

<b>Matter of Darvish v Haslacha, Inc.</b>
2011 NY Slip Op 30134(U)
January 19, 2011
Supreme Court, New York County
Docket Number: 123089/01
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SCHWEITZER

PART 45

Index Number : 123089/2001

**DARVISH, SOHEIL**

vs.

**HASLACHA**

SEQUENCE NUMBER : 052

OTHER RELIEFS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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 the Permanent Receiver for an Order modifying the court's December 31, 2008 Order, allowing him to sell the property by negotiated private sale, and associated matters is **GRANTED** per the attached *Decision and Order.*

**FILED**

JAN 21 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 19, 2011

*Melvin L. Schweitzer*  
**MELVIN L. SCHWEITZER, S.J.C.**  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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



on his experience in the real estate business, Mr. Landis believes that a public auction of the Property would not attract purchasers willing to pay the market price because they would view the auction as a foreclosure sale of distressed property and would expect a substantial discount. *Id.* On the other hand, Mr. Landis argues, a private sale would allow him to “pre-screen potential purchasers and negotiate only with those willing to pay market rate for the property.” Affirmation in Support, 2-3. To that end, Mr. Landis proposes to engage the services of Massey Knakal Realty Services (MKRS) located at 275 Madison Avenue, New York, New York as a broker, and Green Real Estate (GRS) located at 4310 Broadway, New York, New York as a co-broker. Affirmation in Support, 3. Mr. Landis believes MKRS is well qualified as a broker because of its seller-oriented specialization and its extensive list of qualified potential purchasers. *Id.* Mr. Landis finds GRS an appropriate choice as a co-broker because of its familiarity with the Property as its current managing agent. *Id.*

MKRS already made an initial valuation of the Property, finding its value to be between \$2,550,000 and \$2,575,000. Mr. Landis believes that an asking price of \$2,800,000 would be appropriate in the current market. Affirmation in Support, 4. However, Mr. Landis claims that more information will be sought before they make a final determination as to the asking price. *Id.* Mr. Landis proposes to engage the two firms for a period of six months and pay them a single 6% commission. The commission would be paid even if the successful purchaser is an insider, i.e. Mr. Lavian, Mr. Darvish, or Jubilee, Inc. (Jubilee), the current tenant with a right of first refusal. *Id.*

Mr. Lavian objects to the proposed private sale. He claims that the law in this case allows only for the Property to be sold at a public auction. Affidavit in Opposition, ¶¶ 5-10.

Also, Mr. Lavian claims that the Property should not be sold to a third party, but that it should be sold to an insider ( preferably himself). Affidavit in Opposition, ¶ 15.

Mr. Darvish, on the other hand, agrees with the proposed private sale and the appointment of MKRS and GRS. He, however, objects on two points. First, Mr. Darvish objects to the proposed asking price which he believes should be higher. Affirmation in Partial Opposition, ¶¶ 2-4. Mr. Darvish has obtained valuation from another broker, Corcoran Real Estate Group (Corcoran), which valued the Property at \$3,895,000. Affirmation in Partial Opposition, ¶ 4. Accordingly, Mr. Darvish seeks to “ensure that the execution of any order issued by the court requires that the [P]roperty be marketed at a higher price than suggested by [MKRS’s] initial proposal.” *Id.*

Second, Mr. Darvish opposes the Receiver’s proposal to pay a commission even if the purchaser is Jubilee, an existing tenant, or Mr. Darvish, or Mr. Lavian. Affirmation in Partial Opposition, ¶ 5. Such an arrangement, he claims, would violate the terms of the court-approved lease between Jubilee and the Receiver (Lease). Article 38 of the Lease, titled Right of First Refusal, in pertinent part provides:

Accordingly, if at any time during the term of this Lease, Landlord shall receive a bona fide offer from a third person for the purchase of the Real Property, including at auction, which offer Landlord shall desire to accept, Landlord shall promptly deliver to Tenant a copy of such offer . . . , and Tenant may, within thirty (30) days thereafter, elect to purchase the Real Property on the same terms as those set forth in such offer, excepting that Tenant shall be credited, against the purchase price to be paid by the Tenant, with a sum equal to the amount of any brokerage commission, if any, which landlord shall save by a sale to Tenant.

Affirmation in Partial Opposition, Exhibit B. Mr. Darvish interprets this language to conclude that the Lease “expressly contemplated the saving of a commission in the event Jubilee was the successful purchaser.” Affirmation in Partial Opposition, ¶ 7. Likewise, Mr. Darvish argues,

there should be no commission in the event that he or Mr. Lavian are the purchasers because “such sale will not have been generated by any efforts of a real estate broker.” Affirmation in Partial Opposition, ¶ 8. Mr. Landis disagrees. He contends that it would be neither fair nor reasonable to ask MKRS and GRS to use their resources to obtain the best price available and then deny them a commission if an insider purchases the Property. Reply Affirmation by Permanent Receiver in Support of Leave to Appoint a Real Estate Broker and Sell the Property by Negotiated Sale (Reply in Support), ¶ 5. Furthermore, Mr. Landis claims that the Lease does not prohibit a commission and that the brokers’ services will be charged no matter who the eventual purchaser is. Therefore, Mr. Darvish and Mr. Lavian will not be treated differently from Jubilee. Reply in Support, ¶ 6.

#### **Discussion**

##### Private Sale

The court is of the opinion that the negotiated private sale proposed by Mr. Landis should be allowed. Pursuant to BCL § 1206(b)(2), a permanent receiver has the power “to sell at public or private sale all the property vested in him, in such manner and on such terms and conditions as the court shall direct . . . .” This language does not restrict the Receiver’s power to sell in case one of the parties objects to the manner of the sale.

The case Mr. Lavian relies on in support of his contention that the law does not allow a private sale here is distinguishable. In *In re Oak Street Mgmt, Inc.*, 307 AD2d 320 (2nd Dept 2003), the Second Department held that “[a]bsent an agreement between the parties to sell the shares of the corporation to each other or to an outside buyer, the only authorized disposition of corporate assets is liquidation at a public sale.” There, however, the Second Department dealt

with the lower court's appointment of a referee for the purposes of valuing a dissolved corporation's property. The Second Department reversed the lower court's decision, explaining that BCL rules do not allow for such an appointment and that since the parties failed to agree to sell the shares to each other, or to an outside buyer, "no appraisal of the value of the corporation's assets was warranted." Here, however, the BCL explicitly allows the Receiver to utilize a private sale. See BCL § 1206 (b) (2).

Another decision by the Second Department relied on in *In re Oak Street* illustrates the distinction. In *Sternberg v Osman*, 181 AD2d 899, 900 (2nd Dept 1992), the Second Department held that "if there is no agreement between the parties within a reasonable time, and no outside buyer of the business as a whole can be found, a liquidation of the corporation's assets by public sale shall be held." That is not the case here, since finding an outside buyer is exactly what Mr. Landis purports to intend to do. Indeed, Mr. Landis wants to hire MKRS and GRS to obtain a substantially higher price for the Property than would otherwise be available at a public sale. This is in accordance with the Second Department's emphasis on "the benefit of the shareholders" in dissolution proceedings pursuant to BCL § 1111(b)(2). *Id.* Therefore, the court agrees with Mr. Landis that a negotiated private sale is in the best interest of the Haslacha estate.

#### Asking Price

The court will not impose a minimum threshold for the asking price. Mr. Darvish has already consented to the appointment of MKRS as a broker, and cannot now try to impose another broker's valuation opinion. As Mr. Landis explained, the MKRS's initial valuation and proposed asking price are both "works in progress." Reply in Support, ¶ 2. Accordingly, Mr. Landis has already asked MKRS to review Concoran's opinion and the comparables on

which it is based. Since its commission is tied to the ultimate success of the sale, MKRS has a strong incentive to seek out the best available price, and the court need not needlessly restrain its business judgment.

#### Brokerage Commission

The court agrees with Mr. Landis' interpretation of the Lease, in that Article 38 does not prohibit a brokerage commission if the current tenant is the successful purchaser. In interpreting a contract provision, a court must "apply the meaning intended by the parties, as derived from the language of the contract in question." *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 (1st Dept 2008). "A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002). Here, as Mr. Landis correctly points out, the language of the Lease does not prohibit a brokerage commission in the event that Jubilee purchases the Property. The Lease merely provides that if the Haslacha estate makes any savings in brokerage fees by a sale to Jubilee, then those savings will be passed onto Jubilee. *See* Affirmation in Partial Opposition, Exhibit B. In the transaction proposed by Mr. Landis, the Haslacha estate will not make any such savings. MKRS and GRS will be hired to obtain a better offer than would otherwise be available. Their services will be used for the benefit of the estate, i.e. Mr. Darvish and Mr. Lavian. It is both fair and reasonable to expect these services to be commissionable.

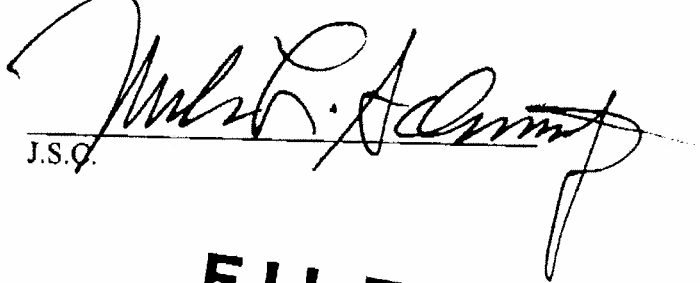
Accordingly, it is

ORDERED that the court's Order is modified to allow the Receiver to sell the Property by negotiated private sale. The Receiver is further granted leave to appoint MKRS and GRS to

assist him in marketing the Property for sale, and to pay them a single 6% brokerage commission of the gross sales price.

Dated: January 19, 2011

ENTER:

  
J.S.C.

**FILED**

JAN 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE