[* 1]

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

PRESENT: CAHN Justice

PART 49

AARON Seligson et al

-v-

ALBERT RUSSO et al -

INDEX NO. 601608/99

MOTION DATE 9/12/05

MOTION SEQ. NO. 015

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . . .

Dated: 9/16/05

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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,

Plaintiffs,

- against -

ALBERT RUSSO, LENA RUSSO; and ALBERT RUSSO as a Trustee of the Trust for the Benefit of Lena Russo, Clifton Russo and Lawrence Russo,

Defendants.

Index No. 601608/99

----------X

Herman Cahn, J.

Defendants move (seq. no. 015) for a preliminary injunction to enjoin the scheduled closing of the sale of real property owned by 401 Broadway Realty Co., a limited partnership dissolved by order of this court dated July 13, 2004 (the "Partnership"), and for related relief, CPLR 6301. They further move for leave to serve and file supplemental counterclaims, *id.*, 3025 (b).

This is another in a series of disputes between the parties (partners in dissolution) to this bitterly fought action regarding the ownership and operation of the prime Partnership asset – 401 Broadway, Manhattan. The Group A and Group B partners (the "Russo Group" and "Seligson Group," respectively)[1] each own a combined 50% interest in the Partnership, and have been hopelessly deadlocked on almost all issues relating to the Partnership. Accordingly, the

---

[1] As the parties characterize themselves, Group A is comprised of defendants; Group B, of plaintiffs.

court ordered the Partnership dissolved in July 2004, appointing a receiver to oversee the incidents of dissolution preparatory to sale of the property.

The Agreement of Limited Partnership between the Seligson and Russo Groups, dated June 15, 1981, contained a right of first refusal clause ("ROFR") providing that before a partner can "sell, assign or transfer" a Partnership interest to a third party, it must first be offered to the other partners "on the same terms and conditions as same are bona fidely offered to third parties" (O.S.C. Ex. 3 ¶ 15.7). The non-selling partners have sixty days in which to accept the offer (*id.*).

On June 15, 2005 the Seligson Group entered into an agreement with non-party HM 401 Associates, LLC, to sell a 49.9% partnership interest to the latter for $33,100,000.00 (Johnson Aff. Ex. A; Meringoff Aff. Ex. A). The agreement provides that the interest conveyed to HM would not include "a .05% general partnership interest to be retained by Aaron Seligson and a .05% limited partnership interest to be retained by Martin Rothman" (*id.*, at 1). Seligson and Rothman are, of course, members of the Seligson Group.

Pursuant to the Agreement of Limited Partnership, the Seligson Group advised the Russo Group of the terms and conditions of the HM deal, by letter dated June 17, 2005 (O.S.C. Ex. 4) and offered it the right to purchase on those terms and conditions. The Russo Group accepted, by letter dated August 12, 2005 (*id.*, Ex. 5).[2] Pursuant to the terms of the accepted HM deal, "[t]he closing of the purchase of the Property ('Closing') shall take place no later than thirty

---

[2] In the event of the Russo Group's exercise of the ROFR, HM is entitled to a $600,000.00 severance payment (Johnson Aff. Ex. A ¶ 16).

(30) days after . . . the termination of the ROFR Period . . . ." (Johnson Aff. Ex. A ¶ 3.)[3] Plaintiffs assert, and defendants do not deny, that the termination of the ROFR period was August 12, 2005 – the day the ROFR was irrevocably exercised by defendants. By that measure, the closing deadline is thirty days thereafter, i.e., September 11 (a Sunday) or 12, 2005. Defendants have deposited $4,000,000.00 in escrow pending the closing, mirroring that condition of the HM deal (Johnson Aff. Ex. A ¶ 4).

Defendants do not deny that September 12, 2005 is, or was, the closing deadline.[4] However, they assert that they are entitled to a reasonable period thereafter to discuss altering that portion of the HM deal which allows plaintiffs Aaron Seligson and Martin Rothman to each remain as a .05% partner, post-closing (*see*, Derfner Aff. ¶¶ 12-15). Defendants' counsel asserts, somewhat esoterically, that the HM deal (to which neither he nor his clients were party or witness) uniquely required such a provision in order to preserve the general partner/limited partner balance of the 401 Broadway Realty Co. Agreement of Limited Partnership (*id.*). Counsel asserts that because his clients, the defendants, are already general partners of the Partnership, unlike HM, there is no need to retain Seligson as a .05% general partner. As counsel

---

[3] The clause fully reads "[t]he closing of the purchase of the Property ('Closing') shall take place no later than thirty (30) days after the later to occur of (a) the termination of the ROFR Period and (b) the execution of the Contract" (Johnson Aff. Ex. A ¶ 3). "Contract" is defined as "a formal purchase contract" between the Seligson Group and HM which, in turn, "must be executed and delivered within 14 days after the termination of the ROFR Period . . . ." (*Id.*, ¶ 2.) The Russo Group's exercise of its right of first refusal on August 12, 2005, renders subparagraph (b)'s time frame moot, as a competing contract between the Seligson Group and HM could no longer be contemplated. The textual discussion, therefore, only focuses on subparagraph (a)'s time frame – the only one applicable in the present circumstances.

[4] The court stayed the September 12, 2005, closing to 9:00 AM, September 23, 2005, to permit the decision of this motion.

struggles to express: "Since defendants are entitled to purchase on the same terms and conditions as HM 401, they in effect step into the shoes of the Buyer [defined as HM]; since Albert Russo is a general partner, Seligson's .05% Partnership Interest is relegated to limited partner status, as is Martin Rothman's successor general partner status" (*id.*, ¶ 13).

Plainly speaking, defendants want to change the deal. This they cannot do.

The ROFR which defendants agreed to in the Agreement of Limited Partnership is clear and unambiguous: before a partner can "sell, assign or transfer" a Partnership interest to a third party, it must first be offered to the other partners "on the same terms and conditions as same are bona fidely offered to third parties" (O.S.C. Ex. 3 ¶ 15.7). The non-selling partners have sixty days in which to accept the offer (*id.*). The ROFR contains no qualifying language allowing the holder of that right to alter the terms and conditions of the sale, assignment, or transfer of the Partnership interest. Indeed, this is reflected in the HM offering memorandum, which explicitly states that: "In the event that the Group A Partners [i.e., the Russo Group] exercise their right to purchase the indivisible 49.9% Sales Interest covered hereby, this agreement shall constitute the Contract and no separate contract shall be required" (O.S.C. Ex. 4 ¶ 16 [emphasis added]).

It is, thus, eminently clear that once the Russo Group exercised their ROFR, which they did, unconditionally, on August 12, 2005, they became bound to the precise terms and conditions of the HM offering memorandum, both by virtue of its plain language and that of the parties' Agreement of Limited Partnership (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992] ["The best evidence of what parties to a written agreement intend to say is what they say in their writing"]; *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990] ["a familiar and

eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms"]).

The Russo Group (movant) has bound itself to the terms and conditions of the HM offering memorandum which, by virtue of the exercise of its ROFR, has transformed into a binding contract between itself and the Seligson Group (O.S.C. Ex. 4 ¶ 16). Movant, thus, cannot demonstrate a likelihood of success on the merits of its assertion that it is entitled to an extension of the closing date in order to re-negotiate Seligson's and Rothman's status as .05% partners in the Partnership, post-closing (*Bishop v Rubin*, 228 AD2d 222 [1st Dept 1996]).

The motion for a preliminary injunction is denied.

Defendants' further motion for leave to serve and file supplemental counterclaims is similarly denied, as the proposed counterclaims (*see*, Derfner Aff. ¶ 22) are premised on the arguments discussed hereinabove to be without merit (*e.g., Heller v Louis Provenzano, Inc.*, 303AD2d 20 [1st Dept 2003]).

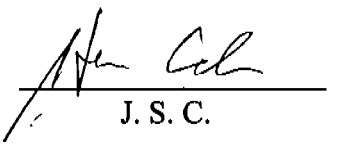
Accordingly, it is

ORDERED that defendants' motions (seq. no. 015) are denied; and it is further

ORDERED that the stay of the closing underlying this matter is vacated, effective 9:00 AM, September 23, 2005.

Dated: September 16, 2005

ENTER:



J. S. C.