

**CW Capital Asset Mgt. LLC v Charney-FPG 114 41st
St., LLC**

2010 NY Slip Op 31887(U)

July 14, 2010

Supreme Court, New York County

Docket Number: 117469/09

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: FRIEDMAN
Justice

PART 52

CW CAPITAL ASSET MGMT
- v -
CHARNOY - FPG 114 4th STREET

INDEX NO. 117469/09
MOTION DATE _____
MOTION SEQ. NO. 5
MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to ~~the~~ approve contract.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2-4</u>
<u>5</u>

Cross-Motion: Yes No

Memo of Law M1

Upon the foregoing papers, it is ordered that this motion *is withdrawn*
pursuant to the accompanying
decision order.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-14-10

Marcy S. Friedman
MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
CWCAPITAL ASSET MANAGEMENT LLC, as
Special Servicer for BANK OF AMERICA, N.A.,
as Trustee on behalf of the registered holders of GS
Mortgage Securities Corporation II, Commercial
Mortgage Pass-Through Certificates, Series 2007-
GG10,

Index No.:117469/09

DECISION/ORDER

Plaintiff,

- against -

CHARNEY-FPG 114 41ST STREET, LLC, et al.,

Defendants.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

_____ x

This is an action to foreclose on a commercial mortgage brought by plaintiff CW Capital Asset Management LLC (“CW”) against defendant-mortgagor Charney-FPG 114 41st Street, LLC (“Charney”) and others. By amended order dated February 26, 2010, this court appointed a temporary receiver for the mortgaged property. The court subsequently received a letter requesting the court’s approval of the receiver’s proposed retention of Structure Tone, Inc. (“Structure Tone”) as general contractor for the building’s lobby renovation. Defendant Charney and defendant Ibex Construction Co. (“Ibex”), a contractor that had done work at the premises prior to the receivership, opposed the receiver’s request on the ground, among others, that Ibex had submitted a lower bid than Structure Tone’s. In response to these letters, and at the request of the parties, the court scheduled a conference on May 19, 2010. At the conference, it appeared that the parties might resolve their differences. However, the court granted leave to the receiver

to move for approval of the Structure Tone contract, in the event the parties did not reach an agreement. The court also specified information it would need if it were to decide such a motion, including the difference in the amounts of the Structure Tone and Ibex bids, and the receiver's basis for selecting Structure Tone. (See May 19, 2010 Transcript at 4.)

The receiver subsequently moved for approval of the Structure Tone contract and the motion was scheduled to be heard on July 7, 2010. Defendants Charney and Ibex submitted opposition to the receiver's motion. At the oral argument, counsel for the receiver made an application on the record to withdraw the motion, which was opposed by defendants.

It is well settled that a receiver must act "in good faith under the circumstances within the authority conferred by the order of appointment." (Jacynicz v 73 Seaman Assocs., 270 AD2d 83, 86 [1st Dept 2000], lv denied 95 NY2d 761.) As an officer of the court, a receiver occupies a fiduciary role and must act appropriately and in accordance with the terms of the order. (See Dulberg v Ebenhart, 68 AD2d 323, 329 [1st Dept 1979]; 1074372 Ontario, Inc. v 200 Corbin Owners Corp., 290 AD2d 497, 498 [2d Dept 2002].) In addition, a receiver is required to post an undertaking, in an amount fixed by the court, that the receiver "will faithfully discharge his duties." (CPLR 6403.)

Here, the February 26, 2010 order appointing the receiver ("appointing order") expressly provides for the receiver to "disburse funds for the completion of the renovations of the Premises' lobby, elevators, sidewalks," first out of the rents received and, to the extent there were insufficient funds, out of the \$3.2 million funded by plaintiff after approval of the budgets referred to in the order. (Feb. 26, 2010 Order, ¶ 19.) The order requires the receiver to prepare a capital budget for completion of the renovation and construction at the premises. (Id., ¶ 24.) The order also provides that, in connection with these renovations, the receiver "may solicit bids from

* 4]
contractors and subcontractors that have previously rendered materials and/or services with respect to the Premises,” but that the receiver “shall not be prohibited hereunder from simultaneously soliciting bids from other contractors and subcontractors.” (*Id.*, ¶ 25.)¹

The order thus specifically authorizes the receiver to make his own decision as to which contractor to hire, so long as he acts in conformity with the standards of a fiduciary and with the budgetary and other requirements of the order appointing him. Given Charney’s and Ibex’s strenuous opposition to the receiver’s proposed retention of Structure Tone, and the spectre of future litigation against the receiver based on such retention, the receiver pursued the conservative course by seeking judicial authority in advance of entering into the construction contract. (See generally Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C6401:3; Feb. 26, 2010 Order, ¶ 34 [authorizing the receiver or any party to apply to the court for further or other instructions or powers necessary to enable the receiver to properly carry out his duties].) However, the receiver clearly was not required, by either the terms of the appointing order or any legal authority, to apply for authorization prior to entering into the contract.

