOSIT v. Five Star Mgt.*, 258 A.D.2d 15, 20 (1st Dept. 1999).

Even if timely, the Defendants' contract reformation claim must be denied on the merits. William is deceased and unavailable to testify. Leogrande's testimony is precluded under CPLR § 4519. The Defendants therefore cannot show "in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 572 (1986).

In *Chimart Assoc.,* the Court of Appeals held:

> As we said in [citation omitted], "[i]nterpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument." *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 572 (1986).
>
> In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement. Indeed, the concepts are closely related. (*Id*. at 573).
>
> Procedurally, there is a "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties" [citation omitted], and a correspondingly high order of evidence is required to overcome that presumption. [citation omitted]. The proponent of reformation must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" [citation omitted]. (*Id*. at 574).
>
> It was uncontroverted that the negotiations had been conducted by sophisticated, counseled businessmen, and the undisputed evidence showed that the unambiguous language reflected precisely what the moving party intended. (*Id*. at 574).
>
> Crucially, there is no unequivocal evidence of mutual mistake or fraud. (*Id*. at 574).

Respectfully, just as in *Chimart Assoc.,* crucially here too, there is no unequivocal evidence of a mutual mistake or fraud in the making of the Partnership Agreement. Defendants' baseless argument to reform the Partnership Agreement to add a waiver of the right to make testamentary bequests, and to seek to posthumously impose that reformation upon the deceased partner should be denied.

Respectfully, given the foregoing, this Court should deny Defendants' contract reformation argument as untimely and unsupported at law and should deny Defendants' cross motion for summary judgment, in its entirety. Respectfully, further, because the Defendants have failed to provide any evidence to rebut the Plaintiffs' motion, this Court should grant Plaintiffs' motion in its entirety.

V. DEFENDANTS' CROSS MOTION MISCONSTRUES THE ESTATES, POWERS AND TRUSTS LAW AND DEFENDANTS' REFERENCED CASE LAW.

Title in Specific Bequests Vest Immediately upon the Death of the Testator

Defendants cite the *Crawford v. McCarthy* 159 N.Y. 514 (1899) and incorrectly argue that this case stands for the proposition that a specific legacy is part of a deceased's estate. This is misleading and incorrect. When the quote cited by Defendants is read within the context of the full case, it is clear, the *Crawford* court was describing the differences between general and specific bequests as they may be made by living testators.

The *Crawford* court referred to the personal property of a living testator as a personal estate. The *Crawford* court does not hold that specific property is part of a deceased's estate, as the Defendants claim. By no means does the *Crawford* case stand for that proposition.

Thereafter, the Defendants cite no other case law on this issue. The Defendants offer no case law in support of this statement, nor can they. Rather, the Defendants misrepresent long standing New York case law and make patently incorrect statements, such as: "Central to this claim is Plaintiffs' fundamentally incorrect conclusion that specific bequests are not part of a testator's estate." (See Memorandum of Law, NYSCEF Doc. # 143, page 4 of 11).

It is settled law in New York that, subject only to the fiduciary's obligations to pay the estate's debts (and there are none here) title in specific bequests pass outside of the testator's estate at death, and vest immediately in the specific devisee. *In re the Estate of Williams*, 162 Misc. 507, 509 (Surrogate's Ct., NY County, 1937); *Matter of Rich*, 27 Misc. 2d 364, 371 (Surrogate's Court, NY County, 1960); *Matter of Grace*, 62 Misc. 2d 51, 54 (Surrogate's Court, Nassau County, 1970); *Matter of Seviroli*, 31 A.D.3d 452, 455-456 (2nd Dept. 2006) and *Matter of Gulnick*, 2022 N.Y. Slip Op 33832 (NY Surrogate's Court, Ulster 2022).

The foregoing cases are referenced and discussed in Plaintiffs' motion. Defendants submit no case law in rebuttal. The Defendants submit only unsubstantiated readings of the cases cited by Plaintiffs. The case law speaks for itself and suffers no revision due to the Defendants' misinterpretations.

To that point, it should be noted that the First Department did not reverse *Harris v. Harris*, 2020 N.Y. Slip Op 31570 (NY Sup. Ct., 2020) on the issue for which it was cited in Plaintiffs' motion, as Defendants incorrectly claim. Plaintiffs cited *Harris* as follows:

> It is well established that because a testator has the right to freely revoke a will until death, an agreement not to revoke a prior will, or an agreement irrevocably making a testamentary bequest, 'demands the most indisputable evidence of ... agreement' and must 'unequivocally renounce [the] testator's right to execute a will making other disposition of [the] property.' [citations omitted] (contracts to make testamentary bequests should only be enforced 'when they have been established by evidence so strong and clear as to leave no doubt.'). *Harris v. Harris*, 2020 N.Y. Slip Op 31570 (NY Sup. Ct., 2020)

In *Harris v. Harris*, 193 A.D.3d 457 (1st Dept. 2021), the First Department reversed holding only that: "Lichtenstein 'should not be bound to manage and operate an LLC with a co-member with wh[om] [he] never intended or agreed to go into business.'" *Harris v. Harris*, 193 A.D.3d 457, 459 (1st Dept. 2021).

The Estate Does Not Possess The Deceased's Assets

Additionally, because William's estate has no debt the fiduciary is not authorized to take possession of the deceased's interests on behalf of the estate (EPTL § 11-1.1(b)(5)). Accordingly, the estate possesses no partnership interests to sell to defendants and the fiduciary is not authorized to take possession of any such interests for that purpose (EPTL § 11-1.1(b)(5)).

Under the EPTL, the fiduciary is authorized and obligated only to effectuate the terms of the deceased partner's Last Will and Testament, and nothing more.

As previously cited, New York Courts have held: "The executor has only a limited right to use the specifically devised property for payment of debts of the estate [citation omitted]" *Keoseian v. Von Kaulbach*, 763 F. Supp. 1253 (S.D.N.Y. 1991) (EPTL § 11-1.1(b)(5)).

"The title to the specific testamentary devisee vests in the beneficiary immediately upon the death of the testator. Such vesting is complete except for the limited right of the executor to use the specifically devised real property for the payment of debts if necessary." *Matter of Burke*, 492 NYS2d 892 (Surrogate's Court, Cattaraugus County, 1985).

"While it is true that EPTL 11-1.1 contains provisions which permit an executor to take possession of real property, [ ] such authority does not apply 'where such property or any estate therein is specifically disposed of'". (*Id*. at *Burke*).

The executor "…is not obliged to take possession of property specifically bequeathed or to bring it to or to collect it at the domicile of the testator, unless it is needed in the administration of the estate, and therefore, unless the executor takes possession of it the legatee, in whom the title is vested, must care for it at his peril, and must take it *as and where* it is. [citation omitted]" *Matter of Roth*, 53 Misc. 2d 1066, 1070, (Surrogate's Court, New York, 1967).

In sum, it is well settled that under the EPTL and the Surrogate's Court Procedure Act (SCPA), that, subject only to the fiduciary's obligations to pay the estate's debts (and here there are none) title in and possession of specific bequests pass outside of the testator's estate at death, and vest immediately in the specific devisee.

The cases referenced in Plaintiffs' motion support this finding, as does *Crawford v. McCarthy* 159 N.Y. 514 (1899).

The Defendants have not submitted any case law that has held differently. Moreover, the Defendants have neither established entitlement to judgment as a matter of law nor have they submitted any evidence that rebuts Plaintiffs' motion in any manner.

Respectfully, given the foregoing, Defendants' cross motion should be denied, and the Plaintiffs' motion should be granted in its entirety.

CONCLUSION

The crux of the Defendants' argument is the incorrect assertion that William's estate (the deceased partner) holds title and/or possession in his partnership interests. As discussed above, this is not correct as a matter of law. Title in William's partnership interests vested in the Plaintiff immediately upon William's death. Additionally, William's estate has no debts and has never taken possession of any partnership interests for any purpose.

The Defendants have cross moved for summary judgment on this claim and failed entirely to establish entitlement to judgment as a matter of law. The Defendants have not submitted any evidence in admissible form in support of their motion. The Defendants have submitted only unsubstantiated misstatements of fact and misinterpretations of law. This is not a basis to grant summary judgment. Likewise, the Defendants have failed to rebut Plaintiffs' motion.

Despite Defendants' assertions, nothing in the Partnership Agreement compels the transfer of a deceased partner's interests to his estate. Nothing in the Partnership Agreement constitutes a waiver of the right to make testamentary bequests of partnership interests. See *Matter of American Comm. v. Dunn*, 10 N.Y.3d 83, 92 (2008); ***Blackmon v. Battcock***, 78

N.Y.2d 735, 739 (1991); *Oursler v. Armstrong*, 10 N.Y.2d 385, 389 (1961); *Harris v. Harris*, 2020 N.Y. Slip Op 31570 (NY Sup. Ct., 2020); *Rubenstein v. Mueller*, 19 N.Y.2d 228, 232 (1967) and *Matter of Estate of Attanasio*, 159 A.D.3d 1180, 1181 (3rd Dept. 2018).

The Defendants' papers struggle to reconcile the facts with the law. Their papers posture but do not hold true to *strict adherence to the terms of the Partnership Agreement*.

For example, the Defendants write:

> "The Partnership Agreement requires Plaintiffs to sell William Egan's Partnership interest to Mr. Leogrande." (See Memorandum of Law, NYSCEF Doc. # 143, page 5 of 11).

This is factually incorrect. Nowhere does the Partnership Agreement require the Plaintiffs to sell William's interests to Defendant Leogrande. The Partnership Agreement provides only that the personal representative of the deceased shall sell to the surviving partner those interests that are held by the estate. (NYSCEF Doc. # 127, ¶ 4.A). Nothing more.

> The Defendants write: "The strict adherence to the terms and conditions of partnership agreements is applied impartially." (*Id*. at page 5 of 11).

The Defendants make this statement and then argue against it. Again, Partnership Agreement provides only that upon the death of a partner, the personal representative of the deceased shall sell to the surviving partner only those of the deceased partner's interests that are held by the estate. (NYSCEF Doc. # 127, ¶ 4.A). Nothing more.

> The Defendants state: "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." (*Id*. at page 6 of 11).

Note that the Defendants do not cite specific provisions of the Agreement in support of this statement. They cannot because none exists.

Nowhere in the Partnership Agreement does it state that "the valuation method contained in the Partnership Agreement would be the exclusive means to calculate the value of a deceased partner's interest." This is pure fabrication added by the Defendants.

> The Defendants write: "The language of the Partnership Agreement is clear and unambiguous." (*Id*. at page 6 of 11).

Yes, it is. The personal representative of the deceased shall sell to the surviving partner only those of the deceased partner's interests that are held by the estate. (NYSCEF Doc. # 127, ¶ 4.A). Nothing more. Nothing in the Agreement compels the transfer of a deceased partner's interests to his estate. Nothing in the Partnership Agreement constitutes a waiver of the right to make testamentary bequests of partnership interests.

In sum, the Defendants incorrectly assert that William's estate holds title in and/or has possession of his partnership interests. The Defendants are incorrect as a matter of law.

Respectfully, as provided herein, and upon Plaintiff's Motion papers submitted, this Court should deny the Defendants' cross motion, in its entirety, grant Plaintiffs' motion in full, and enter a declaratory judgment Order holding that (i) there are no waivers of the right to make testamentary bequests in the Partnership Agreement that (ii) the deceased was free to make a specific bequest of his Partnership interests, that (iii) the deceased did make a specific bequest of his Partnership interests to the Plaintiff, that (iv) as a matter of law, title in the deceased's Partnership interests vested at death immediately in the Plaintiff, and that therefore (v) under the EPTL, the deceased's Partnership interests passed outside of the deceased's estate, and (vi) there are no valuation provisions in the Partnership Agreement that apply to Partnership interests that pass outside of a partner's estate to a specific devisee.

Dated: Warwick, NY
June 28, 2024

Certified pursuant to Court Rule 130-1.1a

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ATTORNEY CERTIFICATION PURSUANT TO THE SUPREME COURT

UNIFORM CIVIL RULE SECTION 202.8-b

Allan J. Ahearne, Jr. an attorney, by signature below, hereby certifies that the forgoing Memorandum of Law is submitted in opposition to Defendants' cross motion and in reply to Defendants' opposition to Plaintiffs' Motion for a Declaratory Judgment and is in compliance with **22 NYCRR § 202.8-b** in that it is **5,007** number of words in length, exclusive of the cover page, table of contents and table of authorities, but inclusive of this certification.

Dated: Warwick, NY
June 28, 2024

Certified pursuant to Court Rule 130-1.1a

Allan J. Ahearne, Jr.