

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ROBERT ABATEMARCO,

Plaintiff,

-against-

ANDREW ABATEMARCO,

Defendant.

ANDREW ABATEMARCO,

Third-Party Plaintiff,

-against-

ROBERT ABATEMARCO and ANTHONY REALTY,

Third-Party Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 006455/13

MOTION DATE: June 17, 2014
Motion Sequence # 004, 005

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Support..... X
Affirmation in Opposition..... XX
Reply Affirmation..... X

Motion by plaintiff Robert Abatemarco to resettle and clarify the court's order of April 15, 2014 is **granted** to the extent indicated below. Cross-motion by defendant Andrew Abatemarco to vacate or modify the preliminary injunction is **denied**.

This is an action by a partner for specific performance of a contract to buy out the other partner's 50 % interest in the partnership. Plaintiff Robert Abatemarco was a 50 % shareholder in Robelan Displays, Inc., which produces indoor advertising display. The other 50 % of the stock was held by Robert's brother, defendant Andrew Abatemarco. On March 29, 2012, the parties entered into a written contract whereby Andrew would sell his 50 % interest in Robelan Displays to Robert for \$300,000. The purchase price was to be paid \$100,000 at the closing and the balance by a note for \$200,000.

Robert and Andrew are each 50 % partners in Anthony Realty, a partnership whose sole asset is a parcel of real estate located at 395 Westbury Boulevard in Hempstead, where Robelan's office is located. Robelan leases the space from Anthony Realty at a rent of \$16,000 per month pursuant to an oral lease. Until the commencement of the present action, the rent was distributed equally to the parties.

Paragraph 13(a) of the stock purchase agreement provides that Robert had a one year option, measured from the closing, to purchase Andrew's 50 % interest in Anthony Realty at a price to be determined by an appraiser, R. D. Geronimo, Ltd. The contract provides that the appraiser is to ignore "Robelan's leasehold interest" and "use comparables in an area within his professional judgment." The appraisal was to be ordered by Robert no later than four months after the closing. The contract provided that the closing would be on or about March 29, 2012. Paragraph 13 provided that "time was of the essence," with regard to the date on which Robert could exercise his option to purchase Andrew's partnership interest. Finally, paragraph 13(b) provides that if Robert's option was not exercised, the property was to be listed for sale with a real estate broker and sold "as soon as practicable."

It appears that the closing of the stock purchase agreement was March 29, 2012. Thus, the option had to be exercised by March 29, 2013, and the appraisal was required to be ordered by July 29, 2012.

Robert did not order the appraisal from DiGeronimo until March 5, 2013. On March 26, 2013, Geronimo issued an appraisal, finding that the "as is fair market value" of the property as of March 11, 2013 was \$1,990,000. The appraisal was based upon recent sales of six comparable industrial buildings, including two in Hempstead. The sales figures were adjusted for condition of the building, utility, and area. On March 29, 2013, Robert served

notice that he was exercising his option to purchase Andrew's interest in Anthony Realty for 50 % of the value of the property, or \$995,000. On April 25, 2013, Andrew rejected Robert's exercise of his option.

This action was commenced by Robert on May 29, 2013. In his first cause of action, plaintiff seeks specific performance of the contract to sell defendant's 50 % partnership interest. The second cause of action is for damages for breach of the agreement to sell defendant's 50 % interest. The third cause of action is to recover plaintiff's 50 % share of the rent which Robelan paid subsequent to April 25, 2013, the date defendant refused to convey his interest in the property.

In his answer, Andrew asserts a counterclaim for breach of fiduciary duty. Andrew alleges that on October 23, 2012, Robert obtained an offer from a third party to purchase the property for \$2,140,000. Robert alleges that on October 22 Andrew received an offer to purchase the property for \$2,507,820, on November 14 he received an offer to purchase for \$2,686,950, and on December 3, 2012 he received an offer for \$2,901,906. Andrew alleges that Robert never disclosed any of these offers to Andrew. Andrew asserts a second counterclaim for fraudulent concealment of these offers. In his third counterclaim, Andrew requests an accounting with respect to the affairs of Anthony Realty. On July 9, 2013, Andrew asserted a third party claim against Robert and Anthony Realty. In the third party claim, Andrew seeks specific performance of the provision of paragraph 13(b), requiring Robert to list the property with a broker, upon his failure to exercise his option.

