

Morgenroth v Toll Bros., Inc.
2008 NY Slip Op 30892(U)
March 14, 2008
Supreme Court, New York County
Docket Number: 0117043/2005
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

C E Ramos

PART 53

Justice

Index Number : 117043/2005

MORGENROTH, ARTHUR

VS.

TOLL BROS

SEQUENCE NUMBER : # 002

DISMISS

INDEX NO.

117043-05

MOTION DATE

MOTION SEQ. NO.

#002

MOTION CAL. NO.

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

Motion is decided in accordance with
Accompanying Memorandum Decision.

FILED

MAR 28 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

3/14/08

[Signature]
HON. CHARLES E. RAMOS ^{J.S.C.}

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
ARTHUR MORGENROTH, Individually and
as Attorney in Fact for IRA CAPSUTO,
RICHARD CAPSUTO, BARBARA HOCHMAN, ESTELLE
MUSHABAC, NORMA GABAY, MURIEL CRESPI,
BABBARA HATTEM, JACK H, MATTHEM, JOYCE
BRIZZ, ROSLYN HATTEM, STEVEN W. CHAPKIN &
JOAN MARTIN,

Index No. 117043/05

Plaintiffs,

-against-

TOLL BROS., INC. & TOLL MANHATTAN I, INC.,

Defendants.

FILED
MAR 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Charles Edward Ramos, J.S.C.:

Plaintiffs move for summary judgment seeking damages in the amount of \$1,125,000. Defendants subsequently cross-moved for summary judgment to dismiss the complaint.

Defendant Toll Bros., Inc. ("Toll") entered into a contract (the "110 Contract") to purchase from plaintiffs, all outstanding shares in 110-112 Third Ave. Realty Corp. ("110 Realty"). 110 Realty owns property located at 110 Third Avenue, New York, New York ("110").

Toll subsequently assigned the 110 Contract to defendant Toll Manhattan I, Inc. ("TMI"). Toll's obligations under the 110 Contract were assumed by TMI.

The 110 Contract contained an Other Property Provision (the "OP Provision")¹. The OP Provision is triggered by Toll's

¹ The OP Provision states that plaintiffs will receive as additional compensation 75% of the difference between the OP and 110. (110 Contract, ¶ 17).

purchase of Other Property². If the OP is acquired for less per square foot, the plaintiffs would share in the benefit. It further states that Toll will use commercially reasonable efforts to acquire the Other Property as soon as possible and for the lowest price possible.

Toll then entered into a contract ("108 Contract") for the purchase of the premises owned by RRR 108 Third Avenue LLC ("RRR"), located at 108 Third Avenue, New York, New York (the "108") for \$7.5 million. 108 is the Other Property as defined by the OP Provision.

Plaintiffs then commenced this action against Toll and TMI alleging that 108 could have been purchased at a lower price if commercially reasonable efforts were used, thereby entitling plaintiffs to a fee under the OP Provision.

Toll and RRR in fact contemplated two contract structures for the purchase of 108.

In the first structure, the purchase price would be \$6 million plus an additional \$1.5 million to be paid directly to the tenants in exchange for their termination agreements. However, Toll would be responsible for obtaining the termination agreements and the Certificate of No Harassment. Under this structure, plaintiffs argue that they would be entitled to \$1,125,000 under the OP Provision because, they contend, the

² Other Property is defined as any property on the same City block as the 110 Premises or which adds to the square foot area permitted by applicable law to be built on the 110 Premises or is contiguous to the 110 Premises. (110 Contract, ¶ 17).

purchase price would be only \$6 million.

In the second structure, the purchase price would be \$7.5 million, however, the obligation of delivering a vacant building would shift to RRR. RRR would be responsible for obtaining the termination agreements from the tenants and the Certificate of No Harassment by the closing date. Plaintiffs would not be entitled to further compensation³ under the OP Provision if the price was \$7.5 million.

Plaintiffs allege that Toll intentionally structured the 108 Contract to circumvent the payment due to plaintiffs under the OP Provision. Plaintiffs also contend that the purchase price of \$6 million should be included in the OP Provision calculations, and that the additional \$1.5 million should be excluded because it was to obtain termination agreements from the tenants and not for the acquisition of the property.

Toll argues that it always intended to purchase 108 as a vacant building and that the additional \$1.5 million should be included as a part of the purchase price, because the funds were necessary to accomplish the intended goal of purchasing 108 vacant.

On November 8, 2007, both parties appeared before this Court seeking summary judgment. Plaintiffs were denied summary judgment. Defendants were granted summary judgment with the

³ Maximum area [25,000] multiplied by \$300 per square foot equals \$7.5 million, then minus the consideration paid [\$7.5 million] for a difference of zero which is then multiplied by 75% for a total of zero.

exception of the one issue to be decided herein.

The remaining issue is if this Court were to assume that the deal was for \$6 million plus \$1.5 million to be paid to the tenants to vacate, whether the \$1.5 million paid by Toll to remove the tenants should be included in the OP Provision calculations so as to defeat the plaintiffs' claim for additional compensation.

The relevant portion of the OP Provision states:

"Purchaser [Toll Bros.] agrees that it shall immediately pay to Seller [plaintiffs] 75% of the maximum sum (to the extent same is more than \$-0-) equal to: (a) \$300 per square foot of the maximum square foot area permitted by applicable law to be built on the Other Property (as that phrase is herein defined), less (b) the bona fide purchase price, rent, fee, compensation or **other consideration paid** or to be paid to the seller, lessor, licensee, owner or other transferor of the Other Property for the purchase, lease or other acquisition of the Other Property or an interest therein..." [**emphasis added**] *Id.*

Consideration "consists of either a benefit to the promisor or a detriment to the promisee." (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 463 [1982]). There may be adequate consideration even if the benefit is conferred to a third party. (*Barclays Bank PLC v Skulsky Trust*, 287 AD2d 365 [1st Dept 2001]).

Assuming the \$6 million structure, Toll would nevertheless pay \$1.5 million in exchange for RRR's promise that the building would be vacant. That the funds went to RRR first and then to the tenants does not diminish the consideration. The \$1.5 million paid to acquire the 108 vacant falls squarely within the terms set forth in the OP Provision.

Plaintiffs' argument that 108 could have been purchased for \$6 million ignores the undisputed fact that Toll expressly intended to purchase 108 vacant, just as 110 was when it was acquired.

Plaintiffs submit no evidence to substantiate its allegations that 108 could have been purchased for less money. Draft contracts and three emails that describe the purchase price as \$6 million, are insufficient to refute the affidavit of RRR's attorney Robert Flink, who states that 108 vacant was valued at approximately \$350 per square foot (this would represent \$7.5 million). (Flink Aff. ¶ 4). In addition, Mr. Flink states that he never received any executed contracts indicating the purchase price was \$6 million. (Flink Aff. ¶ 11). Furthermore, plaintiffs cannot demonstrate the \$1.5 million allocated for the purposes of vacating 108 was unreasonable. The evidentiary record does not support plaintiffs' contention that the building could have been purchased vacant for any less than \$7.5 million.

Moreover, plaintiffs' contention that Toll failed to use commercially reasonable efforts in purchasing the building is not supported by any facts. Plaintiffs fail to demonstrate how Toll failed to use commercially reasonable efforts except for the conclusory statement that the 108 Premises could have been purchased for less money. In light of the fact the Toll was seeking to purchase a vacant building, it was commercially reasonable for Toll to structure the transaction in a manner that required RRR to deliver a vacant building on the closing date.


Accordingly, it is

ORDERED, that plaintiffs motion for summary judgment is denied in its entirety; and it is further,

ORDERED, that defendants motion for summary judgment is granted and the complaint is dismissed in its entirety.

The Clerk is hereby directed to enter judgment in favor of defendants.

Dated: March 14, 2008



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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