

Matter of Elena Melius Found., Inc.

2007 NY Slip Op 33288(U)

October 6, 2007

Supreme Court, Nassau County

Docket Number: 3278-06/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

In the Matter of Application of the

ELENA MELIUS FOUNDATION, INC.
to sell certain of its Real Property.,

INDEX No. 13278/06

MOTION DATE: 7/31/07

MOTION SEQ. No. 2-MG
XXX

The following papers read on this motion:

- Notice of Petition/Affirmation in Support/Exhibits
- Attorney General's Objections to the Petition
- Reply Affirmation

Petitioner, a not-for-profit corporation previously sought an Order granting it permission to sell certain real property in order to raise monies for charitable purposes and to promote childrens health and welfare. The property which Petitioner seeks to sell is known as Section 18, Block 1, Lots 5-110, 5-112 and Section 18, Block 2, Lot 7, located in the Town of Bombay, Franklin County, Hogansburg New York. It is undeveloped property. It is located within the St. Regis Mohawk Reservation Lands, next to a casino. Petitioner seeks to sell the property to Guilford White and Stewart White for the sum of \$300,000.00. The Whites are Native Americans.

In a previous application, Petitioner offered evidence that it has had the property appraised by a licensed appraiser for the value of \$52,000.00. It also sought, and still seeks permission to pay a \$25,000.00 finders fee or commission to Mr. Rick Hamelin for arranging the sale. Mr. Hamelin worked for a business owned by Gary Melius, a principal of the FOUNDATION. The directors claim that they are not seeking to dissolve the corporation and will continue to operate.

The New York State Attorney General's Office previously opposed the sale due to the proposed payment of a finder's fee to Mr. Hamelin. It claimed that the proposed fee is impermissible, excessive and not warranted.

Based on the proof presented, the Petition was denied with leave to renew on papers withdrawing the request for payment of a finders fee to Hamelin, or with the addition of further evidence substantiating the actual services performed by Hamelin which justify payment of the fee sought to be paid from the Not-for-profit corporation. The Court also stated that the Petitioner should offer proof which demonstrates that the payment of the finders fee from the proceeds of the sale is in the best interest of the FOUNDATION. RPL 422-d; NPCL 511.

Petitioner has renewed its application providing additional proof to support its request to pay Mr. Hamerlin for his services. The State again opposes.

The State notes that through a similar petition, dated July 24, 2003, the Petitioner attempted to make the same transaction. That petition was reviewed by the Attorney General's office, who refused to endorse it for a number of reasons including: (a) the FOUNDATION failed to provide the Court and the Attorney General with the information necessary to determine whether or not the proposed transaction was in the best interest of the corporation; (b) it failed to provide an appraisal report to determine whether the sale price was fair; and (c) the proposed payment of a finders fee of \$50,000.00 to Gary Melius was in violation of the law prohibiting self-dealing.

The 2006 petition included an appraisal and a statement that it is in the best interest of the corporation. In addition, it no longer sought payment to Mr. Melius, but only a lesser payment to Mr. Melius's employee for the same stated work, "a finders fee" sought by Mr. Melius in 2003.

The State objected on numerous grounds, including the argument that the payment of a finders fee violated the NPCL and the State's Real Property Law § 442-d. It also noted, as it again does here, that a recovery of a fee of \$25,000.00 on the sale of a property valued at \$300,000.00 would constitute a commission of 8% by a broker, which is 2% more than the average as stated in real estate journals. Furthermore, the Deputy Attorney General noted that it appeared from the proof submitted that the services of Mr. Hamelin

were not needed due to the fact that the FOUNDATION's president already knew the Whites and previously sold them a different parcel of land in September 2002. She noted that in his affidavit Mr. Hamelin set forth no specifics of any expertise utilized to negotiate the terms of this sale.

The Court agreed with the Assistant Attorney General that RPL § 442-d prohibits recovery of any compensation for services rendered in the buying or selling of real estate without alleging and proving that the person seeking the fees was a duly licensed real estate broker or salesperson. RPL 442-d; *Sorice v. DuBois*, 25 AD2d 521 (1st Dept 1966); *Paranello v. Segalla*, 6 AD3d 515 (2nd Dept 2004).

Pursuant to the State's Not-for-Profit Law ("NPCL"), Section 510 and 511 set forth requirements for the sale of property which constitutes substantially all of the not-for-profit's assets. The law requires leave of Court with notice to the Attorney General's office. NPCL § 511(d) requires the Court to find that (1) consideration and terms of the transaction are fair and reasonable to the corporation; and (2) the purposes of the corporation or the interests of its members will be promoted by the transaction.

In the current petition Petitioner has provided a more detailed statement from Mr. Hamerlin and the purchaser, Mr. White, evidencing the actions Mr. Hamerlin took to effectuate the sale.

The Attorney General has filed an objection to the petition. The Attorney General, does not oppose the sale of the property, however, objects to the payment of a finders fee to Rick Hamlin in the sum of \$25,000.00 As noted earlier, Mr. Hamerlin is not a real estate broker. The State argues that NY Real Prop. Law § 440 requires that a party who engages in the business of a real estate broker be duly licensed. Although the Petitioner does not call Mr. Hamerlin's services in "making the deal happen" brokering. Real Property Law § 440 governs compensation for any services rendered in the sale of property, including those which assist the parties in deciding to do business. *Baird v. Krancer*, 138 Misc. 360 (1930). As noted in Petitioner's affidavits, the "said sale could not have proceeded" without Mr. Hamerlin's actions and services rendered.

The Attorney General also repeats the objection to the monetary amount of the fee, sought to be paid to the individual, \$25,000.00 is excessive, as equalling 8% of the sale price of \$300,000.00.

Counsel for the Petitioner argues that the Statute provision and cases cited by the Attorney General are distinguishable, as those cases preclude recovery by the actual individual claiming that he or she performed services in connection with the sale of real property. In this instance, counsel argues, Mr. Hamerlin

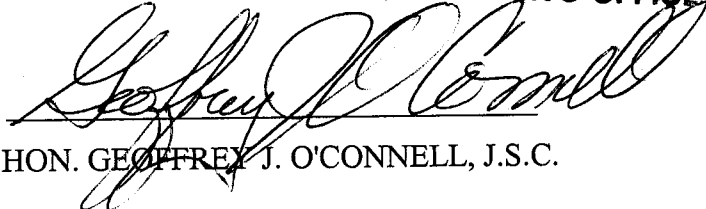
has not brought a suit to recover fees, but the not-for-profit Organization seeks to compensate him from the proceeds of the sale. Counsel argues that the Organization is not precluded from compensating individuals who performed services to the Foundation's benefit.

The Court agrees finding RPL § 440 does not bar payment to a non-licensed real estate broker by a seller, but prohibits non-licensed brokers from bringing their own lawsuits to recover. Further, the Court is satisfied that the Petitioner has made a sufficient showing that the sale of the real property, with the payment to Mr. Hamerlin for his services performed to effectuate the terms of this sale, is in accordance with Not For Profit Corporation Law § 510 and § 511. While the Court agrees with the Attorney General that an 8% fee is generally considered high, in this case it is not unreasonable, particularly in light of the price the buyers have agreed to pay to purchase the property, being approximately four times the uncontested current appraised value of the land as between \$55,000 and \$60,000. In light of the apparently undisputed large profit to the Foundation, which will assist it greatly in carrying out its charitable purposes, the Court finds the fee is not excessive.

Based on the proof presented, the Petition is Granted.

It is, SO ORDERED.

Dated: *OCT. 6, 2007*

ENTERED
OCT 12 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. GEOFFREY J. O'CONNELL, J.S.C.