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.

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

Dated: July 12, 2024

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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 reply memorandum of law in further support of their joint motion (NYSCEF Doc. Nos. 132-143) seeking an order pursuant to CPLR 3212 granting summary judgment on their counterclaim for specific performance.

Defendants presented a prima facia showing that they are entitled to summary judgment. The unambiguous language of B&G's Partnership Agreement (the "Partnership Agreement") requires Plaintiffs Dean George Pappas ("Mr. Pappas"), individually, and as the Executor of the Estate of William Egan's (the "Estate" and together, "Plaintiffs"), to sell the late William Egan's partnership interest in B&G to Mr. Leogrande.

Plaintiffs did not present any material issue of fact in their opposition. In fact, Plaintiffs' opposition papers do not even contain the phrase "specific performance"[1]. Instead, Plaintiffs' entire submission *argues against an argument not made by the Defendants* involving contract reformation. To be clear, Defendants did *not* move for an order to reform the Partnership Agreement nor do the Defendants' moving papers argue that the Partnership Agreement requires reformation. Defendants' moving papers do not even contain the word "reformation".

Plaintiffs have created a "strawman" argument by setting up and then disputing an argument that the Defendants did not even make. Going a step further, Plaintiffs have combined their "reformation" red herring with their equally fictional suggestion that the Defendants are requesting for the Court to read a "waiver" of the right to make a testamentary bequest into the

[1] A word search of Plaintiffs' memorandum of law in opposition shows that it does not contain the phrase "specific performance".

Partnership Agreement. Nobody is suggesting that Mr. Egan waived his ability to pass his partnership interest to whomever he chose. But the value of that interest was set by the Partnership Agreement. Plaintiffs' gymnastics are simply designed to confuse the issues before the Court.

Further, the only cause of action remaining before this Court is for an accounting. Defendants submitted a statement of account of the partnership interest of William Egan (the "Accounting") Exhibit "F" and asked this Court to determine that the Accounting (made pursuant to the terms of the Partnership Agreement) has been furnished. Plaintiffs did not even acknowledge or raise one single argument against the Accounting that Defendants provided. In fact, the word "accounting" does not appear in Plaintiffs' opposition papers.

At bottom, Defendants' motion seeks specific performance on the buy-out provision of the Partnership Agreement. It does not seek to reform the Partnership Agreement to include a waiver of some variety. The language of the Partnership Agreement is clear. Plaintiffs did not address (or even mention) Defendants' requested relief, or the evidence and arguments Defendants presented in support of their application. Plaintiffs have failed to raise a triable issue of fact and therefore summary judgment should be granted.

I. Defendants are Entitled to Summary Judgment

Summary judgment is appropriate where there are no genuine issues of fact and the issue of law raised may be decided by the Court. For instance, in *Split Rail Holdings LLC v. 176 Grand St. Corp.*, 166 A.D.3d 515, 89 N.Y.S.3d 126 (2018), the Appellate Division First Department found that summary judgment for specific performance was appropriate where the terms of the contract in question (involving an option to purchase real estate) were clear and unambiguous.

Plaintiffs have failed to raise an issue of fact that would preclude summary judgment. There is no dispute that the Partnership Agreement was executed. There is no genuine dispute that the Partnership Agreement is binding. By their own admission, Plaintiffs acknowledge that the language of the Partnership Agreement is clear and unambiguous.

Ironically, despite Defendants' continued insistence that the Partnership Agreement must be followed, Plaintiffs' opposition now attempts to saddle Defendants with a position the Defendants have never adopted (that the Defendants are seeking some sort of reformation of the Partnership Agreement.) Again, Plaintiffs' off-point argument is a fallacy. Contrary to Plaintiffs' lengthy and inaccurate position, Defendants have not attempted to introduce parole or extrinsic evidence. Mr. Leogrande's affidavit is offered principally to satisfy the requirement to offer facts and evidence through an affidavit by someone with personal knowledge thereof. To this, Mr. Leogrande identified the Partnership Agreement and detailed the relevant provisions of the Partnership Agreement. Nowhere in Mr. Leogrande's affidavit does he suggest that the language of the Partnership Agreement is unclear.

Mr. Leogrande further attested to the correspondences that were sent to Mr. Egan's personal representative exercising his option to purchase Mr. Egan's partnership interest pursuant to the Partnership Agreement. Plaintiffs' suggestion that those correspondences are not important is misguided, because they necessarily demonstrate that Mr. Leogrande satisfied the notice requirements set forth in the Partnership Agreement to exercise his option to purchase Mr. Egan's partnership interest. Mr. Leogrande's statements regarding his relationship with Mr. Egan, the formation of B&G, the preparation of the Partnership Agreement are simply offered to complete the narrative, not as parole or extrinsic evidence. This should be self-evident to

Plaintiffs. Ironically, Mr. Pappas' affidavit is devoted to a meaningless quibble concerning the preferred title of Mr. Pappas' mother, which has no probative value.

Further, Plaintiffs completely ignored the portion of Mr. Leogrande's affidavit where he introduces the Statement of the Partnership Interest of William Egan that was provided and attached as Exhibit "F" (the "Accounting"). The Accounting is not mentioned anywhere in their opposition papers. Plaintiffs did not dispute its accuracy generally or any portion thereof.

"Facts appearing in movant's papers which the opposing party does not controvert, may be deemed admitted." *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 330 N.E.2d 624 (1975). Plaintiffs' failure to address or controvert the Accounting is remarkable given that Plaintiffs' only cause of action remaining is one for an accounting. Because Plaintiff offered no response, argument, or even acknowledgment of the Accounting, the Court should deem that the accuracy of the Accounting has been admitted by the Plaintiffs. Similarly, as stated above, because the Plaintiffs did not offer any genuine argument against Mr. Leogrande's notice of his election to exercise his buyout option, the Court should deem that that Plaintiffs have admitted that Mr. Leogrande complied with his notice obligations under the Partnership Agreement.

Defendants' moving papers articulate their entitlement to summary judgment. Plaintiffs suggest that this Court ignore the Court of Appeal's decision in *Crawford v. McCarthy* 159 N.Y. 514 (1899) because of its age. *Crawford* is still good law. Further, the reason why Defendants were required to search through centuries of law is because Courts rarely, if ever, are required to analyze and explain the mechanical responsibilities of an executor in the way challenged by Plaintiffs' galling and semantic argument. It bears repeating that Plaintiffs' entire position rests on the absurd proposition that—despite the Plaintiffs commencing this action through the Estate

of William Egan and its executor—that the Estate (and its executor) have no role in collecting (receiving) *and then distributing* Mr. Egan's partnership interest.

The fact that The Estate of William Egan, and Dean George Pappas *as Executor of the Estate of William Egan* are the Plaintiffs in this action contradicts the Plaintiffs argument. Somebody (the personal representative) must actually transact with the Partnership and surviving partner to receive and then distribute the partnership interest of the deceased partner.

Mr. Pappas acknowledges that he is not a partner in B&G. Nobody is arguing that he (or whomever Mr. Egan chose to leave his interest in B&G to) is not entitled to receive that interest. But that interest is set by the terms of an enforceable partnership agreement. The Estate is simply a conduit to receive and distribute the partnership interest. This is consistent with the plain meaning of the Partnership Agreement.

Nowhere in the lengthy and irrelevant discussion about reformation does Plaintiffs contradict the well settled law that Partners may decide for themselves how their affairs are handled. Plaintiffs have not presented any facts or authority to upset this bedrock rule. Therefore, Defendants respectfully request that the Court grant the relief sought in Defendants' cross-motion.

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: July 12, 2024
Hauppauge, New York

PIANA & GIOE, LLC.

By: /s/
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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 1392 words in length, inclusive of the cover page and this certification.

Dated: Hauppauge, NY
July 12, 2024

s/ Jack Piana
Jack Piana