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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Case No.

2010-04539

Defendant-Appellant Paul M. Teutul ("Appellant" or "Paul Jr.") respectfully submits this Reply Brief in further 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."

I. There Is Not A Single Word Of Support In Respondent's Brief For The Rationale By Which Supreme Court Upheld The Purported Option

Respondent pays lip service to Supreme Court's April 21, 2010 Decision / Order. Tellingly, though, Respondent does <u>not</u> support the rationale whereby Supreme Court declared the purported option in the parties' January 21, 2009 Letter Agreement valid and enforceable in the face of Appellant's demonstration that it was a mere "agreement to agree."

The purported option agreement states:

> [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. 7, 102, 189)

Under longstanding New York precedent, such "agreements to agree", wherein a material term is left for future negotiations between the parties, are deemed to be lacking in definiteness and held legally unenforceable.

Agreements which do not specify a definite price may in certain circumstances be deemed sufficiently definite for enforcement, but only if (1) the parties have manifested their intent to be bound, and (2) the price is capable of determination objectively without the need for new expressions by the parties. Here, however, (1) Appellant's attorney unequivocally manifested Appellant's intent <u>not</u> to be bound to any option agreement unless and until the procedure for

determining the price of his minority share in the closely held corporation had been agreed upon. Moreover, (2) inasmuch as the 2009 Letter Agreement provides for the determination of price by means of an unspecified "procedure to be agreed to by the parties ", the price cannot be determined objectively without new expressions by the parties.

In an effort to salvage the purported option, Supreme Court sought to bring this case within the rule of *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation,* 74 NY2d 475, 482 (1989) and its progeny – including this Court's decision in *Marder's Nurseries, Inc. v. Hopping,* 171 AD2d 63 (2d Dept. 1991) – that an agreement that fails to specify price is nevertheless enforceable where the parties have committed the calculation of price to a third party and agreed to be bound by the result. Supreme Court did so by ruling that the parties' <u>mere intention to agree upon an unspecified valuation procedure</u> is the "legal equivalent" of "commit[ting] the calculation of price to a third-party" (!) (R. 10)[1] The Court rationalized that:

> "it is a manifestation of [the parties'] 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)

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

Supreme Court's reasoning is a fundamentally flawed bit of sleight-of-hand. If sanctioned, such reasoning could magically transform every unenforceable "agreement to agree" into an enforceable contract by construing the very thing that makes the contract indefinite and unenforceable – the parties' mere "agreement to agree" – as supplying an objective standard for supplying the material missing terms of the contract ! Obviously, this stands the Court of Appeals' "agreement to agree" jurisprudence on its head.

Nowhere in its brief has Respondent even attempted to justify Supreme Court's ruling in this regard. For the reasons shown at pages 28-31 of Appellant's original brief on appeal, this key ruling, the lynch-pin of Supreme Court's effort to uphold the parties' "agreement to agree", was in error. *See especially, Mark Bruce International, Inc. v. Blank Rome, LLP,* 60 AD3d 550 (1st Dept. 2009); *Clifford R. Gray, Inc. v. LeChase Construction Services, LLC,* 31 AD3d 983 (3d Dept. 2006) Clearly, the parties' mere intention to agree on an unspecified valuation procedure cannot be viewed as supplying any kind of binding formula for determining the price of the option. The 2009 Letter Agreement does not invite recourse to an objective standard; rather, it explicitly requires further expressions by the parties in order to determine price, wherefore the Agreement is indefinite and unenforceable as a matter of law.

II. Respondent's Legal Argument Is Predicated On A Flat Out Misrepresentation Of The Terms Of The Purported Option

Eschewing reliance on Supreme Court's rationale, Respondent seeks instead to establish the definiteness of the purported option agreement by resorting to the simple expedient of misrepresenting its terms.

