

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

**TRIAL/IAS, PART 1
NASSAU COUNTY**

ROBERT ABATEMARCO,

INDEX No. 006455/13

Plaintiff,

**MOTION DATE: March 28, 2014
Motion Sequence # 002, 003**

-against-

ANDREW ABATEMARCO,

Defendant.

ANDREW ABATEMARCO,

Third-Party Plaintiff,

-against-

**ROBERT ABATEMARCO and ANTHONY
REALTY,**

Third-Party Defendants.

The following papers read on this motion:

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

Motion by plaintiff Robert Abatemarco for summary judgment is granted to the extent indicated below. Cross-motion by defendant Andrew Abatemarco for summary judgment dismissing the complaint is denied.

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 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 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(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 would 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 appraisal was required to be ordered by July 29, 2012.

Robert contacted Richard DiGeronimo, the president of Geronimo, on 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 the partnership 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.

Plaintiff moves for summary judgment with respect to his claims, including the cause of action for specific performance, and the dismissal of defendant's counterclaims. Defendant cross moves for summary judgment dismissing the complaint and granting defendant judgment on his counterclaims and third party claim. Andrew argues that Robert was under a fiduciary duty to disclose the higher offers and his ordering of the appraisal was untimely.

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 Andrew's interest in Anthony Realty constituted notice of dissolution of the partnership, regardless of whether the parties denominated it in that manner. Thus, after the agreement was executed, Robert was no longer under a fiduciary duty to notify Andrew as to third party offers.

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]). In contracts to convey real estate, time is not ordinarily of the essence, unless the agreement so provides (Id 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. The contract does not state that time was of the essence with regard to the ordering of the appraisal. Nevertheless, 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]). Although Robert's failure to order the appraisal in a timely fashion does not preclude him from obtaining specific performance, he must do equity by paying Andrew fair market value for his interest in the property. The court concludes that Robert is ready, willing, and able to purchase the property on those terms.

Accordingly, plaintiff Robert Abatemarco's motion for summary judgment is granted to the extent of declaring that Andrew is obligated to sell his partnership interest in Anthony Realty to Robert for fair market value. Defendant Andrew Abatemarco's motion for summary judgment dismissing the complaint is denied.

So ordered.

Dated APR 15 2014

Susan A. Saccoccia
J.S.C.

ENTERED

APR 17 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE