

At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd of April 2017.

PRESENT:
HON. SYLVIA G. ASH,
Justice.

-----X
DORINE BORIELLO, individually, and as Trustee of the Lo Conte Family Irrevocable Trust f/b/o Dorine Borriello, and derivatively on behalf of CATERINA REALTY LLC

Plaintiffs,

Decision / Order

- against -

Index No. 503180/2013

MICHAEL LOCONTE, individually, and as Trustee of the Lo Conte Family Irrevocable Trust f/b/o Michael LoConte, DIANE SCHMIDT, individually, and as Trustee of the Lo Conte Family Irrevocable Trust f/b/o Diane Schmidt, and MARIA PENNEY SELIGSON, individually, and as Trustee of the Lo Conte Family Irrevocable Trust f/b/o Maria Penny Seligson, SOUTH 4TH STREET CONDOS, LLC,

Defendants,

- and -

CATERINA REALTY, LLC and THE LO CONTE FAMILY IRREVOCABLE TRUST,

Nominal Defendants.

-----X
The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

_____ 1
_____ 2

Plaintiff, Dorine Borriello, moves pursuant to CPLR §4404(b), to set aside this Court's August 16, 2016 decision, granting Defendants' motion for a directed verdict dismissing Plaintiff's amended complaint. Defendants, Michael LoConte, Diane Schmidt, Maria Penney Seligson and Caterina Realty, LLC ("Caterina" and collectively, "Defendants") oppose. For the reasons set forth below, Plaintiff's motion is DENIED.

Background

Plaintiff commenced this derivative action on behalf of Caterina, a corporation that owns and operates real property located at 8801 Foster Avenue, Brooklyn, New York (the "Property"). The Individual Defendants and Plaintiff each own twenty-five percent interest in Caterina. The action arises out of a transaction in which Defendants, acting on behalf of Caterina, leased the Property to Jersey Lynne Farms, Inc. ("Jersey Lynne"). Both Plaintiff and Defendants are interest holders in Jersey Lynne.

In her amended complaint, Plaintiff alleged that the lease, entered into on December 13, 2011, was structured to the disadvantage of Caterina and for the benefit of Jersey Lynne. Plaintiff claimed that the annual \$342,000 rent called for by the lease, was substantially below fair market value. Further, Plaintiff claimed that the lease improperly assigned certain expenses to Caterina instead of Jersey Lynne. Plaintiff's amended complaint alleged breach of fiduciary duty and self-dealing on the part of Defendants.

On September 19, 2013, Defendants moved to dismiss the lawsuit, alleging that Plaintiff's claim was barred by Caterina's operating agreement. According to Defendants, the operating agreement prevented Plaintiff from challenging the lease because it was approved by a majority of Caterina's interest holders. On February 24, 2014, Hon. Carolyn Demarest denied Defendants' motion, finding that the provision of the operating agreement cited by Defendants was insufficient to require the dismissal of Plaintiff's claim. On April 29, 2014, Defendants once again moved to dismiss the action. Defendants argued that they did not breach their fiduciary duty because they had relied on the recommendation of a certified appraiser, Malcolm Newman of M.C. O'Brien, Inc., in approving the lease. By an Order dated July 9, 2014, Judge Demarest denied that motion on the grounds that it should have been brought as a motion to reargue and that it was untimely.

In August of 2016, this Court presided over a bench trial in this matter. In her direct case, Plaintiff testified that she had objected to the use of Mr. Newman's appraisal on the grounds that the appraisal was not independent. According to Plaintiff, Mr. Newman's firm had a prior working relationship with Defendants which compromised Mr. Newman's objectivity. Matthew J. Guzowski, a certified appraiser produced by Plaintiff, testified that he performed an appraisal of the Property in December 2014 and determined the fair market value of the rent to be \$560,000 per year. However, Mr. Guzowski demurred when asked by Plaintiff's counsel to testify as to whether Mr. Newman's prior work for Defendants compromised his determination of a \$342,000 market value rent for the Property.

During Plaintiff's case in chief, the Court permitted Mr. Newman to testify out of turn, as a means of accommodating his schedule. After Plaintiff rested her case, Defendants moved for a directed verdict pursuant CPLR to §4401. On August 16, 2016, this Court granted Defendants' motion, finding that Plaintiff had not established breach of fiduciary duty by Defendants. In

rendering its decision, the Court determined that Defendants had relied on Mr. Newman's appraisal in good faith. Additionally, the Court found that Plaintiff had failed to demonstrate that Mr. Newman's prior work for Defendants clouded his professional judgment in rendering his appraisal.

Plaintiff now brings the instant motion to set aside this Court's August 16, 2016 decision. Plaintiff argues that the Court improperly considered Mr. Newman's testimony because Mr. Newman testified out of turn. Further, Plaintiff maintains that the Court's decision violates the "law of the case" doctrine in light of Judge Demarest's prior orders denying Defendants' motions to dismiss. In opposition, Defendants argue that the Court correctly ruled in their favor. Further, Defendants argues that the law of the case doctrine, as cited by Plaintiff is inapplicable. Defendants maintain that Judge Demarest's orders did not rule on the issues that were considered at trial.

Discussion

A motion pursuant to CPLR § 4404 to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise (*see Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021, 1023 [2d Dept 2016]); *Allen v Uh*, 82 AD3d 1025 [2d Dept 2016]). The trial court must decide whether substantial justice has been done, and must look to common sense, experience, and sense of fairness in arriving at a decision (*see Allen v Uh*, 82 AD3d at 1025).

Here, Plaintiff's motion to set aside this Court's decision relies in part, on the alleged error committed during trial in allowing Mr. Newman to testify during Plaintiff's case in chief. However, the sequence of Mr. Newman's testimony does not take away from the substance of this Court's findings. During her case in chief, Plaintiff failed to provide sufficient evidence to demonstrate that Defendants had relied on Mr. Newman's appraisal in bad faith. While Plaintiff testified that Mr. Newman's appraisal was not independent, Plaintiff did not support her claim with competent evidence. Further, Plaintiff's own appraiser, Mr. Guzowski, demurred when asked to corroborate that part of Plaintiff's testimony.

The fact that Mr. Newman had worked for Defendants in the past was insufficient to assail the independence of Mr. Newman's appraisal. Additionally, Plaintiff's claim that the Court was bound by Judge Demarest's prior orders, denying Defendants' motions to dismiss, is without merit. Judge Demarest's orders did not rule on the merits of Plaintiff's case. Rather, the February 24, 2014 Order turned on the sufficiency of Plaintiff's pleadings and the July 9, 2014 Order was denied on procedural grounds. Therefore, Plaintiff's motion is DENIED.

This constitutes the Decision and Order of the Court.

ENTER,



Sylvia G. Ash, J.S.C.

HON. SYLVIA G. ASH, JSC