STATEMENT OF QUESTION PRESENTED

Whether the Court below correctly applied the law to the option agreement in question?

BACKGROUND AND STATEMENT OF FACTS

The issues on this appeal stem from the April 21, 2010 Decision/Order of Hon. Lewis J. Lubell, Justice of the Orange County Supreme Court. That Decision is annexed in the Record at R5-14.[1] Judge Lubell concluded that the Plaintiff holds a valid option to purchase the 20% ownership interest in Orange County Choppers Holdings, Inc. which he had gifted to his son just three years earlier. Judge Lubell further held that the Plaintiff validly exercised that option as of November 19, 2009.

Judge Lubell issued a comprehensive 10-page Decision which was plainly correct on the law as applied to the facts presented.

Distilled to its essential ingredients, this is an action for a corporate valuation and an accounting.[2] That is the long and short of it. The American Public is familiar with the long-running TV show named "American Chopper" which continues to air on Thursdays at 9 p.m. ET on the TLC Channel® (The Learning Channel)[3] and is available over cable and dish satellite networks.

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[1] References to the Record on Appeal shall be denomined as R-5 as an example.
[2] The Complaint is set forth in the Record at R30-40.
[3] TLC (originally an acronym for The Learning Channel) is an American cable TV network which carries a variety of reality-based and some informational programming. Since 1991 TLC

The Plaintiff-Respondent, Paul Teutul, is also known as "Senior" or "Sr." The Defendant-Appellant, Paul M. Teutul, is also known as "Junior" or "Jr." It is undisputed that Sr. and Jr. are father and son. They are both featured on the American Chopper reality show which depicts the planning, design, engineering and fabrication of custom motorcycles and the life-events surrounding each custom creation[4]. R108-114; R334-339.

OCC's world headquarters are located at 14 Crossroads Court in Newburgh, New York. R-109. Many of the American Chopper episodes were filmed right on the work floors of OCC's headquarters. Both Sr. and Jr. are lifelong residents of Orange County, New York. R108-114.

OCC is a reputable and ongoing business. See R108-114; R115-123. The world headquarters also serve as a retail outlet for OCC motorcycles and OCC-branded clothing, jewelry, collectibles and related paraphernalia. *Id.*

Details concerning the business and operation of OCC are set forth in the unrefuted affidavits of Paul Teutul and Stephen R. Markovits, Esq. (in the Record at R108-114 and R115-123).

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has been owned by Discovery Communications, the same company that operates the Discovery Channel, Animal Planet and The Science Channel and other learning-themed networks. The channel is one of the few cable networks also legally available in Canada under its original American interpretation. See generally, "TLC (TV Channel)" at www.wikipedia.org for a concise history of TLC.

[4] American Chopper is famous for its "Theme Bikes" such as the "Dixie Chopper," the "Statue of Liberty Bike," the "New York Jets Bike," the "Fire Bike" and many more engineered over the course of the past seven years. See Affidavit of Paul Teutul submitted at R108-114..

OCC files regular tax returns and its books are examined and audited on a regular basis by the corporation's accountants. That is beyond dispute and is detailed in the supporting affidavits. R115-123.

Differences between Sr. and Jr. (related to management style and work ethics) came to a head during late 2008 and into early 2009. Essentially, this father and son team could no longer work together. Moreover, Jr. failed and refused to cooperate in the continued business of OCC, including the filming of American Chopper episodes pursuant to contract with Discovery Communications, LLC, the parent company which owns and controls the TLC TV channel. Never has Jr. been denied access to the corporate books and records. In fact, one of the recent American Chopper episodes depicts Jr. and his entourage of lawyers and accountants entering OCC's offices for a full-day examination of books and records. All of this is undisputed and is recounted in the Markovits Affdavit. R115-123.

It is undisputed that Sr. own 80% of all outstanding shares of stock in OCC. Jr. owns 20%. It is further undisputed that Sr. gifted to Jr. in 2007 the 20% interest which Jr. now holds in OCC. R108-114; R115-123.

In late 2008, Jr.'s employment with OCC was terminated. Annexed in the Record at R100-103 is a Letter Agreement dated January 21, 2009 which addressed Jr.'s termination of employment; settled outstanding differences

between Sr. and Jr.; and confirmed Jr.'s status as an independent contractor. As confirmed in Sr.'s Affidavit (R108-114), the Letter Agreement was extensively negotiated and Jr. retained high-priced New York City counsel for that purpose.[5] Moreover, the Letter Agreement was one of several documents executed the same day by Sr. and Jr. to resolve corporate, contractual and employment issues between themselves and with Discovery Communications, LLC.

The Grant of Summary Judgment
Simplified the Underlying Action

As stated above, the underlying action is simply one for a valuation and an accounting. As part of the negotiations in January of 2009, Jr. agreed to give Sr. the option to purchase back the stock shares Sr. gifted to his son.

Paragraph "9" of the January 21, 2009 Letter Agreement (R100-103) provides in its entirety as follows:

> The parties further agree that PMT shall extend to Sr., upon Senior'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.

Plaintiff's counsel moved for partial summary judgment because resolution of the option issue will serve to eliminate many of the secondary claims and

[5] Jr. was represented by the Manhattan law firm of Hughes, Hubbard & Reed LLP throughout the negotiations which culminated in a comprehensive agreement and the option in question. See R183-186; R190-197.

counterclaims. The parties and the Court below can then focus on a proper valuation and an accounting of shareholder monies.

In fact, three of the four claims in the Complaint (specific performance, breach of contract and declaratory judgment) will be determined by declaring the legal effect of the option agreement. See R30-40. As set forth in the legal discussion that follows, the validity of the option agreement is a non-factual issue which was properly resolved by the Court below as a matter of law. That threshold finding will, in turn, simplify the remaining issues and likely lead to a resolution of the entire case.

ARGUMENT

POINT I

PARAGRAPH 9 OF THE JANUARY 21, 2009 LETTER AGREEMENT REPRESENTS A VALID AND ENFORCEABLE OPTION UNDER NEW YORK LAW

The seminal pronouncement on "options" was made by the Court of Appeals in Kaplan v. Lippman, 75 N.Y.2d 320, 325, 552 N.Y.S.2d 903, 905 (1990). The High Court noted as follows:

> 'An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date' (*Leonard v. Ickovic*, 79 A.D.2d 603, 433 N.Y.S.2d 499, *aff'd* 55 N.Y.2d 727, 447 N.Y.S.2d 153, 431 N.E.2d 638); *see also*, 1 Williston, Contracts § 61B [3d ed. 1957]; Restatement [Second] of Contracts § 25). The most striking feature of the contractual arrangement known as the "option" is that while the optionor cannot

> act in derogation of the terms of the option agreement, the optionee is not bound until the option is actually exercised (Williston, *op. cit.*). Thus, until the optionee gives notice of his intent to exercise the option, the optionee is free to accept or reject the terms of the option (*id.*).

In the case of options, the Statute of Frauds is satisfied if the option is contained in a written agreement signed by the party to be charged, i.e., the optionor. Kaplan v. Lippman, 75 N.Y.2d at 325, 552 N.Y.S.2d at 905 *citing* Crocker v. Page, 210 App. Div. 735, 736, 206 N.Y.S. 481.

Once the optionee (the holder of the option) gives notice of his intent to exercise the option, the unilateral agreement immediately ripens into a fully enforceable contract. *See* 22 N.Y. Jur. 2d, Contracts, § 22, *citing* Kaplan v. Lippman, *supra*. In reality, an option is nothing more than an irrevocable offer. *Id.* Before exercise, the option can be modified, revoked or amended by agreement of the parties, but it cannot be unilaterally withdrawn, revoked or rescinded by the offeror/optionor. *Id.*; *see also* Silverstein v. United Cerebral Palsy Assn., 17 A.D.2d 160, 232 N.Y.S.2d 968 (1st Dept. 1962). Thus, the optionee is not bound until the option is exercised; that is, until the optionee gives notice of his intention to exercise the option, he is free to accept or reject the option's terms. 22 N.Y. Jur. Contracts, § 57 *citing* Kaplan v. Lippman, *supr.* Equally important, an option must be accepted according to its terms. Hall v.

Mutual Life Ins. Co., 282 A.D.2d 203, 122 N.Y.S.2d 239 *aff'd* 306 N.Y. 909, 119 N.E.2d 598.

The Restatement [Second] of Contracts (American Law Institute, 1981) has much to say about options. "An offer is binding as an option contract if it in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time." Restatement [Second] of Contracts § 87 (1)(a). An option is also binding if made irrevocable by statute or partial performance in the form of action or forbearance by the optionee. *Id.* at § 87 (1)(b) and (2).

The Restatement [Second] of Contracts specifically addresses the issue of "acceptance" relative to offers: "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." *Id.* at § 30 (2). Annexed in the Record at R43-45 is a copy of the November 19, 2009 Letter exercising Sr.'s option (addressed to Jr.'s attorneys) and transmitted by personal delivery and certified mail, return receipt requested. The return receipt is attached as well (R-45). Moreover, Jr. was personally served with the complaint in this action. That is undisputed. A copy of the Affidavit of Service (directly on Jr. via personal delivery) is annexed in the Record at R-107.

In these circumstances, Jr. cannot in good faith dispute that the option's exercise was communicated to him. Moreover, the option is in writing. The option came in the midst of heated negotiations to resolve corporate rights and employment issues. That is undisputed. Moreover, in the very first paragraph of the January 21, 2009 Letter Agreement (at R-100) Jr. recites that "we are entering into this Letter Agreement to resolve the issues outstanding stemming from my termination other than those addressed in a letter of even date herewith related to our efforts to cure the material breaches claimed by Discovery Communications, LLC."

Thus, the option was in writing and had legally recognized consideration. The Restatement [Second] of Contracts § 79 addresses "adequacy of consideration" and "mutuality of obligation." Consideration need not be money "on the barrel head" at the time the deal is struck. The Restatement in § 1 defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." The Restatement [Second] of Contracts at § 2 defines "promise" as follows:

> §2. PROMISE; PROMISOR; PROMISEE...
>
> (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

(2) The person manifesting the intention is the promisor.

(3) The person to whom the manifestation is addressed is the promisee....

Comments

b. *Manifestation of intention....* The phrase "manifestation of intention" adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct.

e. *Illusory promises; mere statements of intention.* Words of promise which by their terms make performance entirely optional with the "promisor" whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise....On the other hand, a promise may be made even though no duty of performance can arise unless some event occurs (see §§224, 225(1)). Such a conditional promise is no less a promise because there is small likelihood that any duty of performance will arise, as in the case of a promise to insure against fire a thoroughly fireproof building. There may be a promise in such a case even though the duty to perform depends on a state of mind of the promisor other than his own unfettered wish (see §228), or on an event within the promisor's control.

The point is that the exchange of promises with the intent to be bound constitutes legally valid consideration. The academic debate about legal consideration has been settled for over a century in New York. *See* Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891).

For a binding contract to be created, consideration must be legally sufficient. To be legally sufficient, consideration for a promise must be either legally detrimental to the promisee (the one receiving the promise) or legally

beneficial to the promisor (the one making the promise). Legal detriment is not synonymous with actual (economic) detriment. A person can incur legal detriment in either of two ways: (1) by doing or promising to do something that he or she had no prior legal duty to do or (2) by refraining from or promising to refrain from doing something that he or she had no prior legal duty to refrain from doing (that is, by forbearance). *See* Hamer v. Sidway, *supra*; Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 464, 457 N.Y.S 2d 433, 616 N.E. 2d 1095; Matter of Urdang, 304 A.D.2d 586, 758 N.Y.S.2d 125. The Second Department recently summarized the prevailing law on sufficient consideration in Hollander v. Lipman, 65 A.D.2d 1086, 885 N.Y.S.2d 354 (2d Dept. 2009).

Under the doctrine of freedom of contract, the parties to a contract are free to make their own bargain, even if the consideration exchanged is grossly unequal or of dubious value. Apfel v. Prudential-Bache Sec., 81 N.Y.2d 470, 475, 600 N.Y.S.2d 433, 616 N.E.2d 1095; Spaulding v. Benenati, 57 N.Y.2d 418, 454 N.Y.S. 2d 733, 442 N.E.2d 1244. The above case law is clear. In general, courts will not question the adequacy of consideration if the consideration is legally sufficient.

Jr.'s attorneys argue that the option is not enforceable because the price term was left open and subject to a procedure to be agreed upon by the parties. This argument (which is their central argument) targets the "fair market value"

price term. Defense counsel argues that this term is too vague and should therefore completely invalidate an option which thoroughly negotiated by the parties and their legal counsel.

It is respectfully submitted that this Court need look no further than its Decision in Marder's Nurseries, Inc. v. Hopping, 171 A.D.2d 63, 573 N.Y.S.2d 990 (2d Dept. 1991). The Hopping case pulls together all the relevant authority on options and the "fair market value" price term. A copy of the Hopping case is annexed in the Record at R-326-333.

This Appellate Division in Hopping cited the Court of Appeals Decision in Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., 74 N.Y.2d 475, 548 N.Y.S.2d 920 (1989). In Cobble Hill, the High Court expressly held that "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...a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties." 74 N.Y.2d at 483, 548 N.Y.S.2d at 923.

Here is the central point overlooked by defense counsel: a designation of a price term as "fair market value" does not require cancellation of the option contract. It is still enforceable and viable. This Second Department in Hopping directly concluded as follows on this central point:

> 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 (*cf.*, *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, 110, 436 N.Y.S.2d 247, 417 N.E.2d 541, *supra*). In the instant case the Supreme Court may, in accordance with the terms of its judgment, entertain applications for the appointment of a third appraiser, or fix the fair market value after a hearing on the issue.

Marder's Nurseries, Inc. v. Hopping, 573 N.Y.S.2d at 996 (emphasis added).

The trial Court has the inherent power to determine fair market value itself by holding a hearing for that purpose. As previously argued, this case is really about valuation and an accounting. That is it. A determination of valuation will streamline and simplify the remaining issues. The Plaintiff respectfully submits that the Court below may therefore direct a hearing on the issue of valuation. Each side can be permitted to submit expert valuation testimony on this central issue.

Upon closer examination of Hopping, 573 N.Y.S.2d at 995, it is clear that this Second Department enumerates the Courts and jurisdictions which have

concluded that a price term of "fair market value" is definite and enforceable.[6] In the final analysis, this Court concluded that "a court may break any stalemate by determining fair market value." Hopping, 573 N.Y.S.2d at 995.

POINT II

THE OPTION AGREEMENT WAS THE PRODUCT OF ARMS-LENGTH NEGOTIATIONS BETWEEN PARTIES REPRESENTED BY COUNSEL

Sr. and Jr. exchanged written promises to create a legally valid and binding option agreement. Moreover, they agreed to the option during the course of settlement negotiations to resolve employment and corporate issues relative to OCC. They both had attorneys and the Letter Agreement was thoroughly and heavily negotiated. Jr. was represented by Hughes, Hubbard & Reed LLP in Manhattan throughout the negotiations. R-183-186; R-190-197. Sr. had in-house corporate counsel. See Affidavits of Sr. and Stephen R. Markovits at R108-114; R115-123. Jr. simply cannot deny the circumstances surrounding the execution of the option. Sr. conveyed his exercise of the option to Jr. via legal reasonable means: personal delivery and certified mail, return receipt requested. As a matter of law, the option is definite, in writing and accompanied by legally sufficient consideration under New York law.

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[6] The Second Department in Hopping points to New York law and invokes the law of California, Illinois, Pennsylvania, Maryland, New Jersey and Ohio. The Second Department further references *Williston on Contracts* and Am. Jur. 2d [1 Williston, Contracts § 41 and 17 Am. Jur. 2d, Contracts, §§ 41, 84.]

The option is further definite as to "price." By its own wording, the option price is the "fair market value" of Jr.'s 20% interest. No one can change that element. The fair market value "is what it is" on the date of exercise. Neither party can move the price up or down. A third-party independent appraiser can tell the parties and the Court below what Jr.'s 20% interest was worth as of November 19, 2009. Here, the price of the option is the fair market value of Jr.'s 20 % interest as of November 19, 2009, the undisputed exercise date.

The only open issue is the procedure for determining fair market value. The option language provides that fair market value is to be "determined by a procedure to be agreed to by the parties as soon as practicable." It is simply a matter of which appraiser. That is a secondary and insignificant term of the option. No one can change the fair market value frozen in time as of November 19, 2009. The only open term is the procedure for agreeing upon an appraisal. Jr. refused to agree. He ignored Sr.'s option exercise and has consequently forced Sr. to seek relief and redress by commencing a lawsuit to enforce his option rights.

