

Clifton Land Co., LLC v Magic Car Wash, LLC

2017 NY Slip Op 31303(U)

June 19, 2017

Supreme Court, Broome County

Docket Number: CA2016001306

Judge: Eugene D. Faughnan

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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 18th day of April, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

CLIFTON LAND COMPANY, LLC,

Plaintiff,

vs.

MAGIC CAR WASH, LLC, NANCY HUSISIAN
and CC PARKWAY DEVELOPMENT, LLC,

Defendants.

DECISION AND ORDER

Index No. CA2016001306
RJI No. 2017-0249-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court on the motion of Nancy Husisian (“Husisian”) and Magic Car Wash, LLC (“MCW”) for an order granting Declaratory Judgment and dismissal of all claims against those two defendants. Specifically, Husisian and MCW seek a direction from the Court as to whom they can sell certain real property- either to the Plaintiff, Clifton Land Company, LLC (“Clifton”), or co-Defendant, CC Parkway Development, LLC (“CC Parkway”). Clifton also filed a cross-motion for partial summary judgment on its Specific Performance, Declaratory Judgment and Breach of Contract claims.

Background facts

MCW is an entity, owned by Husisian, which operates (or previously operated) car washes on various properties owned by Husisian. In 2014, Clifton purchased property and a car wash located in Elmira, New York, from Husisian and MCW. As part of that transaction, Husisian and MCW agreed to give Clifton a Right of First Refusal with regard to the Magic Car Wash in Vestal, New York, and vacant land adjacent to that car wash. The Right of First Refusal provided that Husisian would give Clifton notice of any acceptable purchase offer for the property, and then Clifton would “have five (5) banking days from the receipt of said notice ... to provide ...written notice of its agreement to purchase the Subject Premises on the same terms as set forth in the third-party offer.”

Sometime after the closing on the Elmira car wash, Husisian became interested in selling the Vestal car wash and property. She attempted to obtain an offer from Clifton, but nothing materialized with respect to that, so she began to consider other sale options, including discussions with CC Parkway, which already owned a car wash across the road from her Vestal car wash. CC Parkway wanted to re-develop Husisian’s property as a commercial retail site, but did not have interest in the car wash, since CC Parkway already had its own across the street. In April, 2016, Husisian and CC Parkway signed an Agreement of Purchase and Sale with respect to the Vestal property only, not the car wash business. The contract further provided that MCW

would cease operation of the car wash on the property, and the deed would contain a restrictive covenant prohibiting the operation of a car wash on that location for 10 years. The contract was subject to Cliftons's Right of First Refusal.

Husisian and MCW provided Clifton with notice of the Purchase and Sale contract with CC Parkway. Clifton sought to exercise its Right of First Refusal to purchase the property for the same amount, but stated it would "not accept any deed that attempts to restrict the use of the subject car wash post closing." (Letter from Clifton dated May 4, 2016). The letter further asserted that Clifton considered those terms of the Purchase and Sale contract to "be void and in direct violation of seller's covenants and agreements with [Clifton]."

Husisian thereafter sought to buy out the Right of First Refusal from Clifton, but did not receive a response. Uncertain as to whether Clifton's Right of First Refusal was valid, since it was not on the same terms as her contract with CC Parkway, Husisian did not convey the property to either prospective purchaser.

Clifton then commenced the instant action by the filing of a summons and complaint on June 14, 2016, seeking, among other things, specific performance of the Right of First Refusal, declaratory judgment that the 2014 agreement is enforceable and Husisian cannot convey the property to CC Parkway, and breach of contract. MCW and Husisian filed this motion essentially seeking a determination as to the validity of the contracts, and a determination of whether it can conclude either of these sales.

Discussion

"A right of first refusal is an option to buy conditioned on the seller's willingness to sell. It is not an absolute agreement to sell to the optionee, but merely an agreement that should the owner receive a bona fide offer to purchase the property during the term of the option, he will not accept the offer without giving the optionee the right to buy it on the same terms." *Quigley v. Capolongo*, 53 AD2d 714, 715 (3rd Dept. 1976) (citations omitted), *aff'd* 43 NY2d 748 (1977). It "does not give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the party holding the

preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method." *Metropolitan Transp. Auth. v. Bruken Realty Corp.*, 67 NY2d 156, 163 (1986). "In sum, a right of first refusal merely provides that before an owner sells, it will first give the other party a chance to buy. [1A Corbin, Contracts §261, at 474 [1963]]." *LIN Broadcasting Corp. v. Metromedia, Inc.*, 74 NY2d 54, 60 (1989). "When . . . the selling party has fully complied with its obligations under the first refusal clause by not selling without first making the required offer, the nonselling party has received the bargained-for performance." *Id.* at 62; *Whiteface Resort Holdings, LLC v. McCutchen*, 52 AD3d 1106, 1107 (3rd Dept. 2008).

Husisian alleges that she has complied with the requirements of the first refusal, in that she forwarded the Agreement of Purchase and Sale to Clifton, and Clifton did not exercise the Right of First Refusal on identical terms, because Clifton stated it would not accept any deed that had a restriction on the use of the car wash. She also submitted an affidavit asserting that she had approached Clifton in 2016 about purchasing the car wash and property as she wanted to get out of the car wash business due to her age, health concerns, and economic losses. She never received a response, and then began to look elsewhere for a buyer. This led her to CC Parkway, who was interested in the property only, but not the car wash business. The negotiations included CC Parkway's request that MCW be closed and a deed restriction inserted that the property would not be used as a car wash for a period of ten years. Husisian contends that she has complied with all the terms of the Right of First Refusal, and has acted in good faith. However, due to the conflicting claims on the property, she seeks a declaratory judgment from the Court, and a determination as to whether Clifton's purported exercise of the Right of First Refusal is effective, such that she is required to sell to Clifton, or if it is ineffective, if she can complete the sale with CC Parkway.

Clifton contends that the insertion of the deed restriction preventing the property from being utilized as a car wash was clearly to prevent Clifton from exercising its Right of First Refusal. Clearly, Clifton would not want such a term in the contract, and would not want to purchase the property if it could not operate a car wash. Including the deed restriction in the Agreement of Purchase and Sale was a "poison pill" for Clifton, intended to dissuade it from

exercising its right of first refusal. Clifton contends that the conduct of the Defendants was wrongful, done in bad faith, and constitutes an improper attempt to frustrate Clifton's Right of First Refusal. Defendants' acts essentially deprive Clifton of the benefit of its bargain with respect to the Right of First Refusal. Accordingly, Clifton seeks Summary Judgment on its first three causes of action (specific performance, declaratory judgment and breach of contract), and an Order directing Husisian and MCW to sell the Vestal Property to Clifton on the terms set forth in the 2016 Purchase and Sale contract, but without the deed restriction; and that the Court declare that Clifton has properly asserted its Right to First Refusal on the Vestal Property and Husisian and MCW cannot convey the property to CC Parkway.

CC Parkway argues that it reached a deal with Husisian to purchase the Vestal Property, which involved only the purchase of property, and included a deed restriction, as CC Parkway did not want a competing car wash across the street. CC Parkway contends that Clifton's purported exercise of its Right of First Refusal is ineffective because Clifton only agreed to pay the same price for the property, but not on the same terms. Therefore, Husisian should be permitted to sell to CC Parkway.

The Right of First Refusal does not require that any third party offer be unconditional. *See, Story v. Wood*, 166 AD2d 124 (3rd Dept 1991). "[A] right of first refusal does not give a party a right to purchase the property on any terms so long as the price offered by the third party is met." *M & A Motors, Inc. v. Disco Realty, Inc.*, 24 AD3d 519, 520 (2nd Dept. 2005) (citation omitted). "[T]he right of first refusal may be extinguished where the offer is declined by the holder, or where the third-party offer is not matched." *Yudell Trust I v API Westchester Assocs.*, 227 AD2d 471, 473 (2nd Dept 1996) (internal citation omitted); *See Story* at 129; *Metered Appliances, Inc. v. Lafayette Ct. Apt. Corp.*, 35 Misc3d 1238(A) (Sup. Ct., Kings County 2012).

Moreover, the fact that CC Parkway's offer was subject to conditions does not mean it was not bona fide. *See, Mark Family Realty, LLC v. Sanko*, 136 AD3d 500 (1st Dept. 2016); *Story v. Wood, supra*. Although plaintiff is correct in its argument that a purchase offer is not bona fide where the sole purpose is to wrest a right of first refusal from the holder of the right, Clifton has not provided evidence that the 2016 Purchase and Sale agreement was the result of any collusion between the defendants. Clifton is merely speculating that it was done in bad faith

or the result of wrongful conduct. *See generally, Metered Appliances, Inc., supra.* A "good faith offer" is "(1) a genuine outside offer rather than one contrived in concert with the seller solely for the purpose of extracting a more favorable purchase price from the holder of the right of first refusal . . . and (2) an offer which the seller honestly is willing to accept." *Story* at 128 (citations omitted).

In the present case, the evidence submitted on behalf of Husisian and CC Parkway establishes a legitimate outside offer made by CC Parkway, as the result of arms length negotiations, and reasonable business concerns. Husisian highlights her age and health concerns, as well as the fact that her last remaining car wash is losing money, as factors underpinning her desire to sell the property. She asserts that she sought to engage Clifton in discussions for purchase of the property in 2016 and received no response, so she began to explore other opportunities. Clifton has not produced anything to contradict those assertions. CC Parkway has also provided evidence as to its business needs and concerns, and the desire to have a restrictive covenant placed in the deed, so that Clifton would not exercise a Right of First Refusal and then operate a car wash in that location. Even if defendants tacitly agreed to this approach, the 2016 contract is valid and enforceable in accordance with its unambiguous terms. *See, Metered Appliances, supra.*

By the terms of the Right of First Refusal, Husisian was required to grant plaintiff an opportunity to match the terms of any bona fide third-party offer to purchase the Premises. Because the deed restriction is a valid and enforceable term, Clifton relinquished its Right of First refusal by rejecting such term of a bona fide offer, leaving Husisian free to move forward on its 2016 Purchase and Sale contract with CC Parkway. *See Story*, 166 AD2d at 129. Despite the conditions in the 2016 Purchase and Sale contract, Husisian's notice to Clifton of the offer constituted full compliance with the Right of First Refusal clause. *Id.* Simply put, Husisian did all that was required of her, and Clifton received what it bargained for in 2014- nothing more, and nothing less. And although an implied covenant of good faith and fair dealing is implicit in an agreement granting the right of first refusal (*see Jeremy's Ale House Also, Inc. v. Joselyn Luchnick Irrevocable Trust*, 22 AD3d 6 [1st Dept 2005]), Clifton has not produced any evidence to show defendants' bad faith, or to call into question, the explanations provided by defendants

as to their business dealings.

The cases cited by Clifton in support of its position are distinguishable. In *Quigley v. Capalongo, supra*, the court concluded that the duty of good faith had been breached. That case involved an offer to purchase property, which was subsequently withdrawn, due to the right of first refusal, and then the parties entered into a lease that extended beyond the period of the right of first refusal, with an option to purchase after the end of the lease. Plaintiff was never provided with notice of the offer, and then the offer was altered into a lease in order to avoid providing such notice. In the case at bar, Plaintiff has been given notice of the 2016 contract, as required by the Right of First Refusal. In *Jeremy's Ale House, supra*, also cited by Clifton, the court was confronted with a "right of last refusal", which the court noted is significantly different from a right of first refusal. Further, the court specifically did not find any breach of the duty of good faith and fair dealing, and instead, dismissed the complaint with leave to amend to assert a theory against a subsequent offer, which would have been the offer subject to the "right of last refusal." Lastly, the case of *CR Best Rd, LLC v. Camps Mogen Avraham, Heller, Sternberg, Inc.* 103 AD3d 1075 (3rd Dept. 2013) is distinguishable. That case dealt with an attempt to bundle a property which was subject to a right of first refusal with other property. The instant case involves an attempt to sell the same piece of property which has the Right of First Refusal, with an additional restriction concerning operating a car wash. Here, there is an additional condition, not an additional piece of property.

This Court discerns nothing improper, or wrongful, with respect to the 2016 Purchase and Sale agreement between defendants, and concludes that Husician has complied with the terms of the Right of First Refusal provided to Clifton. The failure of Clifton to match the 2016 offer leaves Husician and MCW free to complete the sale to CC Parkway.

CONCLUSION

On the basis of the foregoing, the Court hereby concludes that Husician has complied with the Right of First Refusal, and that Clifton did not adequately exercise its Right of First Refusal, in that Clifton would not accept a term of the 2016 offer from CC Parkway; accordingly,

Clifton is deemed to have waived its right, and Husisian can complete the sale with CC Parkway. The motion for declaratory judgment by Husisian and MCW is GRANTED, and resolved on that basis.

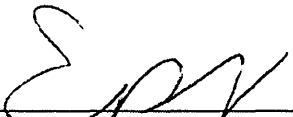
As noted by Defendants, resolution of the Declaratory Judgment motion resolves Plaintiff's cross-motion as well. Plaintiff has cross-moved for summary judgment on its first three causes of action. The first cause of action for Specific Performance of the Right of First Refusal and the second cause for Declaratory Judgment are covered by the Court's resolution of Husisian's Declaratory Judgment motion. Plaintiff also seeks summary judgment on the third cause of action-Breach of Contract. However, the Court's decision on the Declaratory Judgment motion has concluded that Husisian did not breach the Right of First Refusal and has complied with it entirely, and accordingly did not breach her contract with Clifton.

Accordingly, Plaintiff's motion for summary judgment on the first 3 causes of action is DENIED.

The Court's determination also resolves all the claims being raised in the Complaint and by CC Parkway in its Cross-Claims. Based upon the foregoing, Plaintiff's complaint is DISMISSED, and CC Parkway's Cross-Claims are likewise DISMISSED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 19, 2017
Binghamton, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

- 1) Notice of Motion by Nancy Husisian and Magic Car Wash, LLC, dated February 10, 2017, with Affidavit of Steven W. Barnstead, Esq., sworn to on February 10, 2017, with attached Exhibits, and Affidavit of Nancy Husisian, sworn to on January 27, 2017, with Exhibits; and amended Notice of Motion dated April 1, 2017

- 2) **Plaintiff's Notice of Cross-Motion dated April 10, 2017, with Affidavit of Jeffery Arnold, sworn to on April 10, 2017 with Exhibits A and B, Attorney Affirmation of John T. Referemet, Esq., with Exhibits A-D and Memorandum of Law dated April 10, 2017;**
- 3) **Affidavit of Joseph Conaty, sworn to on April 7, 2017 (on behalf of Defendant CC Parkway Development, LLC), with Exhibits A-E, and Affirmation of Gary Farneti, Esq., sworn to April 8, 2017, with Exhibits F-H, and Memorandum of Law dated April 10, 2017;**
- 4) **Affidavit of Nancy Husisian, sworn to on April 14, 2017 in opposition to Plaintiff's Cross-Motion for Partial Summary Judgment, and Memorandum on Law dated April 14, 2017**