SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

----------X

AARON SELIGSON, ANITA E.L. SELIGSON, MARTIN S. ROTHMAN, SIGMUND A. ROLAT, and AARON SELIGSON, MARTIN S. ROTHMAN and PATRICIA ROTHMAN, AS EXECUTORS OF THE ESTATE OF HERBERT A. ROTHMAN, DECEASED,

Index No. 601608/99

Plaintiffs,

-against-

ALBERT RUSSO, LENA RUSSO, ALBERT RUSSO AS A TRUSTEE OF THE TRUST FOR THE BENEFIT OF LENA RUSSO, CLIFTON RUSSO and LAWRENCE RUSSO,

Defendants.

-and-

STEWART E. ROTHMAN, JEFFREY E. ROTHMAN and ARIANA CAULFIELD,

Intervenors.

----------X

CAHN, J:

Defendant Albert Russo moves for summary judgment on his second counterclaim for specific performance.

Plaintiffs cross move for partial summary judgment declaring that (1) none of the defendants exercised a "right of first refusal" or are "contract vendees," and that plaintiffs never offered to sell their partnership interests to anyone and (2) the subject partnership is to be dissolved and the subject building sold in such manner as the court may so provide.

In connection with the motions, the Court held hearings bearing on the issue of whether

the "Group A partners" are entitled to purchase the partnership interests of the "Group B partners," i.e., whether a right to compel specific performance on the part of the defendants had ripened.

Background

Plaintiffs and defendants are the general and limited partners of a New York Limited Partnership known as 401 Broadway Realty Co. (the "Partnership"). The Partnership was formed in 1981, pursuant to an Agreement of Limited Partnership (the "Partnership Agreement") to acquire and operate the premises known as 401 Broadway, New York, New York (the "Building"). The Building is the Partnership's sole real property asset.

Presently, there is a bitter dispute between the two groups of partners. Each group collectively owns a 50 percent interest in the Partnership. Group A, the defendants, includes one of the general partners, movant Albert Russo ("Russo"). Group B, the plaintiffs, includes Aaron Seligson ("Seligson"), the other general partner.

The major asset of the partnership is the Building, a large office building in downtown Manhattan. When the bitter dispute between the two groups developed, the members of Group B started considering ways to resolve it. Russo contends that since Group B considered selling the Building as one way to resolve the partnership dispute, he is entitled to exercise a right of first refusal to acquire their interest in the Partnership. He bases his argument on § 15.7 of the Partnership Agreement which sets forth the rights and obligations regarding a sale, assignment, or transfer of a Partnership interest. Section 15.7 provides:

> Notwithstanding anything contained to the contrary, and except as provided in 15.6, in the event a member of Group A or Group B desires to sell, assign or transfer his or her partnership interest, then said partnership interest, in writing, must be first offered (on the same terms and conditions as same are bona fide

> offered to third parties) to other members of their Group (Group A or Group B, as the case may be), and if said offer to sell is declined or not accepted by any member of said group within sixty (60) days of said offer, then said offer to sell must be then made to the members of the other Group (Group A or Group B, as the case may be), and if said offer is declined or is not accepted by any member of said group within (sixty) 60 days of said offer, then said interest may be sold, assigned and transferred to the third party, to whom the offer was made on the same terms, provided said third party shall comply with the provisions of Paragraphs 15.2, 15.3 and 15.4 of this Agreement.

Seligson commenced this action for dissolution of the Partnership and an accounting. Defendants assert counterclaims sounding in contract and tort. In the second counterclaim, which is the subject of the within motion, defendants allege that beginning in 1998, plaintiffs, in bad faith, embarked on a scheme to circumvent defendants' right of first refusal by soliciting offers from third parties to purchase the Building without defendants' consent. Defendants claim that plaintiffs decided amongst themselves to sell the Building to a third party for $23,000,000 and, subsequently, at a Partnership meeting, held on January 26, 1999 (the "Partnership Meeting"), plaintiffs attempted to coerce defendants into agreeing to a sale of the Building at a price and to a purchaser agreed to by plaintiffs.

Defendants argue that the manifestation of Group B's desire to sell triggered Group A's rights of first refusal; namely, Group B's formal vote for a resolution authorizing a sale to the Elo Organization LLC for $23,000,000. Defendants also claim that they exercised their rights of first refusal and that Group B still manifests the desire to sell through dissolution of the Partnership.

Plaintiffs argue that they did not intend to sell the Building to the Elo Organization LLC (the "Elo Organization") or anyone else for $23,000,000, since that was only an initial offer received, and that the proceedings must be understood in the context of a heated discussion at the Partnership Meeting.

Discussion

1. Intention to Sell.

I find that nothing occurred at the Partnership Meeting or otherwise, which ripened into or constituted an intention to sell either a Partnership interest or the Building. As discussed below, defendants do not have the right to compel plaintiffs to sell (Lin Broadcasting Corp. v Metromedia, 74 NY2d 54 [1989]).

Seligson testified that he did not intend to offer Group B's share to Group A (the defendants herein), or to anyone else, because he believed that a real estate professional would be only interested in buying the entire Building and not a 50 percent ownership of the Building or of the Partnership because that purchaser would then have to deal with the other partner. He testified that the purchaser would be buying into a fight, which is obviously an undesirable situation. This would depress the value of the Group B's interest. I credit this testimony. The Partnership Agreement grants the "General Partner" sole responsibility for the operation and management of Partnership Property and it designates Seligson and Russo, together, as the General Partner. Thus, a sale by one general partner of his group's interest only, would require the purchaser to step into a relationship which is at the very least contentious.

Plaintiffs proffered testimony that they were interested in determining the value of the Building. One means of determining the value of a parcel of real property is to see what price the market would offer. This was apparently what was done here.

I find that, although the Elo Organization may have offered $23,000,000 for the Building, that offer represented only a beginning of negotiations. I credit Seligson's testimony that he

considered the $23,000,000 price as insufficient and he realized that it was a first offer and not a final offer. He expected that if negotiations with Elo continued, a higher offer would be forthcoming. Seligson had not decided to sell the Building because he had not obtained what he considered a fair price nor had he considered any of the ancillary terms that a potential buyer would be likely to demand.

Seligson was "shopping the market" as a means of ascertaining the value that the market was prepared to ascribe to the Building. Seligson's actions did not indicate a firm intention to sell.

Defendants argue that there was a "formal, unequivocal vote by each Group B partner to sell to Seligson's client, Jack Elo, for not less than $23 million." Defendants contend that at the Partnership Meeting, Seligson told the partners: "I would like to sell the building to [Jack Elo] for $23 million dollars." They contend that at the meeting, Seligson also informed the partners that "23 million dollars is a good price."

However, I credit Seligman's denial of an intention to sell the Building. This was a heated meeting involving discussions about resolving an acrimonious partnership situation. Seligman's belief, that he assumed that Elo's $23,000,000 offer was only a first offer that could be improved upon, is reasonable. Therefore, his statement -- that he would sell the Building to Elo for $23,000,000 -- made in the context of a contentious partnership meeting, is properly understood as not representing a definitive commitment to sell. To find otherwise, would negate the ability of partners to conduct discussions openly concerning possible partnership action. Thus, any partner would have to be concerned that a statement made during a meeting which might be construed as favoring a sale, might form the basis of an order forcing that person to sell

his interest.

It must also be noted that a sale of a large New York City office building, normally is accomplished by the preparation and execution of a lengthy and complicated contract of sale, containing many provisions and resolving many issues between seller and buyer. Price is, of course, one of the major issues, but certainly not the only important issue. To find that there had been a decision to sell sufficient to trigger the right of first refusal, without prospective parties having reached agreement on all the major issues, is simply not reasonable.

2. Right of First Refusal.

Defendants' argument -- that the formal vote authorizing a sale to the Elo Organization for $23,000,000 triggered a right of first refusal -- is unpersuasive in that § 15.7 of the Partnership Agreement provides that the right of first refusal is triggered by a "bona fide" offer to third parties. I do not find that a bona fide offer to sell the Building for $23,000,000, was made.

Defendants' contention that a mere expression of a "desire" to sell is sufficient to trigger a right of first refusal is also inconsistent with the Partnership Agreement that provides that the offer must be made on the same terms as that offered to a third party. In so contending, defendants are confusing a right of first refusal, which is provided for in the Partnership Agreement, with an option, which is not provided for in the Partnership Agreement.

Defendants' contention that a right of first refusal is triggered by the desire to sell, and not by either an offer to or from a third party, is incorrect. Under a right of first refusal, the only offer involved is one to be made in the future, if and when the owner reaches agreement with a third-party purchaser (Lin Broadcasting Corp. v Metromedia, 74 NY2d 54 [1989]). An agreement with a third party purchaser did not occur here. Moreover, unlike an option, a right of

first refusal merely provides that before an owner sells, it will first give the other party a chance to buy (Lin Broadcasting Corp. v Metromedia, supra; Rome Sav. Bank v B.W. Husted & Son, 171 AD2d 1048 [4th Dept 1991]). Furthermore, a first refusal right is not irrevocable and its main benefit to the promisee is to prevent the sale to a third party without first making the required offer (Lin Broadcasting Corp. v Metromedia, supra).

Thus, defendants' reliance upon Concert Radio v GAF Corp. 108 AD2d 273 [1st Dept 1985], affd 73 NY2d 766 [1988]), in which the court found that an option right had been triggered, is misplaced. In Concert Radio v GAF Corp., GAF, the owner and operator of a classical music radio station, WNCN, gave Concert Radio, Inc. an option to acquire the radio station as well as a right of first refusal. The court found GAF's manifestation of a desire to sell the station was sufficient to trigger Concert Radio's option rights. The Appellate Division ruled that an actual purchaser need not be identified, nor an actual offer be made to a third party, to trigger the option because the option price was set forth in detail (consisting essentially of GAF's book cost for the radio station). Since the Appellate Division did not find that the right of first refusal was triggered, defendants' reliance upon this decision is disingenuous. In fact, the court indicated, albeit in dictum, that a right of first refusal requires an "identified purchaser and an existing offer" (id). As has been discussed above, in the circumstances, there was no real offer, much less agreement to sell, since no agreement had been negotiated as to the myriad issues necessarily present in a sale of this magnitude.

3. Sale of a Partnership Interest.

Furthermore, the relevant Partnership Agreement provision (§ 15.7) expressly refers to a sale of a Partnership interest, not to a sale of the Building. The right of first refusal as to the

acquisition of a partner's interest in the Partnership does not necessarily translate into a right of first refusal as to the Partnership's asset (Helfand v Cohen, 110 AD2d 751 [2d Dept 1985]).

4. Bad Faith.

Defendants also argue that plaintiffs sought to circumvent their rights of first refusal pursuant to the Partnership Agreement by seeking an immediate dissolution of the Partnership without first offering their interests to defendants. However, Partnership Law § 63 provides that a court shall decree a dissolution when, among other things, "circumstances render a dissolution equitable." Here, there is a bitter dispute between the two groups of partners.

For example, Russo contends that Seligson has been negotiating, preparing, and signing leases in complete secrecy, with the leases containing numerous tenant-friendly provisions that are not customary in the trade. In his counterclaims, Russo alleges that Seligson engaged in self dealing in connection with his law firm's tenancy on the 24th floor of the Building. Allegedly, Seligson took measures that prevented the Partnership from collecting base rent for the 24th floor and he endorsed and deposited rent checks at a nondisclosed bank account. Russo further alleges that in defense of a holdover proceeding commenced against the Seligson firm, Seligson produced a "fictitious lease," prepared in bad faith, that purported to afford the Seligson firm tenancy rights that it did not actually have. In the counterclaims against Sigmund A. Rolat, defendants allege that Rolat improperly requested a rent abatement from the Partnership, conspired with Seligson to defraud the Partnership, and directed the Rolat companies to cease rent payments for a six-month period, beginning December 1998, despite certain knowledge that Seligson did not have the authority to issue a rent abatement.

According to Seligson, the relationship between the partners has deteriorated to the point

where continuous deadlocks destroyed the effective functioning of the Partnership and a dissolution is necessary to preserve the partners' investment and minimize potential losses. He claims that, as evidence of mismanagement, Russo spent $250,000 in anticipation of leasing the 21st floor, although the floor remains half vacant. Moreover, based on the testimony of Jack Elo and Sigmund Rolat, which testimony I credit, the motivation for considering selling the Building was the irreconcilable differences among the partners.

The Partnership Agreement does not require that, in such circumstances, one Group must offer to sell its interest to the other. Thus, although I have not yet ruled on whether a court decreed dissolution is warranted, I find that, by seeking judicial dissolution, plaintiffs have not, thereby, breached the Partnership Agreement. Considering the charges made by each of the general partners against the other as to self-dealing and mismanagement, plaintiffs have not acted in bad faith or in an attempt to defeat defendants' right of first refusal by seeking a judicial dissolution (Power Test Petroleum Dist. v Baker-Tripi Realty Corp., 190 AD2d 845 [2d Dept 1993]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment on the second counterclaim is denied; and it is further

ORDERED that plaintiffs' cross motion is granted only to the extent that it is adjudged and declared that plaintiffs are not obligated to sell their interest in the Building or their partnership interest to any of the defendants.

Dated: August 31, 2001 ENTER:

J.S.C.