

Matter of Gohil v Gohil
2012 NY Slip Op 30320(U)
January 23, 2012
Supreme Court, Nassau County
Docket Number: 017824-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**In the Matter of the Application of
PRADIP GOHIL, KANAKSINH VAGHELA and
RAJSHAKTI JADEJA, individually and
as shareholders of Bayside Mini Grocery,
211-12 Northern Blvd., Corp., BAYSIDE MINI
GROCERY and 211-12
NORTHERN BLVD., CORP.,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 017824-10
Motion Seq. No: 4
Submission Date: 11/22/11**

Petitioners-Plaintiffs,

**For the Judicial Dissolution of
BAYSIDE MINI GROCERY and 211-12
NORTHERN BLVD., CORP.,**

- against -

**PRATAP GOHIL, UDAYSINH GOHIL and
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE,**

Respondents-Defendants.

-----X

Papers Read on this Motion:

- Order to Show Cause, Affidavits in Support,**
- Affirmation in Support and Exhibits.....X**
- Affirmation in Support.....X**
- Affirmation in Opposition and Affidavit in Opposition.....X**
- Affirmation in Opposition and Affidavits in Opposition.....X**
- Reply Affidavit and Exhibit.....X**
- Correspondence dated November 16, 2011.....X**
- Correspondence dated November 22, 2011.....X**
- Correspondence dated November 22, 2011.....X**

This matter is before the court on the Order to Show Cause by Greg S. Zucker, Esq., the Court-appointed receiver (“Receiver”) in this action, filed on October 24, 2011 and submitted on November 22, 2011. For the reasons set forth below, the Court grants the Order to Show Cause to the extent that the Court directs that 1) the Court-ordered auction shall be re-opened on a limited basis to permit Pradip and Eastend each to submit to the Receiver separate one time sealed bids **on or before 5:00 p.m. on February 17, 2012** reflecting his/its highest and best offer, which shall not be less than \$2,600,000, and the Receiver is permitted in his sole discretion to accept whichever offer (the Pradip Offer, or the new offer(s) by Respondents and/or Eastend) is higher and better, whether the transaction be as a stock redemption or deed transfer; and 2) if no further bids are obtained in the reopened auction, the Receiver is authorized to accept the Pradip Offer. **No extensions will be granted with respect to the February 17, 2012 deadline.**

BACKGROUND

A. Relief Sought

The Receiver moves for an Order permitting the Receiver to 1) accept the offer submitted by Petitioners-Plaintiffs (“Petitioners”) Pradip Gohil (“Pradip”) and Kanaksinh Vaghela (“Kenny”) on September 8, 2011 to purchase the property (“Property”) at issue, located at 211-12 Northern Boulevard, Bayside, New York, for \$2,500,000.00 through the redemption of the shares of stock in 211-12 Northern Blvd. Corp. owned by Respondents-Defendants (“Respondents”) Pratap Gohil (“Pratap”) and Udaysinh Gohil (“Udaysinh”) (“Pradip Offer”); 2) sign the Redemption Agreement (Ex. I to Zucker Aff. in Supp.);¹ and 3) close on the Redemption Agreement pursuant to the terms and conditions contained therein.

Alternatively, the Receiver asks that, in the event that the Court determines that the offer submitted by Eastend Hospitality (“Eastend”) to purchase the Property for \$2,600,000.00 should be considered even though it was not timely submitted, 1) the Court-ordered auction be re-opened on a limited basis to permit Pradip and Eastend each to submit to the Receiver separate one time sealed bids on a date certain reflecting his/its highest and best offer, which shall not be

¹ As noted *infra*, the Receiver has provided a copy of a modified Redemption Agreement (Ex. M to Zucker Reply Aff.) which addresses the issue of the Receiver’s fee in connection with the sale of the Property, which was inadvertently omitted from the initial Redemption Agreement.

less than \$2,600,000, and the Receiver be permitted in his sole discretion to accept whichever offer is higher and better, whether the transaction be as a stock redemption or deed transfer; and 2) if no further bids are obtained in the reopened auction, the Receiver be authorized to accept the Pradip Offer.

B. The Parties' History

The parties' history is set forth at a length in a prior decision of the Court dated October 20, 2010 ("Prior Decision"). The Court incorporates the Prior Decision herein by reference.

On April 27, 2011, the Court signed the Order Appointing Receiver (Ex. A to Zucker Aff. in Supp.). In that Order, the Court appointed the Receiver for the purposes of selling the business known as Bayside Mini Grocery ("Company") and the Property. On July 15, 2011, the Court signed an Order authorizing the Receiver to hire Colliers International LI Inc. ("Colliers") as a real estate broker to list, market and sell the Property subject to the terms and conditions provided for in the proposed brokerage agreement with Colliers (*id.* at Ex. B) ("July Order"). In the July Order, the Court further ordered that the Property shall be listed, marketed and sold subject to the following terms and conditions:

- 1) the initial listing price of the Property shall be \$2,600,000.00.
- 2) In consultation with Colliers, the Receiver shall have the authority to reduce the initial listing price for the Property in his sole and absolute discretion.
- 3) During the initial six-month period after the Property is listed for sale by Colliers, which six-month period shall commence on the first day that the Property is publicly listed for sale by Colliers (the "Initial Marketing Period"), the Receiver shall be authorized to accept any offer to purchase the Property in the amount of \$2,000,000.00 or more.
- 4) After the Initial Marketing Period, the Receiver shall be authorized to accept any offer to purchase the Property which he determines in his sole and absolute discretion, in consultation with Colliers, to be the highest and best offer to purchase the Property.
- 5) Upon receipt of an offer to purchase the Property, the Receiver shall notify the parties within two (2) business days. The Receiver shall provide such notice to the parties (through their counsel, if such party has retained counsel) by electronic mail and/or facsimile transmission. Such notice shall be deemed to be received by the parties on the day that the electronic mail and/or facsimile transmission is sent.

- 6) The parties shall have the right to match any offer to purchase the Property within ten (10) days after receiving notice of the offer, provided that, in addition to matching all terms of the offer (including the offer amount), the party matching the offer shall make an offer in an additional amount of at least \$75,000 over and above the offer amount.
- 7) If both parties match an offer to purchase the Property as provided for *supra*, the Receiver shall provide the parties (through their counsel, if such party has retained counsel) with notice by electronic mail and/or facsimile transmission that they have each made matching offers within two (2) business days after receiving offers from both parties. Such notice shall be deemed to be received by the parties on the day that the electronic mail and/or facsimile transmission is sent.
- 8) Within five (5) days of receiving such notice, the parties shall have the right to make their highest and best offer to purchase the Property. The Receiver will be under no obligation to accept the highest and best offer made by any party to purchase the Property in accordance with the terms of this paragraph unless the Receiver, in consultation with Colliers, determines in his sole and absolute discretion that such offer is the highest and best offer to purchase the Property.

In support of the instant application, the Receiver affirms that, prior to his appointment, the parties retained Michael Haberman Associates Inc. to perform an appraisal of the Property. A copy of that appraisal (Ex. C to Zucker Aff. in Supp.) reflects a final estimate of market value of \$2,030,000. In addition, Colliers assessed the market valuation of the Property as \$2,000,000. Thereafter, Colliers conducted a public marketing campaign to elicit offers from third parties to purchase the Property.

Pursuant to the July Order, on August 18, 2011, Judy Chiang made an offer to acquire the Property for \$2,400,000 ("Chiang Offer") (Ex. D to Zucker Aff. in Supp.). Zucker advised the parties with notice of, and an opportunity to match, the Chiang Offer. On September 8, 2011, Pradip and Kenny (collectively "Pradip"), through counsel, exercised their right to purchase the Property in the amount of \$2,500,000.00. The Pradip Offer (*id.* at Ex. F) matched the terms and conditions of the Chiang Offer, but also added that the acquisition of the Property would be through a Stock Redemption Agreement pursuant to which Respondents would redeem the 30% interest in 211-12 Northern Boulevard Corp. ("Corporation") and Plaintiffs would own 100% of the Corporation. In the event that the Property were sold through a stock sale in which less than 50% of the stock was sold, there would be no transfer tax due which would result in an approximate savings of \$75,000.00. The Receiver concluded that the Pradip Offer was the

higher and better Offer.

The Receiver received no other offers from the Respondents. Colliers advised the Receiver that the Pradip Offer represented a price “significantly higher than what it believed the market value of the Property to be” (Zucker Aff. in Supp. at ¶ 10). On September 9, 2011, the Receiver advised Respondents’ counsel that he had not received an offer from Respondents, and Respondents’ counsel responded via email dated September 9, 2011 (*id.* at Ex. G) that the Respondents decided not to make an offer. That same day, the Receiver advised all interested parties of the Pradip Offer and instructed counsel for Plaintiffs to contact counsel for the Receiver (“Receiver’s Counsel”) to discuss memorializing the transaction (“Transaction”). The Receiver’s Counsel and Pradip’s Counsel negotiated the Redemption Agreement, which reduces the Transaction to a written agreement.

Subsequently, on September 22, 2011, Respondents’ counsel advised the Receiver that the Respondents opposed the terms of the Transaction on several grounds including that the Chiang Offer was preferable because it was an outright purchase as opposed to a stock redemption agreement. Respondents’ Counsel also advised the Receiver that the Respondents were offering to purchase the Property outright for \$2,500,000 (“Respondents’ Offer”). The Receiver concluded that the Pradip Offer was still the higher and better offer because of the tax savings it provided.

On October 6, 2011, counsel for Eastend submitted an offer to the Receiver for Eastend to purchase the stock of the Corporation that owns the Property for \$2,575,000.00 through a stock sale and a 90 day closing period (“First Eastend Offer”). Receiver’s Counsel advised the Receiver that, due to the transfer tax implications of the First Eastend Offer, the Pradip Offer remained the higher and better offer. On October 14, 2011, the Receiver received a second offer from Eastend (“Final Eastend Offer”) which involved a \$2,600,000.00 purchase price, sale of the Property outright and 60 day closing period. The Final Eastend Offer was made 37 days after the Receiver had completed the Court-ordered auction, and after the Receiver had received the Pradip Offer. The Receiver also affirms that, before Eastend submitted its Final Offer, counsel for Eastend spoke with Receiver’s Counsel and advised him that Pratap Gohil was sitting in his office although the Receiver does not know whether there is a relationship between Pratap Gohil and Eastend.

Receiver's Counsel affirms the truth of the allegations in the Receiver's Affidavit regarding the Offers extended for the Property. Receiver's Counsel affirms that the Chiang and Pradip Offers were the only offers submitted to the Receiver during the Court-Appointed Auction. He believes that the Pradip Offer is the higher and better offer, and so advised the Receiver.

At the Receiver's request, Receiver's Counsel evaluated the Respondents' Offer even though it was untimely. Receiver's Counsel is of the opinion that the Respondents' Offer was not a higher and better offer than the Pradip Offer in light of the fact that, under the Respondents' Offer, the net amount distributable to the shareholders of the Corporation would be lower, in light of transfer tax obligations. Receiver's Counsel is also of the opinion that the First Eastend Offer was not a higher and better offer in light of the transfer tax implications, and the fact that it contained a longer closing period than the Pradip Offer.

Receiver's Counsel affirms, further, that although the Final Eastend Offer may be a higher and better offer than the Pradip Offer, it was made 36 days after the Court-Ordered Auction had been completed and after the Receiver had accepted the Pradip Offer. Receiver's Counsel also confirms that Eastend's counsel advised Receiver's Counsel that Pratap Gohil was sitting in his office during their conversation, although Receiver's Counsel does not know whether there is a connection between Pratap Gohil and Eastend.

In support of the Receiver's application, Petitioners' counsel submits that, over the past several years, Respondents have "demonstrated the desire to take any action, regardless of its frivolity, to prohibit Petitioners from purchasing the Property" (Leon Aff. in Supp. at ¶ 6). As a result, the Court issued the Order appointing the Receiver, which provided the parties with a right of first refusal, subject to certain conditions. Petitioners' counsel affirms the truth of the affirmations of the Receiver regarding the Chiang Offer, Pradip Offer and the other procedural history of this matter.

Petitioners' counsel expresses his belief that Eastend is an alter ego of Respondents, which he contends is supported by Eastend's Offer to purchase the Property as a stock sale. Petitioners' counsel submits that it is "highly unusual" (Leon Aff. in Supp. at ¶ 25) for a third party with no relationship to the principals to purchase their shares and assume their liabilities. Petitioners' counsel also submits that the Pradip Offer is the best offer as a result of the tax

savings to all parties.

In opposition, Pratap and Udaysinh affirm, *inter alia*, that 1) on or about August 22, 2011, they received the Receiver's letter providing them with the opportunity to match the Chiang Offer, but were unable to secure sufficient funds to match the offer by the deadline of September 8, 2011; 2) from June of 2011, in anticipation of raising funds to make an offer on the Property, they attempted to borrow money from banking institutions but were unable to do so, allegedly due to Petitioners' failure to provide them with certain necessary financial documentation ("Documentation"); 3) they obtained this Documentation in September of 2011 but, at that point, it was too late to secure financing to match the Chiang Offer; 3) the Pradip Offer did not match the terms of the Chiang Offer, and in fact was "considerably less" than the Chiang Offer ("Pradip Aff. in Opp. at ¶ 11), because the Chiang Offer involved a straight deed transfer whereas the Pradip Offer involved the redemption of stock; 4) the Pradip Offer is not, in fact, an offer made by Pradip, but rather by the Corporation; 5) permitting the Receiver to proceed with the Pradip Offer would be in contravention of the provisions of the July Order which makes no reference to the option of a stock redemption agreement; 6) even if the Court permits the Receiver to accept the Pradip Offer, Respondents have the right to have the Redemption Agreement reviewed by their own attorney; and 7) alternatively, if the Court determines that the Final Eastend Offer should be considered, the bidding should be reopened on a limited basis to permit Pradip and Eastend to submit bids on the Property.

Also in opposition to the Receiver's application, Harshad Patel ("Patel"), the managing member of Eastend, affirms, *inter alia*, that 1) Eastend is a real estate holding company owned by Patel and his family, and is not an alter ego of Pratap and Udaysinh; 2) after submitting its First Offer, Eastend's counsel received no response from the Receiver or his Counsel; 3) on October 14, 2011, Patel directed his counsel to contact Receiver's Counsel to determine the status of the bidding process; 4) Receiver's Counsel never advised Eastend's Counsel that he had accepted the Pradip Offer and sent out the contract; 5) on October 14, 2011, Eastend submitted its Final Offer; 6) the Final Eastend Offer is the highest and best offer, and the parties would not be prejudiced if the Court were to direct the Receiver to consider the Final Eastend Offer. Eastend's Counsel affirms the truth of Patel's affirmations, including his claim that Receiver's Counsel did not advise Eastend's Counsel that the Pradip Offer was accepted and the contract

had been sent out.

In reply, the Receiver disputes Respondents' claim that his acceptance of the Pradip Offer was not in the best interest of the parties or was contrary to the July Order. The Receiver affirms that he personally met with the parties and their counsel on multiple occasions to determine a process to sell the Property that would be satisfactory to all parties and their counsel. The parties and their counsel agreed to the terms of the July Order.²

The Receiver further affirms that, in accordance with the July Order, he notified everyone of the Chiang Offer and invited them to match the Chiang Offer so long as any subsequent offers were \$75,000 greater than the Chiang Offer. As reflected by the September 9, 2011 email from Respondents' Counsel, Respondents elected not to match the Chiang Offer. Notwithstanding Respondents' claims regarding their need for documentation to obtain a loan, Respondents never requested an extension of time to make a bid. The Receiver also notes that he facilitated Petitioners providing the Documentation to Respondents.

The Receiver also describes as "meritless" (Zucker Reply Aff. at ¶ 6) Respondents' claim that the Receiver's request to enter into the Redemption Agreement should be denied because it does not provide that, upon the sale of the Property, all liens, encumbrances and governmental violations of the Property are satisfied. The Receiver submits that 1) by avoiding the obligation to provide clean title, his ability to effectuate the sale of the Property is enhanced; 2) the Redemption Agreement contemplates the sale of Respondents' stock, which renders issues of clean title irrelevant because the purchaser acquires the stock subject to all of its attendant liabilities; and 3) as the proposed sale involves Respondents selling their stock, Respondents should have no concerns with a clean title.³

The Court is also in possession of correspondence from Receiver's Counsel, Petitioners' Counsel and Eastend's Counsel dated November 16 and November 22, 2011. In that correspondence, Receiver's and Petitioners' Counsel take the position that it is appropriate for the Receiver to consider the tax consequences in evaluating the highest and best offer. Eastend's

² The Receiver notes that Respondents were represented by predecessor counsel when the parties agreed to the Court-approved auction process.

³ The Receiver also notes that the Redemption Agreement neglects to include a provision regarding the manner in which the Receiver should be paid in connection with the sale of the Property, and provides a revised Redemption Agreement (Ex. M to Zucker Reply Aff.) that cures this oversight.

Counsel submits that the Receiver should not consider the tax consequences in determining the highest and best offer.

C. The Parties' Positions

The Receiver submits that the Court should grant his application in light of the fact that, pursuant to the July Order, he has determined that the Pradip Offer is the highest and best offer for the Property. The Receiver contends that he should not be required to consider the Final Eastend Offer in light of the fact that it was not submitted within the time period set forth in the July Order, and was submitted after he accepted the Pradip Offer.