The Restatement [Second] of Contracts at § 33 addresses the concept of "Certainty." In Comment a (*Certainty of Terms*), the Restatement notes that "where the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract."

In Comment c (*Preliminary Negotiations*) of that same section, the Restatement notes that "if the parties to negotiations for sale manifest an intention not to be bound until the price is fixed or agreed, the law gives effect to that intention." That is not the case here. The price term here was expressly agreed as the "fair market value" on the date of exercise. The only open term is the mechanism for determining fair market value, i.e., the manner of appraisal. But no party can change the terms of an honest, good faith appraisal. Fair market value is what it is.

POINT III

FAIR MARKET VALUE IS NOT AN INDEFINITE PRICE TERM

The Court of Appeals has settled the debate on "fair market value" as the referenced price term in a contract. In Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., 74 N.Y.2d 475, 548 N.Y.S.2d 920 (1989), the High Court expressly held that "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...a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties." 74 N.Y.2d at 483, 548 N.Y.S.2d at 923. The High Court further noted that "a method for reducing uncertainty to certainty might, for

example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage. *Id. citing* Metro-Goldwyn-Mayer v. Scheider, 40 N.Y.2d 1069, 1070-71, 392 N.Y.S.2d 252; Annotation, *Requisite Definiteness of Price to be Paid in Event of Exercise of Option for Purchase of Real Property*, 2 A.L.R.3d 701.

As stated above, the Second Department's Decision in Marder's Nurseries, Inc. v. Hopping, 171 A.D.2d 63, 573 N.Y.S.2d 990 (2d Dept. 1991) is directly on point. In Hopping, the holder of an option to purchase a nursery business brought an action for specific performance. The seller resisted the exercise of the option claiming that the price term was indefinite because it was based on "the fair market value" as determined by two appraisers, one appointed by each party. The purchase price would then be fixed in accordance with "any two of such appraisers." 171 A.D.2d at 66, 573 N.Y.S.2d at 992. In the event of disagreement, the two appraisers selected would, in turn, select a third appraiser. Id.

This Court in Hopping noted that "absolute certainty has never been required. Instead, reasonable certainty has always been viewed as sufficient to avoid the 'last resort' of canceling an otherwise valid contract." 171 A.D.2d at 69, 573 N.Y.S.2d at 993 *citing* Cobble Hill Nursing Home, *supra*, at 483, 548 N.Y.S.2d 920 *quoting* Cohen & Sons v. Lurie Woolsen Co., 232 N.Y. 112, 114,

133 N.E. 370 and Varney v. Ditmars, 217 N.Y. 223, 228, 111 N.E. 822. Considering the facts in the Hopping case, this Appellate Court concluded that "the contractual mechanism for determination of the purchase price, while flawed, is reasonably certain." 171 A.D.2d at 70, 573 N.Y.S.2d at 994.

This Court in Hopping further concluded that "fair market value" for an exercised option, as determined by a third party appraiser, is sufficiently definite as a price term. *Id.* at 71, 573 N.Y.S.2d at 995. This Second Department expressly cited the Fourth Department's Decision in Tonkery v. Martina, 167 A.D.2d 860, 562 N.Y.S.2d 895 *aff'd* 78 N.Y.2d 893, 573 N.Y.S.2d 450, 577 N.E.2d 1042. In affirming the Fourth Department's Decision in Tonkery, 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 that result." Tonkery, *supra,* 78 N.Y.2d at 895. The same principle applies here.

It is long settled, therefore, that agreements positing the price term as "fair market value" are sufficiently definite as to price. Hopping, 171 A.D.2d at 72, 573 N.Y.S.2d at 995 *citing* supporting case law in New York, California, Illinois, Maryland, New Jersey, Ohio and 1 Williston, Contracts § 41 and 17 Am. Jur.2d, Contracts, §§ 41, 84.

POINT IV

THE COURT ITSELF MAY DETERMINE FAIR MARKET VALUE

In this situation, Sr.'s option to purchase set the price term at "fair market value." Moreover, the mechanism or logistics for determining fair market value was left to the parties' agreement. This Court in Hopping expressly stated as follows: "That the procedure by which the 'fair market value' is to be determined lends itself to a stalemate is not a fatal defect since, as expressly noted by the Fourth Department in the *Tonkery* case (*supra*), and as implicitly sanctioned by the Court of Appeals in its affirmance, a court may break any stalemate by determining fair market value itself"(citations omitted and emphasis added). Hopping, 171 A.D.2d at 72, 573 N.Y.S.2d at 995.

In this situation, the price term is definite as the fair market value. Moreover, because a stalemate has resulted (i.e., Jr. will not cooperate to perform the option contract), the Court below may grant summary judgment directing specific performance and determining the fair market value itself. That is the prevailing law in New York.

As argued below at Point VI, the option could never be an "agreement to agree" as advocated by Appellant's counsel.

POINT V

PARTIAL SUMMARY JUDGMENT WAS APPROPRIATE

It is long settled that partial summary judgment may be granted as to a single cause of action or as to a part of a single cause of action. Levey v. Saphier, 74 A.D.2d 918, 426 N.Y.S.2d 79 (2d Dept. 1980); *see generally* Professor Siegel's comments at McKinney's Cons. Laws of N.Y. Ann., CPLR 3212, Practice Commentary C3212:30 (West 2005). It has been said that "the partial summary judgment procedure should be fully utilized." Id. at C3212:30, Prof. Siegel *quoting* Janos v. Peck, 21 A.D.2d 529, 251 N.Y.S.2d 254 (1st Dept.) aff'd 15 N.Y.2d 509, 254 N.Y.S.2d 115 (1964) (declaratory judgment action). In fact, a motion for partial summary judgment may be made even as to a claim not brought as a separate cause of action. Clayton v. Fish, 191 Misc. 136, 73 N.Y.S.2d 727. A severable portion of a single cause of action may be disposed of on summary judgment. Lindner v. Eichel, 34 Misc.2d 840, 232 N.Y.S.2d 240, aff'd 17 A.D.2d 735, 233 N.Y.S.2d 238. The trial court has wide discretion in granting partial summary judgment and even in imposing conditions to avoid possible prejudice to the party against whom that judgment is granted. Robert Stigwood Organization, Inc. v. Devon Co., 44 N.Y.2d 922, 408 N.Y.S.2d 5 (1984).

Partial summary judgment on the specific performance and breach of contract claims was particularly apt here. As discussed at length above, the option given by Jr. to Sr. is valid and enforceable as a matter of law. It satisfies every applicable test for enforceability: it is written; it is supported by legally sufficient consideration; it has a definite and calculable price term; it has been validly exercised; and such exercise has been communicated to Jr. by reasonable means. Furthermore, partial summary judgment will cut short extensive discovery and will streamline and simplify the remaining accounting and valuation issues. As set forth above, the Court below can take appropriate steps to determine valuation itself.

POINT VI

THE OPTION AGREEMENT IS NOT AN "AGREEMENT TO AGREE"

The option agreement is not an "agreement to agree," as Appellant's counsel so desperately advocates. As the Court of Appeals concluded in Cobble Hill Nursing Home, *supra*, a price term is not considered indefinite if two conditions are met: (1) the parties manifest their intent to be bound and (2) the price term can be determined objectively without new expressions of intent from the parties. 74 N.Y.2d at 483, 548 N.Y.S.2d at 923.

Here, Sr. and Jr. exchanged written promises to create a legally valid and binding option agreement. Moreover, they agreed to the option during the course of settlement negotiations to resolve employment and corporate issues relative to OCC. They both had attorneys and the Letter Agreement was thoroughly and heavily negotiated. See original and reply Affidavits of Sr. and Stephen R. Markovits in the Record at R-108-114; R-115-123; R-334-339; R-340-346.

The price term here is "fixed." It is fair market value on the date of exercise. No new expressions of intent are required from the parties. No one can change fair market value. Moreover, as indicated above, the Court itself can break any stalemate and determine fair market value.

Thus, all conditions noted by the Court of Appeals in Cobble Hill have been met and absolutely no new expressions of intent were or are required from Jr. or Sr.

The High Court's decision in Tonkery v. Martina, 78 N.Y.2d 893 (1991) is equally compelling. There, the Court declined to invalidate an agreement for indefiniteness, noting that "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." Id. at 894.

The same reasoning applies here. Jr. and Sr. never agreed to agree on a purchase price in the future. They agreed that the price was "fair market value."

That is undeniable. All that remained was the procedure for determining fair market value. As discussed in detail above, even the Court itself can make that determination to break any stalemate.

Jr. cannot now deny the circumstances surrounding the execution of the option. Moreover, Sr. conveyed his exercise of the option to Jr. via legally reasonable means: personal delivery and certified mail, return receipt requested. As a matter of law, the option is definite, in writing and accompanied by legally sufficient consideration under New York law. It is not an agreement to agree. It is an integrated, final agreement in which all parties had highly sophisticated legal counsel.

POINT VII

THE PAROL EVIDENCE RULE BARS DEFENSE COUNSEL'S ATTEMPT TO OFFER EVIDENCE TO CONTRADICT OR MODIFY THE TERMS OF THE OPTION

Appellant's counsel repeatedly 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. First, the January 21, 2009 Letter Agreement (R100-103) was in fact signed. It was in fact negotiated. It was in fact the finished product of intensive push and pull between parties and their attorneys. Second, after the fact

attempts to vary or modify or re-characterize the option agreement are improper and barred by the Parol Evidence Rule.

The Court of Appeals in Marine Midland Bank v. Thurlow, 53 N.Y.2d 381, 389, 442 N.Y.S.2d 417, 421 (1981), restated the Parol Evidence Rule long embedded in American Jurisprudence:

> The parol evidence rule states 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." (Thomas v. Scutt, 127 N.Y. 133, 137, 27 N.E. 961 [emphasis added]; see, also, 9 Wigmore, Evidence [3d ed.], § 2426, p. 70; Richardson, Evidence, [10th ed.], §§ 601-603, pp. 598-599). The majority recognizes that the rule applies to "all prior or contemporaneous negotiations *between the parties* offered to contradict or modify the terms of the writing" (p. 387, p. 419 of 442 N.Y.S.2d, p. 807 of 424 N.E.2d [emphasis added]).

This Second Department has repeatedly affirmed the parol evidence rule and has cited the High Court's holding in Thurlow above. *See* Harris v. Hallberg, 36 A.D.3d 857, 859, 828 N.Y.S.2d 579, 581 (2d Dept. 2007); *see also*, Katz v. American Technical Industries, Inc., 96 A.D.2d 932, 466 N.Y.S.2d 378 (2d Dept. 1983).

Here, Appellant's counsel has improperly and extensively cited to the back and forth exchanges (in e-mails and correspondence) between Ken Lee, Esq. and Steven Markovits, Esq., the attorneys who represented and negotiated the option for Jr. and Sr., respectively. See Appellant's Brief at pp. 23-27.

The option contained in the January 21, 2009 Letter Agreement (R100-103) was a completed agreement. The parties manifested their intent to be bound and the price term could be determined objectively without new expressions of intent from the parties. See Cobble Hill Nursing Home, *supra*, 74 N.Y.2d at 483, 548 N.Y.S.2d at 923. Thus, Appellant's counsel improperly argues that complete agreement had not been reached by focusing on "negotiations" between the parties via their counsel in order to vary, modify or contradict the terms of the option agreement itself. That argumentation and proffer of evidence are directly barred by the parol evidence rule under New York and American Jurisprudence. The exceptions for fraud simply do not exist here and have never been alleged.

SUMMARY AND CONCLUSION

The option agreement is legally valid and enforceable under New York law. The option was extensively negotiated between Sr. and Jr. through their legal counsel. As a matter of legal construction, the option has all the required elements of an enforceable option contract and it was validly exercised. Moreover, the Court below has inherent authority to direct the appointment of an independent third-party appraiser to value Jr.'s 20 % ownership interest in OCC or hold a hearing on the valuation issue alone. Affirmance of Judge Lubell's April 21, 2010 Decision/Order will simplify and streamline the issues and ultimately foster settlement among the parties.

For all of the foregoing reasons, and based on the full Appendix Record on Appeal, the determination of the Court below should be affirmed in its entirety.

Dated: Newburgh, New York
June 16, 2010

Respectfully submitted,

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