

Frame v Maynard

2011 NY Slip Op 30782(U)

April 1, 2011

Sup Ct, NY County

Docket Number: 601736/2004

Judge: Paul G. Feinman

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

PRESENT: HON. ROSE S. FENIMAN
HON. ROSE S. FENIMAN
Justice

PART 12

Frame

INDEX NO. 601736/04

MOTION DATE 2/9/11

MOTION SEQ. NO. 010

MOTION CAL. NO. 3

- v -

Maynard

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

MOTION IS GRANTED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

APR 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Bench Trial 5/16/11, 10 AM
Pt 12, Room 214 60 Centre St

Dated: 4/1/2011

Rose S. Feniman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
ALEXANDER M. FRAME,

Plaintiff,

against

KENNETH L. MAYNARD,
5008 BROADWAY ASSOCIATES, LLC,

Defendants.

-----X
R.H. GUTHRIE, BEATRICE GUTHRIE,
PAUL HINES, and CAROLINE PAULSON,

Cross Claimants,

against

KENNETH L. MAYNARD,
5008 BROADWAY ASSOCIATES, LLC,

Defendants.

-----X
Appearances:

For Cross Claimants Paulson & Hines
William J. Dockery, Esq.
17 Battery Place, Suite 1226
New York NY 10004

For Defendants Kenneth L. Maynard & 5008 Broadway Associates, LLC:
Kennedy Johnson, Gallagher, I.L.C
By: Derek McNally, Esq.
99 Wall Street, 15th Fl.
New York NY 10005

For Cross Claimants Guthrie
Rogovin Golub Bernstein & Wexler, LLP
By: Benjamin J. Golub, Esq.
10 East 40th St., 25th Fl.
New York NY 10016

FILED
APR 04 2011

E-filed papers considered in review of this motion to assess damages and other relief

Papers	Numbered
Signed Order to Show Cause, Golub & Dockery Affirms., Ex. A-C	<i>hard copy</i>
Order to Show Cause	18, 28
Dockery Affirm., Ex. A-F	19
Suppl. Golub Affirm. in Support of OSC	21
Def's' "Post Appeal Memo Regarding <i>Rothko</i> Damages"	22
Affirm. in Opp to Cross-Claim Defendants' Motion	23
Golub Affirm. (for the Guthries), Exhibits	24
Reply Affirm. of Dockery in Supp. of OSC and TRO	26
Houlihan Affidavit, Exhibits	26-1
Transcript of Proceedings of Feb. 9, 2011	27

NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

Plaintiff Alexander M. Frame and defendant Kenneth L. Maynard were the two general partners of a limited partnership formed to acquire and operate a building located at 5008 Broadway, New York, New York. The cross claimants were several of the limited partners. Among other issues raised during the bench trial conducted before this court, the plaintiff and cross claimants accused Maynard of breaching the partnership agreement and his fiduciary duties. This court found in favor of plaintiff Frame and cross claimants Beatrice Guthrie and Caroline Paulson and awarded them money damages, but dismissed the cross claims of R.H. Guthrie and Paul Hines. (*Frame v Maynard*, Sup Ct, NY County, October 6, 2008, Feinman, J., index No. 601736/2008 [hereinafter, "Trial Dec." [Doc. 10]).

On appeal, the Appellate Division, First Department affirmed this court's decision as to plaintiff (*Frame v Maynard*, 78 AD3d 508 [1st Dept 2010]), and the parties have since filed a stipulation by which Frame was to be paid the amount of judgment awarded to him from the bond held by U.S. Specialty Insurance Co. (Doc. 23-3). As to cross claimants Beatrice Guthrie and Caroline Paulson, the appellate court affirmed this court's finding of liability against Maynard, but vacated its calculation of damages. The Appellate Division also modified the judgment by reinstating Paul Hines's cross claims for breach of fiduciary duty and constructive fraud. The matter was remanded back to this court for further proceedings as to damages in accordance with the appellate opinion.

In its opinion, the Appellate Division noted the general rule that the measure of damages when a fiduciary has sold property for an inadequate price is the difference between what was received and what should have been received, but held that under the circumstances of this case, this rule should not have been used. Because Maynard was found to have breached his fiduciary duty to plaintiff and the cross claimants, and to have committed constructive and actual fraud based

on his self-dealing while a fiduciary, the Appellate Division held that the measure of damages should be assessed based on the exception to the general rule as set forth in *Matter of Estate of Rothko*, 43 NY2d 305 (1977). In *Rothko*, where the trustees of the artist Mark Rothko's estate sold paintings to galleries with which they were affiliated, and the galleries then quickly resold them for up to 10 times the amounts paid to the estate, the appropriate award was held to be the amount of the difference between the sale price and the value of the paintings *at the time of trial* (43 NY2d at 321)(emphasis added). Thus, the Appellate Division's opinion must be read as directing that Paulson, Guthrie and Hines be awarded damages based on the value of the building *at the time of trial* which commenced in September 2007, rather than its value in either June 2001, of \$2.2 million, or in February 2002, of \$2.9 million, the appraisals found credible by this court in its post-trial decision.

The Motion

Cross claimants Paulson, Hines, and both R.H and Beatrice Guthrie, move for an order: (1) increasing the amounts awarded in accord with the appellate court's ruling; (2) permanently enjoining defendants Maynard and 5008 Broadway and their agents and employees, from transferring or in any manner encumbering the premises known as 5008 Broadway; (3) permanently enjoining the defendants and their agents, including U.S. Speciality Insurance Company, from in any manner transferring the assets currently held by U.S. Specialty Insurance Company as security for the undertaking on appeal, except for the assets used to satisfy the judgment of plaintiff Frame; (4) permanently enjoining the U.S. Specialty Insurance Company from delivering any of the assets in question to defendants; and (5) for an order directing Maynard and 5008 Broadway Associates to continue to operate the premises in the ordinary course of business and to be restrained from transferring, selling or encumbering the premises.

By so-ordered stipulation signed on December 1, 2010, defendant Maynard agreed to provide five business days' written notice to the cross claimants of any sale, refinancing, or transfer of 5008 Broadway. Defendants also agreed to deliver to the attorneys for cross claimants copies of three-years' worth of prior tax returns for both Maynard and 5008 Broadway, a mortgage statement for the premises as of 11/30/10, and any financial statements from the past three years for the premises, if available.

Arguments

Cross claimants argue that the extant trial record contains evidence demonstrating that the value of the building at the time of trial was \$7,500,000, and that the court can recalculate damages using this figure without the need to take more testimony. This figure is derived from the appraiser Jan Barenholtz's report (Doc. 19, p. 78 *et seq.* [OSC, Ex. C]). They urge the court to accept this valuation, arguing that Barenholtz's testimony was never contradicted and defendants did not submit any evidence to contradict his testimony or the report, and in fact did not put in any appraisal report at all concerning the building's value in 2007.

In opposing the cross claimants' argument, defendant reminds the parties and the court that this court explicitly chose not to rely on Barenholtz's analysis and report, but rather credited the appraisal prepared by Daniel Houlihan, an appraiser retained by plaintiff, not defendant, as an expert witness. Houlihan valued the building both in June 2001 and February 2002.¹ Indeed, this court has already stated that Houlihan's conclusions were based on utilizing the "more reliable" income approach analysis (see Trial Dec. at p. 49 [Doc. 10]). Therefore, defendants argue, the court should not, in following the directive of the Appellate Division, now turn around and determine the building's value based on Barenholtz's analysis simply because it offered an analysis of 2007.

¹The Houlihan appraisal is attached to defendants' opposition [Doc. 23-1].

Defendants fault the cross claimants for not seeking, at the time of trial, additional disclosure so that Barenholtz could have prepared an appraisal as to the building in 2007 using a more reliable method of analysis. They also contend that because the cross claimants did not seek further disclosure and did not ask the court to hear further testimony from Barenholtz after spreadsheets were offered into evidence that included 2007 figures concerning the building,² defendants strategically chose not to submit a rebuttal appraisal, relying on the absence of a credible 2007 appraisal.

Defendants suggest that because the trial court had credited the income approach analysis of Houlihan, this approach could be employed, using the 2007 figures provided in the spreadsheets. Their attorney provides his computations based on such an analysis and asserts that the building's value at the time of trial was \$3.224 million (Defendants' Post-Appeal Memo. of Law Regarding *Rothko* Damages, pp. 9-19 [Doc. 22]). The cross claimants dispute this through new affidavits submitted by Barenholtz and Houlihan, and by additional submissions intended to buttress the \$7,500,000 figure posited by Barenholtz (Doc. 24, pp. 3-12, 36, 37; Doc. 26-1, pp. 2-6). Barenholtz states that defendants' computations are based on outdated assumptions and incorrect facts (Doc. 24, pp. 3-12). Houlihan points out various "errors" in the defendants' proposed analysis and valuation, including use of an "incorrect assessed value and the incorrect tax rate," an incorrect room count, applying an expense ratio that was accurate in February 2002, but not in September 2007, using an improper methodology to project the NOI and the capitalization rate, and using the incorrect J-51 tax rate (Doc. 26-1, pp. 2-6).

Analysis

This court, as set forth in its October 6, 2008 decision after trial, credited the testimony of

²The documents were submitted as "Guthries' Exh. II" (Doc. 23-2).

and appraisal of Daniel Houlihan, who had used the income approach analysis, a reliable method of property appraisal. Critical to the court's decision to credit Houlihan's appraisal was the fact that it was made without foreseeing its use in subsequent litigation (Trial Dec. p. 49 [Doc. 10]).

Accordingly, as noted above, the court found the credible evidence, provided by Houlihan, showed that the property's value on June 18, 2001 was \$2.2 million, and the value on February 7, 2002, was \$2.9 million (Trial Dec. pp. 49-50 [Doc. 10]).

By contrast, the court found that the testimony of experts Jan Barenholtz, retained by the Guthries, and Martin Levine, retained by defendant Maynard, was of limited probative value, as both experts were influenced by being employed by the parties who called them to the stand (Trial Dec. pp.29-30 [Doc. 10]).³ Barenholtz did not perform an income approach analysis for his estimate of the building's value (Trial Dec. p. 15 [Doc. 10]). Levine did not appraise the property; rather he reviewed the appraisals made by Houlihan and by Barenholtz (Trial Dec. p. 16 [Doc. 10]). Levine agreed with Houlihan's methodology in the June 2001 valuation, although he thought the projected expenses were understated (Trial Dec. pp. 16-17 [Doc. 10]).

The motion by the cross claimants asking the court to recalculate the damages by now crediting the Barenholtz analysis concerning 2007 values is denied. For the same reasons Barenholtz's testimony and appraisal were not relied upon in the court's original decision after trial, Barenholtz's calculation of the building's value in 2007 cannot be relied upon now . The fact that his work included 2007 is not, of itself, sufficient for the court to determine to rely on it at this juncture.

The alternative suggested by defendant is also untenable, as the court cannot rely on the

³The testimony of Barenholtz and Levine was credited to the extent it confirmed Houlihan's appraisal (Trial Dec. pp.29-30 [Doc. 10]).

arithmetical computations of defendant's attorney, plugging in a formula, even when it is based on a sound methodology. This is all the more obvious given the affidavits submitted by Houlihan and also Barenholtz, who describe various inaccuracies and incorrect assumptions made by defendant in arriving at a valuation for 2007.

In remanding for further proceedings as to damages in accordance with its opinion, the Appellate Division has directed this court make new findings of fact with respect to the damages. CPLR 4404 provides that when a trial court sets aside its own verdict, it can proceed to make new findings of facts "with or without taking new testimony." Inasmuch as the Appellate Division has vacated the damages' calculations previously made, and remanded for further proceedings, rather than simply recalculate them based on the extant record, it has implicitly vested this court with the discretion to determine whether these new findings of facts require the taking of new testimony. Here, the extant record does not provide the court a credible way to arrive at a valuation for 5008 Broadway as of the time of trial in 2007. Clearly, new testimony will be required and the court will be called upon to evaluate the credibility and reliability of any such valuations. Alternatively, the parties may agree to a binding appraisal by a neutral expert agreed upon by all of them.

The branches of the motion seeking to permanently enjoin defendants and their agents from any transfer of the assets currently held by U.S. Specialty Insurance Company in security, and to permanently enjoin U.S. Specialty Insurance Company from delivering any of the assets to defendants, are granted to the extent that the assets held in security by U.S. Specialty Insurance Company are to remain untouched except for satisfying the judgment in favor of plaintiff Frame, pending further decision and order by this court. The branch of the motion seeking an order directing defendants to continue to operate 5008 Broadway in the ordinary course of business is granted pending further decision and order by this court. To the extent that movants seek to restrain

defendants from transferring, selling or encumbering the premises, as noted above, the parties previously agreed that defendants will provide the cross claimants with written notice five business days ' prior to any transfer, sale, or mortgaging of the property.

Finally, the application made at oral argument on February 9, 2011 to restrain defendant Maynard from "utilizing 5008 Broadway income to fund his lifestyle and to pay legal fees" (Tr. of Oral Arg., p. 5 [Doc. 27]), to the extent this seeks relief different from that addressed herein, is denied without prejudice to renewal on papers. It is

ORDERED that the branch of the motion seeking to modify and increase the awards as to the cross claimants, is granted to the extent that the action is set down in Part 12 for May 16, 2011 at 10:00 a.m. for the taking of new testimony as to the value of the building as of September 2007; or in the alternative the parties may agree to have a neutral third-party appraiser issue a binding appraisal; and it is further

ORDERED that the branches of the motion seeking a permanent injunction are granted to the limited extent set forth above; and it is further

ORDERED that the branch of the motion seeking an order directing defendants to continue to operate 5008 Broadway in the ordinary course of business is granted pending further decision and order by this court; and it is further

ORDERED that the branch of the motion seeking to restrain defendants from transferring, selling or encumbering the premises is granted to the extent that defendants are ordered to provide to the cross-claim plaintiffs a written notice within five business days prior to any transfer, sale, or mortgaging of the property known as 5008 Broadway, New York, New York.

This constitutes the decision and order of the court.

Dated: April 1, 2011
New York, New York



J.S.C.

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