Petitioners join in the Receiver's application submitting, *inter alia*, that 1) a valid and binding contract was created following the Receiver's acceptance of the Pradip Offer; 2) the Court should permit the Receiver to proceed with the Pradip Offer in light of the fact that it was timely, and because the Receiver determined that it was the best offer; 3) in reliance on the Receiver's acceptance of the Pradip Offer, Pradip sought financing from several banking institutions; and 4) the Court's Orders appointing the Receiver and specifying his authority would be rendered meaningless if the Court were to entertain the Eastend Offer, which was untimely and is not the best and highest offer.

Respondents oppose the Receiver's application submitting, *inter alia*, that 1) the Receiver's determination is not in the best interest of the parties and is contrary to the July Order; 2) Respondents' efforts to obtain financing to purchase the Property was adversely affected by Petitioners' delay in providing necessary Documentation; 3) the Receiver should have rejected the Pradip Offer on the grounds that it did not match the terms of the Chiang Offer, was not actually an offer from Pradip but rather from the Corporation, and would be in contravention of the terms of the July Order regarding the escrowing of proceeds from a sale of the Property; 4) Respondents were not aware, during the Court-ordered bidding period, that the July Order permitted the option of an offer that involved stock redemption; and 5) even if the Court permits the Receiver to accept the Pradip Offer, Respondents must be given the opportunity to have the Redemption Agreement reviewed by a transaction attorney who is experienced in the purchase and sale of commercial real estate through stock purchase agreements.

Eastend opposes the Receiver's application submitting, *inter alia*, that 1) the Receiver violated the July Order by accepting the Pradip Order which is not an offer to purchase the

Property in the amount of \$2,000,000.00 or more because of the use of the stock redemption; 2) the Receiver's power to apply the standard of his "sole and absolute discretion" regarding the highest and best offer does not come into effect until after the Initial Marketing Period of 6 months expires, pursuant to paragraph 4 of the July Order; 3) the Receiver and Petitioners should be estopped from asserting that the Final Eastend Offer is untimely in light of the fact that the Receiver and his Counsel never advised Eastend's Counsel that the bidding process was completed and the Receiver had already accepted an offer; 4) it is clear that the Final Eastend Offer is the highest and best offer, and the parties would not be prejudiced if the Court were to direct the Receiver to consider the Final Eastend Offer; and 5) no contract was entered into regarding the Pradip Offer in light of the fact that it is contingent on Respondents agreeing to enter into a Stock Redemption Agreement, to which they do not agree.

RULING OF THE COURT

A receiver is a fiduciary and an officer of the court who acts at its direction and on its behalf. *Coronet Capital Co. v. Spodek*, 279 A.D.2d 600, 602 (2d Dept. 2001), citing, *inter alia*, *Insurance Co. v. City of New York*, 71 N.Y.2d 983 (1988). The Court concludes that the Receiver, in determining the best and highest offer, properly considered the tax consequences of the Offers, and may consider those tax consequences, as well as any other factors he deems appropriate, in complying with the Court's directions herein. The Court further determines, however, that there is some ambiguity in the July Order regarding whether the Receiver had the discretion to accept an offer to purchase the Property that was not a straightforward purchase of the Property, but rather involved the redemption of stock, as set forth in the Pradip Offer. In light of that ambiguity, the claims by Respondents and Eastend that the Receiver did not adequately consider their Offers and the Receiver's concession that the Final Eastend Offer may be the highest and best Offer, the Court will grant the Receiver's alternative application for relief. Accordingly, the Court directs that 1) the Court-ordered auction shall be re-opened on a limited basis to permit Pradip and Eastend each to submit to the Receiver separate one time sealed bids **on or before 5:00 p.m. on February 17, 2012** reflecting his/its highest and best offer, which shall not be less than \$2,600,000, and the Receiver is permitted in his sole discretion to accept whichever offer (the Pradip Offer, or the new offer(s) by Respondents and/or Eastend) is higher and better, whether the transaction be as a stock redemption or deed transfer; and 2) if no further

bids are obtained in the reopened auction, the Receiver is authorized to accept the Pradip Offer.

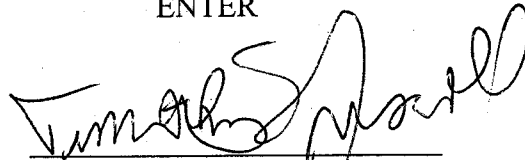
No extensions will be granted with respect to the February 17, 2012 deadline.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
January 23, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 30 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE