

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
ROBERT ABATEMARCO,

Plaintiff,

-against-

ANDREW ABATEMARCO,

Defendant.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 006455/13

MOTION DATE: July 8, 2013  
Motion Sequence # 001

The following papers read on this motion:

Order to Show Cause.....	X
Affidavit in Opposition.....	X
Memorandum of Law.....	X

Motion by plaintiff Robert Abatemarco for a preliminary injunction is **granted** to the extent indicated below.

This is an action for specific performance of a contract to sell a 50 % interest in a 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 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 the 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.

Paragraph 13 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. Finally, paragraph 13 provided that time was of the essence, with regard to the date on which Robert would exercise his option to purchase Andrew's partnership interest.

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

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 buildings located in Freeport, New Hyde Park, Hicksville, Mineola, and two in Hempstead. The sales figures were adjusted for condition of the building, utility, and area. Robert exercised his option to purchase Andrew's interest in the partnership on March 29, 2013.

On April 25, 2013, Andrew rejected the appraisal on the ground that it was based on a "sales comparison" approach and an income approach was not utilized.

This action for specific performance of the contract to sell defendant's 50 % partnership interest in Anthony Realty was commenced on May 29, 2013. By order to show cause dated June 28, 2013, plaintiff moves for a preliminary injunction, restraining defendant from evicting Robelan from the space or collecting the rent. In the order to show cause, the court temporarily restrained defendant from evicting Robelan for non-payment of rent or for holding over after the termination of a month-to-month tenancy. The court further temporarily restrained defendant from collecting rent, other than by way of counterclaim in the present action, provided that Robelan paid 50 % of the rent into escrow.

In opposition to the motion, defendant asserts that the fair market value of the property is almost \$ 3 million. Defendant further asserts that the appraisal, or the ordering of the appraisal, was untimely.

The purchaser may obtain specific performance of a contract to convey realty, if he shows that he was ready, willing, and able to perform his contractual obligations (ADC Orange, Inc. v Coyote Acres, 7 NY3d 484, 490 [2006]). A contract to convey realty is not indefinite merely because the sales price was to be set by a neutral evaluator, according to an objective standard (166 Mamaroneck v 151 E Post, 78 NY2d 88, 92 [1991]). In contracts to convey real estate, time is not ordinarily of the essence, unless the agreement so provides (ADC Orange, Inc. v Coyote Acres, supra, 7 NY3d at 489). Since the sole asset of Anthony Realty was a parcel of real estate, plaintiff may obtain specific performance of the contract to purchase defendant's partnership interest according to these same standards.

The contract provided that plaintiff was to order an appraisal within four months of the closing. Once the appraisal was ordered, the completion of the appraisal was outside plaintiff's control. Although plaintiff's option was required to be exercised within one year of the closing, the contract did not require the appraisal to be obtained within a particular period of time. In any event, time was not of the essence with regard to the obtaining of the appraisal. By ordering the appraisal in timely fashion, plaintiff complied with the condition precedent to defendant's obligation to convey. The court further concludes that plaintiff was ready, willing, and able to conclude the sale.

Because the lease was not an arm's length transaction, the contract properly instructed the appraiser to ignore the current rent and value the property according to the comparable sales method. The contract required the appraiser to set the purchase price according to an objective standard. Because the premises is Robelan's principal place of business, it would be irreparable harm for plaintiff to be evicted from the premises.

Accordingly, plaintiff's motion for a preliminary injunction is **granted** to the extent that the temporary relief granted by the court is continued, pending final judgment in the action. Defendant is preliminarily enjoined from evicting Robelan for non-payment of rent or for holding over after the termination of a month-to-month tenancy. Defendant is further enjoined from collecting rent, other than by way of counterclaim in the present action, provided that Robelan pays 50 % of the rent into escrow.

Please be advised that a Preliminary Conference has been scheduled for September 27, 2013 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference shall be fully versed in the factual background and their client's schedule for the purpose of setting firm deposition dates.

Dated AUG 09 2013

  
J.S.C.

**ENTERED**

AUG 13 2013

NASSAU COUNTY  
COUNTY CLERK'S OFFICE