Respondent pretends, here as it did in Supreme Court, that the parties agreed to fix the price of Appellant's minority stake in the closely held corporation as (1) the fair market value (2) on the date of Respondent's exercise of the purported option (3) as determined by appraisal. (Respondent's Brief, pp. 10-11, 14-15, 21; R. 77-78) Since the 2009 Letter Agreement contains no such terms, Supreme Court understandably declined to uphold the purported option on that basis, expressly finding that "the parties have never come to terms on the method to be used to determine fair market value." (R. 12) This Court, too, should reject Respondent's blatantly false characterization of the Letter Agreement.

A. Respondent's Argument

Respondent argues that *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation, supra,* and its progeny, including *Tonkery v. Martina,* 167 AD2d 860 (4th Dept.), *aff'd* 78 NY2d 893 (1991) and this Court's decision in *Marder's Nurseries, Inc. v. Hopping, supra,* support the enforceability of the

purported option, based on the following line of argument:

(1) The price term of the purported option was, supposedly, "fair market value", or, as otherwise stated, fair market value on the date of the option's exercise as determined by appraisal.

(2) The only issue remaining for negotiation by the parties was, supposedly, the identity of the appraiser.

(3) Appellant allegedly caused a "stalemate" by refusing to cooperate in an appraisal process.

(4) Supreme Court has the legal authority to break the alleged "stalemate" and determine fair market value itself.

(*See,* Respondent's Brief, pp. 10-18, 21-22)

B. The Falsity Of Respondent's Factual Premises

The indispensable factual predicate (Nos. [1] and [2] above) for Respondent's legal argument in support of the enforceability of the purported option agreement simply does not exist.

Once again, the purported option agreement states:

> [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. 7, 102, 189)

The price term of this provision is quite plainly <u>not</u> (1) the fair market value (2) on the date of Respondent's exercise of the purported option (3) as determined by appraisal, nor indeed is it any one of those three elements.

1. The Price Term Was Not "Fair Market Value"

First, contrary to Respondent's assertion, the agreed price was not "fair market value", but rather, "fair market value, as determined by a procedure to be agreed to by the parties as soon as practicable." By its very terms, the Letter Agreement requires further expressions of the parties in order to determine price. For the reasons developed at length at pages 23-28 in Appellant's original brief, that valuation procedure is unquestionably material to the parties' agreement, wherefore the "agreement to agree" renders the purported option unenforceable as a matter of law.

2. The Price Term Was Not Fair Market Value "On The Date Of Exercise" Of The Purported Option

Second, contrary to Respondent's assertion, the Letter Agreement nowhere states that the agreed price is fair market value "on the date of Respondent's exercise" of the purported option. Respondent's claim entails the proposition that the 2009 Letter Agreement somehow accorded him the right to compel a sale of Appellant's stock for fair market value determined as of any date unilaterally chosen in Respondent's sole discretion. The notion that anything so obviously prejudicial to Appellant's interests can be read into the 2009 Letter Agreement when (a) that Agreement does not create an option at all, only a promise that

Appellant shall extend an option at some undefined time if Respondent should so request, (b) the Agreement is silent with respect to the term wherein the option might be exercised, and (c) Appellant's attorney insisted that the valuation procedure was a material aspect of the agreement which had to be agreed upon , is quite frankly preposterous. Respondent's gross misstatement serves only to confirm that the purported option was an invalid and unenforceable "agreement to agree."

3. The Price Term Was Not Fair Market Value As Determined "By Appraisal"

Third, contrary to Respondent's assertion, the Letter Agreement does not provide for a determination of fair market value "by appraisal", but rather, as already noted *ad nauseam*, by an unspecified "procedure to be agreed to by the parties as soon as practicable." Respondent in desperation attempts to minimize the significance of this "agreement to agree" by erroneously claiming that "[i]t is simply a matter of which appraiser." (Respondent's Brief, p. 14) Neither the language of the 2009 Letter Agreement nor any other competent evidence supports Respondent's contention that Appellant bound himself to the determination of price by an appraiser. The "procedure" in question is not specified in the Agreement; and by the explicit terms of the Agreement, the definition of that

procedure was reserved for future negotiations by the parties. Indeed, the evidence shows that Appellant's attorney specifically rejected Respondent's proposal for a determination of fair market value by appraisal. (R. 156, 160, 184, 185-186, 193, 195-197) Once again, Respondent's gross misstatement serves only to confirm that the purported option was an invalid and unenforceable "agreement to agree."

In short, Respondent's argument in support of the enforceability of the purported option agreement is premised on a gross mischaracterization of the terms of the 2009 Letter Agreement. The legal conclusions which Respondent draws from this non-existent state of affairs must necessarily fail.

C. Since The Determination Of Price Was Explicitly Made Dependent On A "Procedure To Be Agreed To By The Parties", The Purported Option Was An Unenforceable "Agreement To Agree" Which Cannot Be Sustained Under New York Law

The falsity of Respondent's factual premises being established, the invalidity of the legal argument flowing from those premises in support of the purported option is readily demonstrable.

Citing *Tonkery v. Martina, supra,* Respondent observes, "the Court of Appeals noted that the 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." (Respondent's Brief, p. 17) Citing *Marder's Nurseries, supra,* to the same effect, Respondent notes that the parties' agreement there provided for a detailed appraisal process, concerning which this Court wrote, "the contractual mechanism for determination of the purchase price, while flawed, is reasonably certain." (Id., pp. 16-17) According to Respondent, "[t]he same principle applies here" (Id., p. 17), and, per *Marder's Nurseries*, warrants the court in "break[ing] any stalemate by determining fair market value." (Id., p. 13)

No, it does not. Respondent's contention depends entirely on his demonstrably false assertion that the parties created a valid option wherein Appellant agreed to sell his minority stake for fair market value on the date of the option's exercise as determined by appraisal – in other words, that Appellant had agreed to commit the determination of price to an appraiser and to be bound by an appraiser's determination. Had that been the case, which it most certainly is not, *Tonkery* and *Marder's Nurseries* could provide a warrant for judicial intervention to determine fair market value in order to give effect to the parties' agreement. Here, however, there was no such agreement. To the contrary, an "agreement to agree" resulted when Appellant's attorney specifically rejected Respondent's proposal for a determination of price by appraisal and insisted that the parties

reach agreement on an as yet unspecified procedure for making the price determination.

Thus, there was only an "agreement to agree" on a procedure, not an agreed upon procedure, for determining price. Under longstanding New York precedent cited in Appellant's original brief (pages 17-18) the "agreement to agree" is unenforceable. Since Appellant cannot be compelled to agree, Respondent's notion that Appellant, by supposedly failing to "cooperate", is somehow chargeable with provoking a "stalemate" which the Court can break by determining fair market value itself is utterly wrong.[2]

As set forth in Appellant's original brief (pages 31-34), judicial intervention is permissible, not to create a valuation method where the parties had explicitly left that matter to future negotiation, but only to address unforeseen flaws in the valuation procedure that the parties had agreed to.

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[2]It bears repeating at this juncture that it was Respondent, not Appellant, whose actions effectively prevented agreement on the matters left conspicuously open for future negotiation by the 2009 Letter Agreement. Instead of requesting an option and seeking agreement on a valuation procedure as contemplated by the Agreement (R. 7, 102, 189), Respondent demanded that Appellant convey his shares for $0 in accordance with an appraisal which Appellant's attorney had unequivocally rejected as a basis for determining the price of Appellant's shares. (R. 7, 102, 156, 185-186, 189, 193, 195-197) When Appellant naturally refused, Respondent commenced legal action. (R. 257, 279) Later, and still without ever seeking agreement on a valuation procedure, Respondent sought unilaterally to dictate a sale of Appellant's shares for fair market value determined as of November 19, 2009 (i.e., on the date he attempted to exercise his purported option). (R. 32, 43-44) Since nothing in the Letter Agreement gives Respondent the right unilaterally to determine the date of valuation, Appellant again declined to bow to Respondent's demand, and this action ensued.

> ...*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.

(Appellant's Brief, p. 34)

III. Appellant Has Not Sought To Use Parol Evidence To Contradict Or Vary The Terms Of The Purported Option

As Respondent correctly states, the parol evidence rule provides that "evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms." *Marine Midland Bank v. Thurlow,* 53 NY2d 381, 389 (1981) (emphasis added). However, it is Respondent, not Appellant, who is attempting to contradict or vary the terms of the 2009 Letter Agreement.

Contrary to Respondent's allegations, Appellant has not used parol evidence in any way to contradict or vary the terms of the purported option. Respondent falsely asserts that Appellant "refers to the back and forth negotiations between Jr. and Sr.'s attorneys in 2009 as evidence that the option was left open or somehow undefined." (Respondent's Brief, p. 22 [emphasis added]). Not so.

The fact that, as Respondent puts it, "the option was left open or somehow undefined" is quite explicitly stated on the face of the Letter Agreement itself. Paragraph "9" states:

> [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 <u>to be agreed to by the parties</u> as soon as practicable. (R. 7, 102, 189 [emphasis added])

Thus, contrary to Respondent's assertions, the 2009 Letter Agreement cannot be deemed a "finished product" (Respondent's Brief, p. 22) or a "completed agreement" (Id., p. 24), for the parties' "agreement to agree" – unequivocally reflecting the need for further negotiations to define the procedure for valuing Appellant's shares – was expressly made part of the Letter Agreement.[3]

Ironically, it is Respondent who is attempting to contradict or vary the terms of the purported option by claiming that the parties agreed to fix the price of

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[3]Respondent puts great weight on its assertion that the January 21, 2009 Letter Agreement was "thoroughly and heavily negotiated" by counsel for the parties. (Respondent's Brief, p. 13) That is utterly beside the point. As Respondent's own evidence shows, the parties in negotiating this agreement were operating under a very short January 21, 2009 deadline imposed by the Discovery Channel to cure an alleged breach of their Talent Agreement with Discovery Channel in connection with the television program "American Choppers." (R. 122-123 [Markovits Aff., ¶ 44-49]; R. 151-152) As Respondent's own evidence also shows, the parties concluded the Letter Agreement under pressure as the Discovery Channel's deadline was set to expire, but were unable to resolve their differences concerning valuation issues in time to meet that deadline. This appears on the face of the 2009 Letter Agreement itself, which explicitly states that the valuation procedure remained "to be agreed to by the parties." (R. 7, 102, 189) It also appears from the post-Letter Agreement e-mail of January 22, 2009, wherein Appellant's attorney specifically reminded Respondent's attorney that they still had to deal with "the valuation issue." (R. 158)

Appellant's minority stake in the closely held corporation as fair market value on the date of exercise of the purported option as determined by appraisal. (Respondent's Brief, pp. 10-11, 14-15, 21; R. 77-78) These alleged terms appear nowhere in the Letter Agreement.

Ironically again, it is Respondent who put before Supreme Court the January 20, 2009 red-lined version of the Letter Agreement which contradicts Respondent's own claim by proving that Appellant's attorney specifically rejected Respondent's proposal for determining the option price by appraisal. (R. 123 [Markovits Aff., ¶ 49]; R. 153-157)

Appellant cited Respondent's proffered evidence of the parties' pre-Letter Agreement negotiations as but one part of a whole constellation of facts which conclusively demonstrate the materiality of the valuation procedure which per the express terms of the Letter Agreement remained to be agreed to by the parties. (Appellant's Brief, pp. 23-28) Such use of the evidence does not violate the parol evidence rule because it involves no contradicting or varying the terms of the Agreement.

CONCLUSION

For the reasons set forth hereinabove and in Appellant's original brief on appeal, 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 the 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
June 29, 2010

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