By order dated August 9, 2013, the court granted plaintiff's motion for a preliminary injunction to the extent of enjoining defendant from evicting Robelan for non-payment of rent or for holding over after the termination of the month-to-month tenancy. Defendant was further enjoined from collecting rent, other than by way of counterclaim in the present action, provided that Robelan paid 50 % of the rent into escrow.

By order dated April 15, 2014, the court granted plaintiff Robert Abatemarco's motion for summary judgment to the extent of declaring that Andrew was obligated to sell his partnership interest in Anthony Realty to Robert for fair market value. The fiduciary relation between partners terminates upon notice of dissolution, even though the partnership affairs have not been wound up (*6D Farm Corp. v Carr*, 63 AD3d 903, 906 [2d Dept 2009]). Robert's agreement to purchase Andrews's interest in Anthony Realty constituted notice of dissolution of the partnership. Thus, after the agreement was executed, Robert was no longer under a fiduciary duty to notify Andrew as to third party offers.

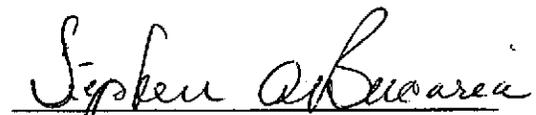
Plaintiff Robert Abatemarco moves to resettle and clarify the order to the extent of declaring that Andrew is obligated to sell his partnership interest at the appraisal price, which is presumably less than the value of the property as of July 29, 2012, when the appraisal was due to be ordered. Although Robert had one year after the closing to exercise his option to purchase, the appraisal was to be ordered within four months of the closing. The contract did not state that time was of the essence with regard to the ordering of the appraisal (ADC Orange, Inc. v Coyote Acres, 7 NY3d 484, 489 [2006]). Nevertheless, it was clearly the intent of the parties that the option price was to be fixed a significant amount of time before the option was to be exercised. He who seeks equity must do equity (Victor Fischel & Co. v R.H. Macy & Co., 20 NY2d 180, 187 [1967]); Lincoln Life & Annuity Co. v Caswell, 31 AD3d 1, 11 [1st Dept 2006] [McGuire, J, concurring]). While Robert's failure to order the appraisal in a timely fashion does not preclude him from obtaining specific performance, Robert should not benefit from his delay in ordering the appraisal. Thus, Robert is required to do equity by paying Andrew fair market value for his interest in the partnership, determined as of the date the appraisal would reasonably have been prepared, had it been timely requested. Accordingly, plaintiff Robert Abatemarco's motion to resettle and clarify the order of April 15, 2014 is **granted** to the extent of declaring that Andrew is obligated to sell his 50% partnership interest in Anthony Realty to Robert for the fair market value of the property as of August 29, 2012.

If the parties cannot agree as to the fair market value of the property as of that date, a hearing shall be conducted on a date to be scheduled by the court. At the hearing, Robert will also be required to show that he was ready, willing, and able to purchase the partnership interest at that price on the date that the option was exercised (ADC Orange, Inc. v Coyote Acres, supra 7 NY3d at 490).

Defendant Andrew Abatemarco moves to vacate or modify the preliminary injunction to the extent of directing that 1) the rents placed in escrow since July 2013 be immediately released to the defendant and 2) the \$16,000 monthly rent be distributed to the parties. However, the purpose of the preliminary injunction is to maintain the status quo. Andrew should not benefit in terms of receiving rental income for the period of time after he was required to convey his interest in the partnership. Defendant's motion to vacate or modify the preliminary injunction is **denied**.

So ordered.

Dated JUN 23 2014


J.S.C.

ENTERED

JUN 23 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE