

Jubilee, Inc. v Landis
2011 NY Slip Op 33926(U)
November 2, 2011
Sup Ct, NY County
Docket Number: 110823/2011
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCHWEITZER
Justice

PART 45

Jubilee, Inc.

INDEX NO. 110823/11

MOTION DATE _____

Marc A. Landis, et al.

MOTION SEQ. NO. 001

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 *by defendant to dismiss the complaint and cancel the Notice of Pendency is DENIED per the attached Decision and Order.*

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

Dated: November 2, 2011

Nick R. Schumoff
NICK R. SCHUMOFF, J.S.C.

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

In this instance, pursuant to an Order of the court dated January 19, 2011, the Receiver was authorized to sell the Property at a negotiated private sale.

First, the Landlord received an offer to purchase the Property on certain terms and conditions set forth in a proposed written Contract of Sale executed by a proposed purchaser, Skyway Development Group, Inc. (Skyway), on May 11, 2011, for a purchase price of \$2.4 million.

The Receiver then wrote to Jubilee on May 12, 2011 advising it of the offer and informing Jubilee that it had 30 days to elect to purchase “on terms identical to those contained in the enclosed Contract of Sale. . . .” The Receiver noted that “the enclosed Contract of Sale is conditioned upon approval” of the court “so the same condition would apply to you in the event you elect to purchase the subject premises.”

By letter dated June 12, 2011, Jubilee responded to the Receiver, “Please be advised that . . . Jubilee, Inc. hereby elects to purchase the Premises on the same terms and conditions set forth in the Contract.”

Thereafter, on July 18, 2011, a third-party, Aurora Del Mar LLC (Aurora), a limited liability company, wholly-owned by Jonathan Lawrence, made a formal offer for a higher purchase price of \$2.7 million. Aurora manually modified the proposed Skyway contract to constitute Aurora’s offer by changing the name of the purchaser, substituting its offer of \$2.7 million for the \$2.4 million Skyway purchase price and substituting Aurora’s information with respect to notices for that of Skyway. Aurora also changed the down payment for the offer from \$240,000 to \$270,000 on Schedule C of the proposed Contract of Sale. Aurora also scratched out the old down payment amount of \$240,000 on the acknowledgment line of the

contract which was reserved for the signature of the escrow agent who would hold the down payment (Phillips Nizer LLP), inadvertently failing to insert the new down payment amount to replace it. In all other respects, however, the proposed Contract of Sale was identical to the Skyway proposed Contract of Sale.

The Receiver apparently believed that the Aurora offer should be deemed late because the Receiver had set a deadline for last and best offers and Aurora, which had made an initial offer, did not reaffirm it (believing that its original offer remained outstanding for acceptance purposes). The Receiver thus filed his motion with the court seeking approval to sell the Property to Skyway for \$2.4 million pursuant to the terms and conditions in the proposed Contract of Sale. The court, however, on August 16, 2011, denied the Receiver's application and directed the Receiver to accept the offer from Aurora for the higher amount of \$2.7 million.

Because Jubilee continued to have ROFR rights, the Receiver, by notice dated August 19, 2011, advised Jubilee that the court had directed him to accept an offer at a purchase price of \$2.7 million "on the terms set forth in the enclosed Contract of Sale, dated as of May 11, 2011 between the Landlord, as Seller, and Skyway Development Group LLC, as Purchaser." The notice again gave Jubilee 30 days to elect to purchase the subject premises "on terms identical to those contained in the enclosed Contract of Sale." The notice added that "the enclosed Contract of Sale and any election by you *may be conditioned* upon further approval" of the court. (emphasis added) The contract which was enclosed with the Receiver's notice was a copy of the original Contract of Sale with the modifications noted *supra*.

On September 2, 2011, Jubilee's counsel wrote to the Receiver and noted a question pertaining to the closing date which he identified by using the same proposed Contract of Sale

that originally was used for the Skyway transaction. Counsel also raised several other questions he believed were posed by the notice that the Receiver sent to Jubilee. With respect to the closing date, counsel noted that the alternatives in the proposed Contract of Sale either had passed or were misconstrued by the Receiver, i.e. July 7, 2011, or the *latest* to occur of (i) five business days following the ROFR expiration¹, (ii) five business days following court approval, and (iii) July 21, 2011. Counsel noted in this regard that the Receiver had stated in his notice to Jubilee that the proposed contract “may” require court approval (as opposed to his earlier notice to Jubilee pertaining to the Skyway proposed contract, which unequivocally stated that the proposed contract *was* subject to court approval). So counsel inquired in his letter to the Receiver whether any proposed contract signed by Jubilee would be subject to court approval (presumably because it would affect the closing date), and also whether a proposed offer from Jubilee would be acceptable to the Receiver.

Counsel for the Receiver responded on September 6, 2011, stating that it was not the Receiver’s “present intention” to seek further court approval, and thus the closing would be scheduled for five days after expiration of Jubilee’s ROFR per the proposed Contract of Sale. Receiver’s counsel added, however, that the Receiver could not guarantee that other parties might take the position that a further court order was required, and, if so, the closing would take place five business days after such court approval.

¹ In the court’s view, it appears that the Receiver, in drafting the initial Contract of Sale (which was carried over to the proposed Aurora transaction), misconstrued the intent of the expiration of the 30-day time limit within which Jubilee, as tenant, had to exercise the ROFR. In requiring that Jubilee, as tenant, close within five days after expiration of the ROFR should it exercise the ROFR, the Receiver imposed a condition which was inconsistent with the seeming intent of section 17.10 of the proposed Contract of Sale, as drafted. That section conditions the *seller’s* obligation to perform on the expiration of the ROFR, i.e. by selling to the original proposed buyer if the ROFR has not been exercised by the tenant. It does not appear to have been intended to impose upon the tenant an unreasonably swift time limit within which to close a sale immediately after exercising its ROFR.

On September 14, 2011, the Receiver sent to counsel for Jubilee a form of Contract of Sale in Jubilee's name in the event Jubilee exercised its ROFR.

On September 18, 2011, Jubilee once again exercised its right of first refusal and advised the Receiver that it had elected to purchase the Property for \$2.7 million on the same terms and conditions set forth in the proposed Contract of Sale enclosed with the Receiver's notice of August 19, 2011. However, in its letter, Jubilee noted "several discrepancies" with regard to the proposed contract that Jubilee had to match. The Receiver's contract included a "time of the essence" clause, it deleted the purchaser's right to terminate the contract in the event court approval of the sale was not obtained by September 15, 2011 (yet it was not clear at that time whether the Receiver would seek court approval), and it did not appear to indicate whether Aurora had deposited a down payment in escrow. There were several other matters of concern to Jubilee's counsel, including the time within which to close and a credit against the purchase price for any brokerage fees saved on the sale. Notwithstanding these questions raised by Jubilee, its president clearly reconfirmed Jubilee's exercise of the ROFR as follows:

"I would like to reconfirm that we are hereby exercising our Right of First Refusal to purchase the Premises at a purchase price of \$2,700,000.00 on the terms and conditions set forth in the Offer approved by the Court. However, the Contract that you have provided to our attorney does not conform to the terms of the Offer approved by the Court. Accordingly, we are hereby requesting that you provide us with a revised Contract which conforms to the terms of the Offer approved by the Court at your earliest convenience."

In response, counsel for the Receiver expressed his willingness to delete the "time of the essence" reference, confirmed that Aurora indeed had deposited \$270,000 in escrow and that Aurora was willing to close in five days if the ROFR was not exercised by Jubilee "timely and correctly." The Receiver confirmed the deadline, midnight, September 19, 2011, by which the

ROFR had to be exercised "based on the contract provided to you on September 14, 2011," and made it clear that if the ROFR was not in the Receiver's office by the time business opened the following day, together with the escrow deposit, the closing with Aurora would be scheduled forthwith. When Jubilee's deposit was not forthcoming, on September 20, 2011, the Receiver notified counsel for Jubilee that his client's ROFR had expired and that the Receiver would proceed to a closing with Aurora "pursuant to the Order of the Court granted on August 16, 2011."

In response, Jubilee commenced this lawsuit for a declaratory judgment against the Receiver on September 22, 2011, and on October 6, 2011, the Receiver countered with his motion to dismiss and to cancel the Notice of Pendency. The court held its hearing on the Receiver's motion on October 17, 2011, allowing Aurora to intervene as an interested party.

Discussion

During oral argument, it became apparent to the court that the Receiver's posture viz. Jubilee was one of some doubt whether Jubilee had the necessary funds to purchase the property in a timely fashion and on the purchase terms of proposed contract approved by the court, i.e. "Purchaser shall not seek or obtain mortgage financing, mezzanine financing or any other type of financing for the acquisition of the Premises, it being understood that this is an "all-cash" transaction." (Section 17.10 of the proposed Contract of Sale). These doubts apparently were reinforced by Jubilee's back and forth questioning of certain provisions of the proposed contract—including the closing date—and led to the relatively cautious approach the Receiver began to take with respect to some of the questions being posed by Jubilee and its counsel, culminating in the Receiver's addition of a "time of the essence" provision which had not been in

the proposed Contract of Sale as approved by the court. Jubilee's objections to the insertion of this clause ultimately persuaded the Receiver to remove the provision from the proposed Contract of Sale and to adhere to the terms of the Aurora contract as it had been approved by the court. This, after all, was the intent on which the ROFR was predicated. This did not stop the Receiver, however, from continuing to press for a quick payment of the escrow deposit and a swift closing, both of which conditions are understandable given the existence of a firm offer from Aurora which already had made an escrow deposit representing ten percent of the purchase price. In the court's view, the Receiver simply was discharging his fiduciary duty to the Haslach estate in the most vigilant manner possible, thus seeking to balance the estate's interest against the clear contractual rights of Jubilee to exercise its valuable, previously bargained-for ROFR so that its restaurant could remain in place at the Property if at all possible.

It was for this reason that at the hearing, the court took it upon itself to question Jubilee's counsel as an officer of the court in order to determine whether Jubilee did, in fact, have the funds or immediate access to the funds to both meet the escrow deposit obligations of the proposed contract and the remaining portion of the \$2.7 million purchase price. After conferring with his client, both counsel and Mr. Eric Macaire, Jubilee's president, represented to the court that Jubilee did indeed have the funds to meet all financial obligations of the proposed Contract of Sale as approved by the court in the proposed sale to Aurora.

The court also has examined the language of Jubilee's communications with the Receiver and his counsel to determine whether a bona fide offer has been made by Jubilee on the same terms and conditions as approved by the court in the proposed Contract of Sale to Aurora. That language has been recounted in the "Background" section of this Decision, and the court is

entirely satisfied that Jubilee, on more than one occasion, has stated its offer to purchase the Property for \$2.7 million on the same terms and conditions as approved by the court. In the court's view this is all that is required by ROFR section 38.01 of the Lease. The provision does NOT require a signed agreement of purchase by the ROFR expiration date, nor does it require a down payment to have been placed in escrow by that time. Rather, what is required is a clear and concise statement that the ROFR is being exercised on the same terms and conditions as those set forth in the offer (in this case the Aurora offer approved by the court). The only confusion pertaining to Jubilee's acceptance was the closing date; and, as noted during the oral argument, the closing dates in the proposed offer approved by the court did present some confusion in that the closing dates either had passed or the five-day post ROFR provision had not been properly drafted by the Receiver as it was not intended to apply to the tenant exercising the ROFR, but rather to the seller when the ROFR is *not* exercised by the tenant (see n 1, *supra*).

Accordingly, this court finds that the complaint states a cause of action and thus declines to dismiss it nor to order the cancellation of the Notice of Pendency.

The court hereby notifies the parties that pursuant to CPLR 3211 (c) the court has elected to treat the motion to dismiss as a motion for summary judgment in order that there be an expeditious disposition of the controversy. The parties already have submitted all of the documentary evidence pertaining to this matter, which was supplemented by the explanations on oral argument of the motion to dismiss.

The court thus orders that a summary judgment hearing be held on Wednesday, November 9, 2011 at 11:00 a.m. at 60 Centre Street, Room 218, at which time the parties may present any additional evidence at a Declaratory Judgment evidentiary hearing, if necessary, after

which the court will decide on an expeditious schedule with respect to a signing and closing of the sale of the Property, taking into account Jubilee's timely exercise of its ROFR, but considering any other evidence that Aurora wishes to introduce at that time to persuade the court not to issue a declaratory judgment in Jubilee's favor.

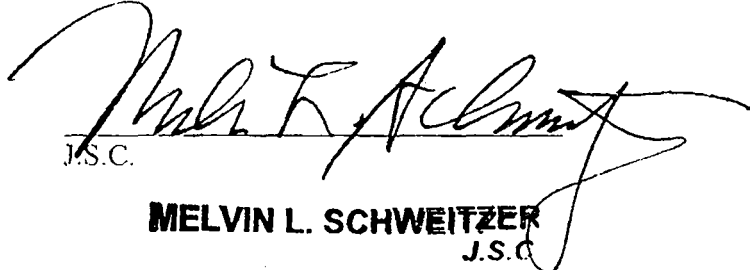
Given the circumstances that have led to this decision, it behooves the court to comment in the strongest possible terms that its inclination herein is predicated on the representations that have been made to it in court by counsel for Jubilee as an officer of the court and by his client, Mr. Eric Macaire, President of Jubilee. In the event the court grants summary judgment to Jubilee, the court appreciates that it will be foregoing an offer from Aurora which would provide an immediate \$2.7 million to the Haslacha estate. Accordingly, should the court order a sale to Jubilee to go forward and it turns out, in any way, that Jubilee has not signed and closed as required by the court on its imposed timetable, the full force of the court's legal and equitable authority will be exercised to require Jubilee to answer in damages both to the Haslacha estate and to Aurora, including the imposition of sanctions, and an appropriate remedy also will be fashioned, including with respect to the Jubilee restaurant revenues, if necessary, to ensure that any such damages and sanctions are paid promptly.

With these admonitions firmly in mind, it is hereby

ORDERED that the motion of the receiver to dismiss the complaint and to cancel the notice of pendency is DENIED, pending an immediate hearing and trial, if necessary, on the motion for summary judgment in the court's discretion for the expeditious disposition of the controversy.

Dated: November 2, 2011

ENTER:


J.S.C.
MELVIN L. SCHWEITZER
J.S.C.