SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

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PAUL TEUTUL,

Plaintiff-Respondent,

–against–

PAUL M. TEUTUL,

Defendant-Appellant,

ORANGE COUNTY CHOPPERS HOLDINGS, INC.
and ORANGE COUNTY CHOPPERS, INC.,

Defendants.

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PRELIMINARY STATEMENT

Defendant-Appellant Paul M. Teutul ("Appellant" or "Paul Jr.") respectfully submits this brief in support of his appeal from an order of the Supreme Court, Orange County (Hon. Lewis J. Lubell, J.) dated April 21, 2010, insofar as Supreme Court granted the cross-motion of Plaintiff-Respondent Paul Teutul ("Respondent" or "Paul Sr.") for partial summary judgment declaring a purported option to be valid and enforceable as a matter of law, and declined Appellant's request that the Court search the record and hold the purported option to be an unenforceable "agreement to agree."

INTRODUCTION

Paul Teutul (Paul Sr.) and Paul M. Teutul (Paul Jr.) are father and son, and the majority and minority shareholders, respectively, of Orange County Choppers Holdings, Inc. ("OCCHI"), a closely held corporation engaged in the manufacture of custom motorcycles. In 2009, they entered into a Letter Agreement providing:

> [Paul Jr.] shall extend to [Paul] Sr., upon [Paul Sr.'s] request, an option to purchase all of his shares in Orange County Choppers Holdings, Inc., for fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable.

The Letter Agreement does not purport to create an option, but only a promise that Paul Jr. shall extend an option upon request, and is silent with respect to material terms such as the option's term and the time and manner of its exercise. Furthermore, the undisputed evidence shows (1) that Paul Jr.'s attorney had rejected a proposal by Paul Sr.'s attorney that fair market value be determined via appraisal by a company called MPI; (2) that the valuation procedure was a material term as to which Paul Jr.'s attorney insisted upon agreement, as the negotiations of the parties and the language of the 2009 Letter Agreement attest; (3) that the definition of a valuation procedure was left for future negotiations between the parties; and (4) that the parties never in fact reached agreement upon a procedure for valuing Paul Jr.'s shares.

Nevertheless, Supreme Court ruled that the 2009 Letter Agreement establishes a valid and enforceable option, properly exercised by Paul Sr., and granted Paul Sr. partial summary judgment on causes action whereby he has sought to compel Paul Jr. to sell his shares in OCCHI. As a matter of law, the parties created only an indefinite and unenforceable "agreement to agree", wherefore Paul Jr. should be awarded summary judgment dismissing Paul Sr.'s claims on the purported option.

QUESTION PRESENTED

Whether Supreme Court erred in ruling that the 2009 Letter Agreement created a valid and enforceable option, properly exercised by Respondent, for the purchase of Appellant's shares in a closely held corporation, since

(a) its language does not purport to create an option, but only a promise that Appellant shall extend an option upon request, without specifying material terms such as the option's term or the time and manner of its exercise, and

(b) the price term – "for fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable" – was indefinite because the valuation procedure was a material term, left for future negotiation, as to which the parties never reached agreement,

wherefore the Letter Agreement created as a matter of law only an indefinite and unenforceable "agreement to agree" ?

Supreme Court ruled that the 2009 Letter Agreement created a valid and enforceable option which was properly exercised by Respondent. (R. 10-12)[1]

STATEMENT OF FACTS

A. Pertinent Background

Supreme Court's decision aptly summarizes the pertinent background information concerning the parties and the situation leading up to the January 21, 2009 Letter Agreement that is the focus of this appeal.

"Plaintiff Paul Teutul ("Paul Sr.") is the Chief Executive Officer, managing director and majority shareholder of defendant Orange County Choppers Holdings, Inc. ("OCCHI"). Among other business activities, OCCHI is engaged in the manufacturing of custom motorcycles. Founded by Paul Sr. and his son, defendant Paul M. Teutul ("Paul Jr."), in or around 1999, OCCHI is situated in Newburgh, New York."

"Paul Jr. is a director of OCCHI and, with twenty percent of the outstanding stock, is its sole minority shareholder. Paul Jr. came to own his share of the business when, in 2007, Paul Sr. offered Paul Jr. a minority interest in OCCHI to retain Paul Jr.'s highly regarded, valuable and creative services. Thereafter, Paul Jr. and Orange County Choppers, Inc. entered into an employment agreement

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[1]Numerical references preceded by "R." are to the Record on Appeal.

dated January 16, 2008 (the "2008 Letter Agreement"). Before the close of 2008, however, Paul Jr.'s employment with OCCHI would be terminated. Nonetheless, Paul Jr. still maintains his twenty percent stake in OCCHI and his directorship position."

"Upon Paul Jr.'s critically acclaimed design of OCCHI's first "theme bike", the "Spider Man Bike", OCCHI attracted the attention of the Discovery Television Network ("Discovery") which, in 2002, led to the creation of the television reality show called *American Chopper*. *American Chopper* depicts the planning, design, engineering and fabrication of custom motorcycles and the professional and personal interactions between various OCCHI employees, most noteworthy, Paul Sr. and Paul Jr. ..."

"In response to Paul Jr.'s termination, Discovery advised the parties that they were in breach of contract with Discovery. In order to resolve that issue, as well as others, Paul Sr. and Paul Jr. entered into a letter agreement dated January 21, 2009 (the "2009 Letter Agreement"). Among other things, the 2009 Letter Agreement superceded and modified a good part of the parties' 2008 Letter Agreement including the modification of a non-competition clause. The 2009 Letter Agreement also defined Paul Jr.'s association with OCCHI as that of an independent contractor. In addition, and most relevant to the issues now before

the Court, the 2009 Letter Agreement provides the following at paragraph "9" (the "Option"):

> [Paul Jr.] shall extend to [Paul] Sr., upon [Paul Sr.'s] request, an option to purchase all of his shares in Orange County Choppers Holdings, Inc., for fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable."

(R. 6-7)

B. The Creation Of An "Agreement To Agree" On The Purported Option

Kenneth E. Lee, Esq., a member of the law firm of Hughes Hubbard & Reed LLP, represented Paul Jr. in connection with the January 21, 2009 Letter Agreement. Mr. Lee's uncontradicted affidavit concerning the genesis of Paragraph "9" of the 2009 Letter Agreement states as follows:

> 2. The Letter Agreement refers to plaintiff Paul Teutul as "Senior" or Sr.", and to defendant Paul M. Teutul as "PMT". Paragraph "9" of the Letter Agreement states:
>
> > The parties further agree that PMT shall extend to Sr., upon Sr.'s request, an option to purchase all of his shares in Orange County Choppers Holdings, Inc., for fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable.
>
> (*See,* Ex. "A" ¶ 9 [emphasis added])
>
> 3. My understanding of the language in Paragraph 9 is that it does not purport to create an option, but rather, constitutes an agreement that PMT shall extend an option in future if Senior should so request. In addition, my understanding of Paragraph 9 is that before an option could be extended or exercised, it would be necessary for the parties to agree on a procedure for

extending the option and determining the price of the option, as no such agreement had been reached as of January 21, 2009.

4. Attached hereto as Exhibit "B" is a true copy of an e-mail exchange, dated January 20, 2009, between me and Senior's counsel, Stephen Markovits, prior to the finalization of the language of the Letter Agreement. The e-mail reflects the fact that I rejected Mr. Markovits' proposal that the value of PMT's shares in Orange County Choppers Holdings, Inc. ("OCC") be determined by "Management Planning Inc., of Princeton, New Jersey (www.mpival.com), the company that undertook the original valuation of the company shares," by striking out this language from Mr. Markovits' proposal.

5. In place of Mr. Markovits' proposal, I substituted language proposing that the value of PMT's shares would be determined by "a procedure to be agreed to by the parties as soon as practicable." This language ended up in the final executed Letter Agreement. The price and procedure for extending the option and determining the price of the option would be key and important aspects of any transfer of PMT's shares in OCC to Senior, if one were to occur.

(*See,* R. 183-194, Lee Affirmation ¶¶ 1-5 and Exhibits "A" and "B" thereto)

C. The Parties Never Reached Agreement On The "Procedure" To Be Agreed Upon Pursuant To Paragraph "9" Of The 2009 Letter Agreement

Steven Markovits, Esq., general counsel for OCCHI, represented Paul Sr. in connection with the 2009 Letter Agreement. Mr. Markovits' affidavits in support of Respondent's motion for partial summary judgment do not even allege, never mind prove, that the parties reached agreement with respect to the "procedure", explicitly referenced in Paragraph "9" of the Letter Agreement,

whereby the value of Paul Jr.'s shares would be determined. (*See,* R. 122-123, 344) Mr. Markovits tenders a February 3, 2009 exchange of e-mails between himself and Mr. Lee concerning an MPI appraisal. (R. 123, 160-161) However, he characterizes Mr. Lee's one-word response to his February 3rd e-mail as merely an "acknowledgment" of "[his] working on updating an earlier appraisal of the companies shares" by MPI. (R. 123, ¶ 52) Nowhere does Mr. Markovits assert that Mr. Lee had retracted his explicit written rejection of the proposal for an MPI appraisal, or that he and Mr. Lee had in fact reached agreement with respect to a procedure for determining the value of Paul Jr.'s shares. (R. 122-123, 344) Paul Sr.'s assertion that fair market value "was left to be determined by an appraiser" (*See,* R. 111, ¶ 14) is flatly contradicted by the Letter Agreement, and is also incompetent, as he fails to demonstrate any knowledge whereof he speaks.

Mr. Lee, in contrast, expressly affirms without contradiction that "Mr. Markovits and I never reached any agreement on the procedures referenced in Paragraph 9." (R. 184, ¶ 11) His affirmation states:

> 6. Shortly after the execution of the Letter Agreement, I recall Mr. Markovits suggesting that Senior could engage MPI to conduct an updated appraisal of the company shares, since it had performed an earlier appraisal already and was familiar with OCC's operations.
>
> 7. Mr. Markovits and I never reached any agreement on the procedures referenced in Paragraph 9, including a way to determine the price of an

option pursuant to which Senior would purchase PMT's shares in OCC. At no time did I ever agree that PMT would accept as binding or final any appraisal of the shares by MPI. On the other hand, as long as the MPI appraisal was not binding on PMT, I had no objection to Mr. Markovits ordering such an updated appraisal if he wished to do so.

8. In February 2009, Mr. Markovits informed me that he had contacted MPI to do an update. However, I did not hear from Mr. Markovits for several months after that and assumed that Senior was no longer interested in pursuing the idea of seeking to acquire PMT's shares.

9. In May of 2009, Terence J. Devine, Esq., a member of Mr. Markovits' law firm, forwarded a report wherein MPI had purportedly determined that the value of PMT's shares in OCC was $0. By letter dated May 20, 2009, I responded to Mr. Devine:

> I write on behalf of Paul M. Teutul in response to our letter of May 14, 2009, enclosing an "appraisal" from MPI of Paul's minority interest in OCC. The proposal you have forwarded – to purchase Paul's share for $0 – is not acceptable to Paul.

A true copy of my May 20, 2009 letter is attached as Exhibit "C". By letter dated June 1, 2009, Mr. Devine responded:

> If necessary, we are prepared to move forward to enforce the understanding you reached with Steve Markovits that MPI would be the appraiser and their numbers would be final.

A true copy of Mr. Devine's June 1, 2009 letter is attached as Exhibit "D". By letter dated June 5, 2009, I replied to Mr. Devine as follows:

> I write in response to your letter to me of June 1, 2009, regarding Orange County Choppers Holdings Inc. ("OCC") which I received in the mail today. Without commenting on the substance of the letter, I wish to correct a misstatement in your letter, specifically that Stephen Markovits and I agreed on behalf of Paul Teutul Sr. and Paul M. Teutul (Jr.) that MPI's appraisal of Paul M. Teutul's interest in OCC

> would be "final" and binding upon Paul M. Teutul. That was not something that I agreed to on behalf of my client. Therefore, there is no agreement or understanding to sell the interest in OCC to your client for $0 that can be "enforced".
>
> Regarding your suggestion that Paul M. Teutul propose a transfer price, I will convey that to Paul promptly. Paul M. Teutul reserves any and all rights he may have with respect to this matter.

A true copy of my June 5, 2009 letter is attached as Exhibit "E".

(R. 184-186)

D. Respondent's Multiple Essays To Enforce The Purported Option

Instead of seeking agreement on the matters left conspicuously open for future negotiation by the 2009 Letter Agreement, Paul Sr., on July 9, 2009, commenced legal action against his son. (R. 257, 279) After this action was discontinued (R. 272, 292), Paul Sr. again sought to enforce the purported option, unilaterally dictating, despite the parties' failure to reach agreement on a valuation procedure, that fair market value be determined as of November 19, 2009:

> [T]his letter will constitute a formal exercise of the option provided for in the Letter Agreement dated January 21, 2009, effective immediately, November 19, 2009, at the current fair market value.

(R. 32, 43-44)

Paul Sr. thereafter commenced the present action against Paul Jr., seeking *inter alia* to enforce the purported option via causes of action for specific

performance, breach of contract and a declaratory judgment. (R. 29-45) Paul Jr. answered, denying that the purported option was a valid and enforceable agreement (R. 33, 48), and specifically alleging that

> The purported option contained in Paragraph "9" of the January 21, 2009 document referenced in Paragraph 11 of the complaint is not an enforceable obligation but a mere "agreement to agree", which cannot be enforced because essential terms were not agreed to but left for future negotiation.

(R. 48)

E. Supreme Court's Decision and Order

Supreme Court reviewed Court of Appeals precedent supporting the validity of option agreements which satisfy two critical threshold criteria: (1) they manifest the parties' intent to be bound; and (2) the price can be determined objectively without the need for new expressions by the parties. The Order states:

> [T]he courts have upheld option agreements where "the option manifests the parties' unmistakable intent that the price was to be fixed by a third person - the Department of Health - ...without the need for further expression of the parties" Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., supra), the option provides that "a third party, an arbitrator, is to determine the price term in the event they are unable to reach an agreement on their own" (166 Mamaroneck Avenue Corp. v. 155 East Post Road Corp, 78 N.Y.2d 88, 91 [1991]), and where the option provided "the purchase price was to be either the sum offered by a bona fide third-party purchaser, or, in the alternative, the price fixed by three appraisers ... [where] the option also set forth the manner in which the appraisers were to be selected" (Tonkery v. Martina, 78 N.Y.2d 893 [1991]).

> Upon holding that the option in Tonkery v. Martina, supra, was not void for indefiniteness, the Court noted that the option clearly indicated that the parties agreed to commit the calculation of price to a third-party and to be bound thereby; "never agreed to agree on a purchase price in the future, but instead tied the price of the parcel to an extrinsic event - either the price offered by a bona fide purchaser or that set by appraisal - and, additionally, provided the method for selection of appraisers" (Tonkery v. Martina, supra, at 895).

(R. 10)

Supreme Court acknowledged that despite the express stipulation in the 2009 Letter Agreement that a valuation procedure was "to be agreed to by the parties as soon as practicable", the parties had "never come to terms on the method to be used to determine fair market value." (R. 12) The Court nevertheless ruled that the purported option was not an unenforceable "agreement to agree" because, per the Court, the parties' mere intention to agree upon an unspecified "procedure" was the "legal equivalent" of having agreed to commit the determination of price to a third person.

> Here, although the parties did not expressly state their intention to "commit the calculation of price to a third-party", the Court finds that their intention to agree upon a "procedure" is sufficiently the legal equivalent of same in that it is a manifestation of their intention to have fair market value determined in a manner that falls outside of what their individual subjective beliefs might be and to be bound thereby. As in Tonkery v. Martina, supra, the Teutuls did not agree to agree on a purchase price in the future. Instead, they set the price at "fair market value".

(R. 10-11)

Supreme Court went on to consider this Court's decision in *Marder's Nurseries, Inc. v. Hopping,* 171 AD2d 63 (2d Dept. 1991). In *Marder's Nurseries,* as Supreme Court observed, this Court "upheld an option even though the agreed upon method to determine fair market value was deemed 'seriously flawed'". (R. 11) Capitalizing on *Marder's Nurseries* holding that in such circumstances a court is empowered to break any stalemate by "entertain[ing] applications for the appointment of a third appraiser, or fix[ing] the fair market value after a hearing on the issue", Supreme Court continued:

> This Court sees no distinguishable difference between the authority of this Court to select an appraiser, upon application, or to "fix the fair market value after a hearing" where, as in Marder's Nurseries, Inc. v. Hopping, supra, the option contains a "seriously flawed" method with which to determine fair market value and where, as here, the parties have never come to terms on the method to be used to determine fair market value. The authority of the Court recognized in Marder's Nurseries, Inc. v. Hopping, supra, to resolve the parties' stalemate is no less intrusive on the contractual rights of the parties than where, as here, the parties have yet to define the procedure to be employed to determine fair market value on the option exercise date. In fact, an argument can be made that the latter is less so.

(R. 12)

Supreme Court did not address Appellant's contention (R. 169, 171-172, 183-184) that the 2009 Letter Agreement did not create an option but merely a promise that Paul Jr. shall extend an option upon Paul Sr.'s request. Assuming the

existence of the purported option, and disregarding the fact that the Letter Agreement is silent with respect to the option's term and the time and manner of its exercise, Supreme Court ruled that Paul Sr. had validly exercised it. (R. 12)

ARGUMENT

SUPREME COURT ERRED IN GRANTING RESPONDENT SUMMARY JUDGMENT, AND DENYING APPELLANT SUMMARY JUDGMENT, ON RESPONDENT'S CAUSES OF ACTION TO ENFORCE THE PURPORTED OPTION BECAUSE (A) THE 2009 LETTER AGREEMENT DID NOT CREATE AN OPTION, (B) THE AGREEMENT IS SILENT WITH RESPECT TO CERTAIN MATERIAL TERMS, (C) THE PRICE TERM WAS INDEFINITE BECAUSE THE PROCEDURE FOR DETERMINING THE VALUE OF APPELLANT'S SHARES WAS A MATERIAL TERM LEFT FOR FUTURE NEGOTIATION, AND (D) THE PARTIES NEVER REACHED AGREEMENT ON THAT PROCEDURE, FAILING WHICH THE PURPORTED OPTION REMAINED AN INDEFINITE AND UNENFORCEABLE "AGREEMENT TO AGREE"

A. The Law of Contracts and the Requirement of Definiteness

"Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract....[T]he requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement." *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation,* 74 NY2d 475, 482 (1989) (emphasis added). *See also, 166 Mamaroneck Avenue Corp. v. 151 East Post*

Road Corp., 78 NY2d 88, 91 (1991); *Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher,* 52 NY2d 105, 109 (1981). "The Court determines, as a matter of law, whether the definiteness requirement has been met." Banks, New York Contract Law (Vol. 28, West's New York Practice Series, 2006), §2:26.

B. The Omission Of Material Terms Renders The Purported Option Agreement Indefinite And Unenforceable

Paragraph "9" of the 2009 Letter Agreement does not purport to create an option at all. By its very terms, it constitutes only a promise that Paul Jr. shall extend an option at some undefined time if Paul Sr. should so request. It states:

> The parties further agree that PMT shall extend to Sr., upon Sr.'s request, an option to purchase all of his shares in Orange County Choppers Holdings, Inc., for fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable.

The Letter Agreement is silent with respect to the option's term and the time and manner of its exercise, and leaves for future negotiation the definition of a procedure for valuing Paul Jr.'s shares in the closely held corporation. This renders the purported option agreement indefinite and unenforceable as a matter of law.

The requirement of definiteness applies to stock option agreements. *See, Sugerman v. MCY Music World, Inc.,* 158 F.Supp.2d 316, 324-325 (S.D.N.Y. 2001) (citing cases). In *Sugerman*, the court held that no stock option agreement

existed where there was no manifestation of mutual assent to material terms including "when the option might be granted; the option term; the exercise price; and the expiration date." *Id.*, at 325. The Court wrote:

> Here, there is no manifestation of mutual assent to the material terms of any stock option arrangement, including: how many options might be granted of what class of stock; when the options might be granted; the option term; the exercise price, and the expiration date. "There is no way to tell from the face of the document how the parties intended to establish" the missing material terms, *Express Indus. & Terminal Corp.*, 93 N.Y.2d at 590..., which were "left for future negotiations", *Martin Delicatessen,* 52 N.Y.2d at 109...

Sugerman, 158 F.Supp.2d at 325. *See also, Kunica v. St. Jean Financial, Inc.,* 1998 WL 437153 at *6 (S.D.N.Y., Aug. 3, 1998) (silence with respect to amount of stock options, exercise price, and "date on which Rogers could exercise the options" deemed fatal to the existence of a valid and enforceable agreement); *Reiss v. Financial Performance Corporation,* 97 NY2d 195, 198 (2001) (designated time period and expiration date for exercise is material provision of stock warrant agreement).

Here, then, the failure of the parties to manifest mutual assent with respect to such materials terms as the time and manner of the purported option's exercise, or even the term within which the option might be exercised, renders the purported option agreement indefinite and unenforceable. In addition, the parties having left for future negotiation the definition of a procedure for valuing Paul Jr.'s shares,

they created only an indefinite and unenforceable "agreement to agree." To this issue we now turn.

C. A Mere "Agreement To Agree" In Which A Material Term Is Left For Future Negotiations Is Indefinite and Unenforceable

"Dictated by these principles [underlying the requirement of definiteness], it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable..." *Joseph Martin, Jr. Delicatessen, Inc., supra*, 52 NY2d at 109 (emphasis added); *166 Mamaroneck Avenue Corp., supra,* 78 NY2d at 91.

> A contract is incomplete and unenforceable when, as to some essential term, there has been no agreement but only an agreement to agree in future....If the contract contains, as to some material term, an "agreement to agree" and it fairly appears that what the parties intended was that the treaty should be binding only if the parties did thereafter in fact arrive at a mutually satisfactory agreement as to that term, then unless and until the arrive at that point, there is no contract.

May Metropolitan Corporation v. May Oil Burner Corporation, 290 NY 260, 264 (1943).

> [I]f there are essential elements affecting the rights of the parties, which are not implied by, or to be inferred from what the parties have agreed upon, but left open for future consideration and adjustment, the contract as a whole lacks completeness, and no action can arise upon it.

Brown v. New York Central Railroad, 44 NY 79 (1870). *See also,* Banks, New York Contract Law, *supra,* §2:25 ("Where, however, the parties have left an

essential term of an agreement open for future negotiation, there is no contract."); §2:26 ("The requirement [of definiteness] has not been met, and there is no enforceable contract, if an essential term of the agreement...has been left open for future negotiation...")

D. The Purported Option Agreement Is An Invalid And Unenforceable "Agreement To Agree" Because A Material Term Was Left For Future Negotiation

1. Policy Considerations Underlying The Doctrine Of Definiteness

In *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation, supra,* the Court of Appeals observed that the requirement of definiteness in contracts implicates competing policy considerations. On the one hand, "there must be a manifestation of mutual assent to material terms", so that contractual obligations are not imposed on parties who did not agree to them. On the other hand, to avoid defeating the reasonable expectations of the parties in entering into a contract, "courts should not be 'pedantic or meticulous' in interpreting contract expressions." *Id.,* 74 NY2d at 482-483.

These considerations militate firmly against enforcement of the purported option agreement here. First, to compel a forced sale of Paul Jr.'s shares in OCCHI at a price arrived at via some court-contrived mechanism imposed on default of agreement between the parties flies in the face of his attorney's

insistence that there be agreement first as to the procedure for valuing those shares, and imposes on Paul Jr. a contractual obligation he never agreed to. Second, given Mr. Lee's explicit rejection of Respondent's proposed method of valuation and his equally explicit insistence that a valuation procedure be agreed to by the parties, Respondent can have had no reasonable expectation in the absence of agreement – indeed, in the absence of any demonstrable effort to reach agreement – that the purported option would be enforced.

2. Caselaw Where Agreements Were Held Sufficiently Definite Because The Parties Provided For Determination Of Price By A Third Person

The Court in *Cobble Hill Nursing Home* concluded that under certain conditions, "a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future or contains no computational formula." *Id.,* at 783. Those conditions are essentially twofold:

(1) the parties must have manifested their intent to be bound; and

(2) the price must be capable of determination objectively without the need for new expressions by the parties.

> Where at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing the uncertainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage....A price "so arrived at would have been the end product of agreement between the parties themselves."

Cobble Hill Nursing Home, at 783 (emphasis added).

Cobble Hill Nursing Home and its progeny, including *Marder's Nurseries, Inc. v. Hopping,* 171 AD2d 63 (2d Dept. 1991), have accordingly declared contracts enforceable, in the face of claims of indefiniteness, where the parties both manifested their intent to be bound and expressly provided for the determination of the price term by a third person or persons.

In *Cobble Hill Nursing Home* itself, the Court was able to find an enforceable agreement because "the option manifests the parties' unmistakable intent that price was to be fixed by a third person – the Department of Health – itself providing an objective standard without the need for further expressions by the parties." *Id.,* 74 NY2d at 783 (emphasis added).

In *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp., supra,* the parties expressly provided that "a third party, an arbitrator, is to determine the price term in the event they are unable to reach an agreement on their own." The Court held that "by providing for this eventuality and agreeing to be bound by the result, the parties 'invited recourse to an objective extrinsic event, condition or standard on which the amount was made to depend' [cit.om.], and that the renewable term is consequently definite and enforceable." *Id.,* 78 NY2d at 92 (emphasis added).

In *Tonkery v. Martina,* 78 NY2d 893 (1991), a three year option agreement for the purchase of real property provided that "the purchase price was to be either the sum offered by a bona fide third-party purchaser, or, in the alternative, the price fixed by three appraisers. The option also set forth the manner in which the appraisers were to be selected." *Id.,* at 894 (emphasis added). The Court, declining to hold the agreement void for indefiniteness, wrote:

> The terms of the option indicate clearly that the parties both intended to commit the calculation of price to a third party and agreed to be bound by the result. The parties never agreed to agree on a purchase price in the future, but instead tied the price of the parcel to an extrinsic event – either the price offered by a bona fide purchaser or that set by appraisal – and, additionally, provided the method for selection of appraisers. We conclude that this "provides an objective standard that renders the *** [option] definite and enforceable" [cit.om.].

Id., at 895.

Finally, *Marder's Nurseries, Inc. v. Hopping, supra,* 171 AD2d 63 (2d Dept. 1991), involved an option to purchase real property. The contract provided for the determination of the purchase price as follows:

> [T]he purchase price was to be set by two appraisers, one appointed by each party, who were then to "diligently proceed to agree on the fair market value". In the event of a disagreement between the two appraisers originally designated, they (the appraisers, not the parties) were to select a third appraiser. The purchase price would then be fixed in accordance with "the decision of any two of such appraisers".

Id., 171 AD2d at 66. Following *Cobble Hill Nursing Home, 166 Mamaroneck*

Avenue Corp., and *Tonkery v. Martina, supra,* the *Marders's Nurseries* Court concluded that the agreement was sufficiently definite because the parties had agreed to commit the calculation of price to a third party and to be bound by the result. *Id.*, at 70-73. *Cf., Danton Construction Corp. v. Bonner,* 173 AD2d 759 (2d Dept. 1991) (dismissing action to enforce option to purchase property where contract reserved defendant's right to "reformat" the terms of the contract to maximize potential tax advantages)[2]. *See also, Galesi v. Galesi,* 37 AD3d 249 (1st Dept. 2007).

In each of these cases, it was the parties' commitment of the calculation of price to a third person and their agreement to be bound by the third person's determination that provided "an objective standard without the need for further expressions by the parties", and rendered the agreement definite and enforceable.

Those elements are simply not present here. First, Mr. Lee, Paul Jr.'s attorney, plainly manifested Paul Jr.'s intent not to be bound to any option agreement unless and until the procedure for determining the value of his shares in

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[2]In *Danton,* this Court wrote: "[A]n 'agreement to agree', which leaves material terms of a proposed contract for future negotiation, is unenforceable [cit.om.]. Applying these principles at bar, we find that by reserving a vague right to 'reformat' the terms of the proposed conveyance, the defendant sellers left significant terms of the transaction open to future negotiation. Since the parties never came to a meeting of the minds as to the essential terms of the proposed conveyance, and never executed a formal contract as contemplated by the option letter, we find that the option letter was no more than an unenforceable 'agreement to agree'." *Danton Construction Corp., supra,* 173 AD2d at 760.

the closely held corporation had been agreed upon. Second, the 2009 Letter Agreement does not provide for the determination of the price of the purported option by a third person or persons, but rather, by means of an unspecified "procedure to be agreed to by the parties as soon as practicable." As such, the price cannot be determined objectively without new expressions by the parties.

3. Appellant, Through His Attorney, Made It Perfectly Clear That The Procedure For Valuing His Shares In The Closely Held Corporation Was A Material Term Of The Parties' Agreement And Manifested His Intent Not To Be Bound In The Absence Of Agreement Thereupon

That the procedure for valuing Paul Jr.'s shares in OCCHI was material to the parties' agreement and that Paul Jr. would not be bound in the absence of agreement on such a procedure is eminently clear from the course of the parties' negotiations and the express language of Paragraph "9" of the 2009 Letter Agreement.

First, the red-lined version of the Letter Agreement unequivocally demonstrates that Mr. Lee, Paul Jr.'s attorney, rejected a proposal by Mr. Markovits, Paul Sr.'s attorney, that the fair market value of Paul Jr.'s shares be determined by "Management Planning Inc., of Princeton, New Jersey..., the company that undertook the original valuation of the company shares", by striking this language from the proposed agreement. (R. 156, 184 [¶4], 193)

Second, Mr. Lee's January 20, 2009 e-mail to Mr. Markovits (R. 153) expressly identified that issue as one which remained to be hammered out.

Third, Mr. Lee wrote in place of Mr. Markovits' proposal that the value of Paul Jr.'s shares would be determined by "a procedure to be agreed to by the parties as soon as practicable." It was this language that was incorporated in the final, executed 2009 Letter Agreement. (R. 102, 156, 184 [¶4], 189, 193) Thus, contrary to Supreme Court's observation (R. 11), the parties did not "set the price at 'fair market value'". The price term was:

> "fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable." (R. 102)

The language of Paragraph "9" expressly left open for future negotiation the key question of the procedure for determining the value of Paul Jr.'s shares in OCCHI, a closely held corporation.

Fourth, by e-mail to Mr. Markovits on January 22, 2009 (R. 158), the day after the Letter Agreement was executed, Mr. Lee explicitly reminded Mr. Markovits that the "valuation issue" still needed to be resolved.

Mr. Lee could scarcely have done more to make it plain that the procedure whereby the value of Paul Jr.'s shares would be determined in the event Paul Sr. were to request an option was material to the parties' agreement, and that agreement was required before Paul Jr. would be bound.

The materiality of the valuation procedure is confirmed by the very nature of the case. Although Paragraph "9" of the Letter Agreement employs the term "fair market value", that concept has little significance in the context of valuing a minority stake in a close corporation, such as OCCHI. Fair market value is

> the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.

IRS Publication 561, Determining the Value of Donated Property, p. 2 (Rev. April 2007). There is, of course, no ready "market" for the purchase and sale of shares in a close corporation. As this Court explained in *Blake v. Blake Agency, Inc.*, 107 AD2d 139 (2d Dept. 1985),

> Within the context of a closely held corporation, market value is usually of little significance because the shares of stock are not traded on any public market...

Blake, supra, 107 AD2d at 146.

The Court of Appeals has similarly noted that (a) close corporations by their very nature "contradict the concept of 'market' value", and (b) there is, accordingly, "a variety of evidence and methods aimed at determining the price of minority interests in closely held corporations." *Matter of Seagroatt Floral Company, Inc.,* 78 NY2d 439, 445 (1991). The Court wrote:

> Valuing a closely held corporation is not an exact science. Accordingly, courts in such proceedings confront a variety of evidence and methods aimed at determining the price of minority interests in closely held corporations – legal entities that by their nature contradict the concept of a "market" value...

Seagroatt, supra, 78 NY2d at 445.

It is hardly surprising, then, that Mr. Lee would insist on agreement, as the record indisputably establishes he did, concerning the procedure whereby Paul Jr.'s shares in OCCHI would be valued in the event Paul Sr. should request an option to purchase them.

No agreement was ever reached. Mr. Lee's affirmation (¶ 7) explicitly states:

> Mr. Markovits and I never reached any agreement on the procedures referenced in Paragraph 9, including a way to determine the price of an option pursuant to which Senior would purchase PMT's shares in OCC. At no time did I ever agree that PMT would accept as binding or final any appraisal of the shares by MPI.

(R. 184-185 [¶7]) Mr. Markovits does not claim otherwise. (R.122-123, 344)

That the valuation procedure was a material term, failing agreement on which there could be no binding, enforceable option, is only reinforced by the repeated misstatements Respondent and his attorneys have made in an effort to avoid the conclusion that the purported option was merely an unenforceable "agreement to agree":

- Stephen Markovits' law firm claimed that there was an "understanding" that "MPI would be the appraiser and their numbers would be final", and even sued Paul Jr. to enforce the purported understanding, but that lawsuit was withdrawn, and Mr. Markovits has not in this proceeding rebutted Paul Jr.'s attorney's unequivocal assertion that there was no such understanding.

- Paul Sr.'s assertion that fair market value "was left to be determined by an appraiser" is flatly contradicted by the Letter Agreement, and is, moreover, incompetent, as he fails to demonstrate any knowledge whereof he speaks.

- Attorney Richard Mahon erroneously claimed that "[t]he price term here was expressly agreed as the 'fair market value' on the date of exercise." (R. 78 [¶ 29]) As the 2009 Letter Agreement unequivocally shows, the parties expressly agreed to no such thing.

The price term in the 2009 Letter Agreement was not "fair market value" or "fair market value on the date of exercise," but rather:

> "fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable" (R. 102)

– that is, by an unspecified procedure as to which the parties never in fact reached agreement.

Attorney Mahon's statement entails the proposition that the 2009 Letter Agreement accorded Paul Sr. the right to compel a sale of Paul Jr.'s stock for fair market value determined as of any date unilaterally chosen in the sole discretion of Paul Sr. The notion that anything so obviously prejudicial to Paul Jr.'s interests can be read into the 2009 Letter Agreement in the face of Mr. Lee's insistence that

the valuation procedure was a material aspect of the agreement which had to be agreed upon serves only to confirm that the purported option was an invalid and unenforceable "agreement to agree."

4. The Letter Agreement Did Not In Actuality Or In Legal Effect Provide An Objective Standard For Determining The Price Of The Purported Option Without Need For Further Expressions By The Parties

Supreme Court erred in ruling the purported option in the 2009 Letter Agreement valid and enforceable because, contrary to that Court's ruling, the parties' mere intention to agree upon an unspecified valuation procedure is in no sense the "legal equivalent" of "commit[ting] the calculation of price to a third-party." The Court's rationalized that:

> "it is a manifestation of their intention to have fair market value determined in a manner that falls outside of what their individual subjective beliefs might be and to be bound thereby."

(R. 10-11; emphasis added) The Court's reasoning is fundamentally flawed, and as a matter of law insufficient to sustain the purported option in the face of Appellant's charge of indefiniteness.

Paul Jr.'s attorney insisted upon agreement on the manner in which fair market value would be determined. No agreement was ever reached, and the manner of valuation, and hence the price term of the option, cannot be determined

without "further expressions by the parties." Since the agreement says nothing about what the substance of the valuation procedure would be, there is no warrant for Supreme Court's view that it must fall outside what the parties "individual subjective beliefs might be".

Even if the parties' expressed intent to agree on a valuation procedure somehow implies that the hypothetical procedure-to-be-agreed-upon would necessarily fall outside the parties' individual subjective beliefs, that would not be sufficient to insulate the purported option from the charge of indefiniteness, since the matter was still left for determination by the parties themselves, and not by a third party.

Mark Bruce International, Inc. v. Blank Rome, LLP, 60 AD3d 550 (1st Dept. 2009) is on point. In that case, the Court held that a standard of reasonableness, even as fortified by the implied covenant of good faith and fair dealing, was not objective and was too indefinite to be enforceable because it was left for future determination by the parties themselves. The Court wrote:

> The exchange of e-mails, which did not set forth the fee for plaintiff's services or an objective standard to determine it, was too indefinite to be enforceable (*see generally Cobble Hill Nursing Home...*). The standard of reasonableness, left for future determination by the parties themselves, rather than by a third party, was not made objective by the implied duty to determine the amount of the fee in good faith.

Id. at 551 (emphasis added). Here, likewise, the determination of a valuation procedure was left for future determination by the parties themselves.

Clifford R. Gray, Inc. v. LeChase Construction Services, LLC, 31 AD3d 983 (3d Dept. 2006) is also apropos, in that the Court rejected the use of the parties' mere intention to agree as a basis for remedying an indefinite price term. In that case, a contractor and subcontractor entered into an exclusivity agreement pursuant to which the subcontractor submitted proposals for certain work on a construction project. The exclusivity agreement contemplated the execution of a subcontract, and when the contractor instead put the work out for competitive bidding, the subcontractor sued. The Court held that the parties' intention to enter into a subcontract provided no basis for supplying a missing price term, writing:

> [T]here must be "an objective method for supplying a missing term" (*Matter of 166 Mamaroneck Ave. Corp...*). Here, although an exclusivity agreement contemplates the parties' execution of a subcontract, that implicit provision cannot be viewed as a binding formula for supplying a missing term (*see Martin Delicatessen v. Schumacher...*), nor does it "invite[] recourse to an objective extrinsic event, condition or standard" (*id...*[cit.om.]. Rather, it requires further expressions by the parties and therefore fails to "reduc[e] uncertainty to certainty" (*Cobble Hill Nursing Home...*)

Clifford R. Gray, Inc., 31 AD3d at 986. Here, similarly, the parties' intention to agree on a valuation procedure "cannot be viewed as a binding formula for

supplying a missing term". Moreover, the 2009 Letter Agreement does not invite recourse to an objective standard; rather, it expressly "requires further expressions by the parties" – i.e., an unspecified valuation procedure to be agreed upon – and "therefore fails to 'reduc[e] uncertainty to certainty'".

E. New York Authority Culminating In *Marder's Nurseries* Does Not Authorize The Court To Remedy An Unenforceable "Agreement To Agree" On A Valuation Procedure By Appointing An Appraiser Or Determining Fair Market Value Itself

Acknowledging that the parties never reached agreement on a valuation procedure, Supreme Court arrogated to itself the authority to determine the fair market value of Paul Jr.'s shares in OCCHI, writing:

> This Court sees no distinguishable difference between the authority of this Court to select an appraiser, upon application, or to "fix the fair market value after a hearing" where, as in Marder's Nurseries, Inc. v. Hopping, supra, the option contains a "seriously flawed" method with which to determine fair market value and where, as here, the parties have never come to terms on the method to be used to determine fair market value.

(R. 12-13)

The "difference" which Supreme Court could not perceive is palpable and outcome determinative. New York law countenances judicial intervention (1) to remedy flaws in a valuation procedure which the parties agreed to, (2) in order to give effect to that agreement, (3) provided the valuation procedure was incidental to and not an essential part of the contract. *See, In re Fletcher,* 237 NY 440,

448-450 (1924); *Mutual Life Ins. Co. v. Stephens,* 214 NY 488, 495-496 (1915); *Marder's Nurseries, Inc. v. Hopping, supra,* 171 AD2d at 71; *Tonkery v. Martina,* 167 AD2d 860 (4th Dept. 1990), *aff'd* 78 NY2d 893 (1991).

That line of cases provides no warrant whatsoever for judicial intervention to create a valuation procedure where, instead, the procedure was a material term which the parties never agreed to but explicitly left for future negotiation. The effect of Supreme Court's intervention in the circumstances here is, in essence, to forge agreement where none existed, and to impose a contractual obligation where none was undertaken.

In *In re Fletcher, supra,* the Court of Appeals observed that where parties have sought to enforce appraisal provisions in contracts,

> [t]he courts have always enforced such contracts where as in this case the provision for an appraisal could be regarded as incidental and subsidiary to the substantive part of the agreement, and, treating the method as a matter of form rather than substance, the courts have by a reference or otherwise determined the value for the purpose of enforcing the contract according to its real spirit and purpose."

In re Fletcher, supra, 237 NY at 448 (emphasis added) (quoting *Mutual Life Ins. Co. v. Stephens, supra,* 214 NY 488, at 495). In contrast, as the Court of Appeals observed in *Mutual Life Ins. Co. v. Stephens,* if an appraisal provision is "an essential part of the contract...it can be enforced if at all only in the manner agreed upon." *Id.,* 214 NY at 496.

Tonkery and *Marder's Nurseries* are fully in accord with these principles of contract law. In both cases, the parties had agreed to an appraisal procedure wherein the appraisers selected by the parties were to choose a third appraiser, and the procedure failed because the parties' appraisers failed or refused to choose a third appraiser in accordance with the provisions of the contract. *Tonkery,* 167 AD2d at 860; *Marder's Nurseries*, 171 AD2d at 66. Judicial intervention in these circumstances – i.e., in aid of a failed appraisal procedure which the parties had agreed to – comports with the principles articulated *In re Fletcher* and *Mutual Life Ins. Co. v. Stephens.* Indeed, both *Tonkery* (p. 860) and *Marder's Nurseries* (p. 71) reference *In re Fletcher* in support of their holdings.

Thus, this Court's holding in *Marder's Nurseries* is limited to cases where the parties have agreed upon a valuation procedure. This is evidenced by the Court's repeated reliance on the fact that the parties in *Marder's Nurseries* had in fact agreed upon such a procedure:

- "[T]he contractual mechanism for the determination of the purchase price, while flawed, is reasonably certain." (p. 70)
- "[T]he price term was sufficiently definite since it 'indicate[d] clearly that the parties both intended to commit the calculation of price to a third party, and agreed to be bound by the result" (citing *Tonkery)* (p. 71)

- "[A] contract should not be canceled solely on the ground that the parties, having stipulated that the purchase price was to be determined by a group of appraisers, failed to foresee all possible obstacles or hindrances which might arise during the course of the appraisal procedure." (p. 71-72)

- "The problematic nature of the method designed by the parties for arriving at "fair market value", therefore, should not require cancellation of the contract, since this does not, as the defendant contends, make out only an agreement to agree..." (p. 73)

It was in these circumstances that the *Marders' Nurseries* Court concluded, in conformance with longstanding New York authority, that judicial intervention was permissible, not to create a valuation method where the parties had explicitly left that matter to future negotiation, but to address unforeseen flaws in the valuation procedure that the parties had agreed to. *Id.,* at 72-73.

Hence, *Marders' Nurseries* does not support Supreme Court's arrogation of broad authority to select an appraiser or to fix the fair market value itself in circumstances where, as here, the parties themselves have never come to terms on the method to be used to determine fair market value, but explicitly left the matter for future negotiation. As noted above, "it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable..." *Joseph Martin, Jr. Delicatessen, Inc., supra,* 52 NY2d at 109 (emphasis added); *166 Mamaroneck Avenue Corp., supra,* 78 NY2d at 91.

F. Conclusion

The 2009 Letter Agreement does not purport to create an option, but only a promise that Paul Jr. shall extend an option upon request, and is silent with respect to material terms such as the option's term and the time and manner of its exercise. Furthermore, the procedure whereby the value of Paul Jr.'s shares in OCCHI, a closely held corporation, would be determined, a material term of the Letter Agreement, was left for future negotiation by the parties and never ultimately agreed upon, wherefore the purported option was and remained an indefinite and unenforceable "agreement to agree." Inasmuch as the First, Second and Fourth Causes of Action in the plaintiff's complaint are all founded on this unenforceable agreement to agree, they are insufficient in law.

Therefore, Supreme Court's order must be reversed, and Appellant granted summary judgment dismissing the First, Second and Fourth Causes of Action in Respondent's complaint.

CONCLUSION

For the reasons set forth hereinabove, Supreme Court's April 21, 2010 Order should be reversed insofar as it granted the cross-motion of Plaintiff-Respondent Paul Teutul for partial summary judgment declaring a purported option to be valid and enforceable as a matter of law, and the First, Second and Fourth Causes of Action in Respondent's complaint should be dismissed.

Dated: Newburgh, New York
May 10, 2010

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