Moreover, as the receiver is prepared to assume the responsibility provided for in the appointing order, and to enter into the contract without advance approval, the court finds that he

¹It is noted that Charney did not object to the provision in the appointing order authorizing the receiver to renovate the lobby. The parties have been in agreement from the outset of this action that the renovation is necessary in order to fully rent the building and to stem a rent strike on the part of existing tenants. Charney did, however, seek a provision that “the receiver shall attempt to utilize the services of contractors and subcontractors that have previously rendered materials and/or services with respect to the Premises in order to make us[e] of construction permits that are still in effect; provided, however, that the receiver shall not be prohibited hereunder from simultaneously soliciting bids and negotiating with other contractors or subcontractors.” (See Proposed Order, filed Jan. 22, 2010.) The court instead adopted the provision, quoted above, that “the receiver may solicit bids from contractors and subcontractors” that previously worked at the premises, but “shall not be prohibited hereunder from simultaneously soliciting bids from other contractors or subcontractors.” (Feb. 26, 2010 Order, ¶ 25.)

should be permitted to do so. In so holding, the court emphasizes that the receiver's determination as to which contractor to retain for the renovation of the building's lobby must be made in conformity with the standards of a fiduciary and with the requirements of the appointing order. As discussed below, defendants fail, on this record, to raise any triable issues of fact regarding the receiver's compliance with his obligations. In any event, any such issues may be raised in connection with the final accounting.

In concluding that the receiver should be permitted to withdraw his motion for advance approval of the contract, the court rejects Charney's and Ibex's contention that the receiver should be required to accept Ibex's bid because it is lower or because Ibex previously worked in the building and is familiar with the physical structure. The decision as to which bid to accept involves consideration of numerous factors including, but not limited to, the scope of work, the terms of the bids, and the track records of the bidding contractors, and should be made with the benefit of expertise in contracting for and overseeing major construction. Klaus Kretschmann, on whose appointment CW and Charney agreed, was employed at the time of his appointment by Cushman & Wakefield, and has expertise, or access to expertise, in managing major commercial properties. He has filed an undertaking, in order to ensure "the faithful performance of his duties as receiver," in the required amount of \$100,000. (Feb. 26, 2010 Order, ¶ 2.) Plaintiff and Charney agreed on this amount at the time the appointing order was made.

The court agrees with Charney that the receiver's motion does not contain the information that would be necessary if the court were to decide whether to grant advance approval of the Structure Tone contract. Ibex's bid is approximately 20 percent lower than Structure Tone's, and the receiver's motion does not offer a detailed comparison of the work provided for in the two bids or a detailed statement of the receiver's reasons for preferring the higher bid. If the court

were to decide whether to approve the contract, it would be necessary for the court to hold a hearing and to take testimony from the receiver and appropriate experts on which bid to approve. The court finds that it is not in the interests of either CW or Charney to delay renovation of the lobby pending such a hearing, under these circumstances in which it is undisputed both that the receiver has the authority to enter into a contract for the renovation, and that the renovation is necessary to preserve the value of the property, make it fully rentable, and respond to a rent strike.

Finally, Charney's apparent suggestion that the receiver has breached his fiduciary duties is based on nothing more than innuendo. Charney cites "publicly available records indicat[ing] that there is a close relationship between Structure Tone and Cushman & Wakefield." (See Stahl Aff. In Opp., ¶ 4, Ex. D.) Charney appears to claim an impropriety in the receiver's retention of Structure Tone because Structure Tone performed construction work for Cushman & Wakefield, or because Cushman & Wakefield represented Structure Tone in a leasing transaction, prior to the receiver's appointment. The mere fact that there were past dealings between the firms wholly fails to demonstrate, or to raise a triable issue of fact, as to a breach of fiduciary duty on the receiver's part.

The court also finds no basis on this record to increase the amount of the receiver's bond.

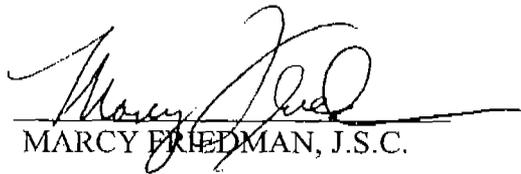
Accordingly, it is hereby ORDERED that the application of the receiver, Klaus Kretschmann, to withdraw his motion seeking advance court approval of the Structure Tone contract is granted, and the motion is deemed withdrawn; and it is further

ORDERED that to the extent that the opposition papers to the receiver's motion by defendants Charney and Ibex seek advance court approval of the Structure Tone contract, such applications are denied; and it is hereby

ORDERED that the receiver shall be stayed, for five business days from the date of this order, from entering into the Structure Tone contract, in order to afford defendants the opportunity to pursue appellate remedies.

This constitutes the decision and order of the court.

Dated: New York, New York
July 14, 2010


MARCY FRIEDMAN, J.S.C.

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