[Cite as *Variable Annuity Life Ins. Co. v. 113 St. Clair Properties*, 2010-Ohio-5373.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94901

VARIABLE ANNUITY LIFE INSURANCE COMPANY

PLAINTIFF-APPELLEE

vs.

113 ST. CLAIR PROPERTIES, ET AL.

DEFENDANTS-APPELLEES

[Appeal by: Midwest Real Estate Partners, L.L.C.]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-529384

BEFORE: Rocco, P.J., Boyle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 4, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} In this appeal assigned to the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1, appellant Midwest Real Estate Partners, L.L.C. challenges the trial court's order that denied without a hearing Midwest's

"Application for an order approving the payment of a brokerage fee." Midwest sought a brokerage sales commission after the property located at 113 St. Clair Avenue, Cleveland, Ohio ("the property") was purchased by substitute-plaintiff/ appellee L & R Investment Company at a sheriff's sale.

{¶ 2} The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assoc.* (1983), 11 Ohio App.3d 158, 463 N.E.2d 655; App.R. 11.1(E).

{¶ 3} Midwest argues in its sole assignment of error that the trial court abused its discretion in this case by denying its motion without conducting an evidentiary hearing. This court disagrees.

{¶ 4} The record reflects that in early 2004, the original plaintiff, Variable Annuity Life Insurance Company, filed a foreclosure action with respect to the defendant business property and requested the appointment of a receiver. The trial court granted the request and appointed appellee Mark A. Dottore as receiver.

{¶ 5} According to the trial court's amended order of appointment, the receiver was authorized to "effect an orderly sale * * * of the Assets * * *" and to do so "in any manner which he * * * believes will maximize the proceeds received from the sale." The trial court further authorized the receiver "to employ any * * * agents * * * deemed necessary" to assist him in executing his duties.

{¶ 6} On September 20, 2004, the receiver executed an "Exclusive Listing

Agreement" with appellant Midwest for the lease and/or sale of the property, subject to "the terms and conditions" set forth. The receiver was designated in the agreement as the "Owner." Article II of the agreement stated in pertinent part as follows:

{¶ 7} "2.1 Duration. The term ("**Term**") of this Agreement shall commence on the date hereof and shall continue for a period of two years. This agreement shall be subject to earlier termination as hereinafter set forth in this Article II. *If not earlier terminated*, this agreement shall continue on a year-to-year basis after the expiration of the term from the date hereof *until terminated* by *either* party * * *.

{¶ 8} "2.2 Termination by Owner

{¶ 9} "2.2.1 By Owner on Occurrence of Specific Events. Owner may terminate this Agreement on not less than ten days' prior written notice of termination to Broker at any time after:

{¶ 10} "* * *

{¶ 11} "C. Disposition. All or substantially all of the * * * Business Property shall have been disposed of or sold.

{¶ 12} "2.4.1. Effect of Termination. Termination of this Agreement shall terminate all rights and obligations of the parties hereunder, except that Owner shall pay to Broker when and *if due and payable, subject to * * * Article III, all * * * sales commissions which shall have been earned* prior to such termination * * *."

(Underlining in original; italics added.)

{¶ 13} Article III of the agreement pertained to Midwest's obligations with respect to the sale of the property. Paragraph 3.3 stated that, if Midwest introduced the "Owner" to the party with whom he decided to close a transaction, Midwest would be paid a commission.

{¶ 14} Article V, paragraph 3 pertained to the "Sales Commission" for a purchase. This paragraph provided: "If [Midwest] finds a Purchaser ready, willing, and able to purchase [the property], at the price and terms acceptable to the Owner:

{¶ 15} "A. The Owner agrees to pay the Broker a fee of 4 percent ('Fee') of the sales price * * *

{¶ 16} "B. The Fee shall be paid to [Midwest]: (i) whether the other Person that is a party to the transaction is found by [Midwest], the Owner, or any other Person, or, (ii) if the Owner agrees to sell, exchange or otherwise transfer or convey [the property] * * * within one year after the termination of this Agreement ('Carryover Period') to a Person who was submitted to the Owner

{¶ 17} * * by [Midwest] and whose or which name appears on any list of Persons ('Registration List') which [Midwest] shall have mailed or delivered to Owner within 10 days following the expiration of the term of this Agreement. * * *."

(Underlining sic.)

{¶ 18} On February 6, 2006, the trial court issued a decree of foreclosure

with respect to the property.

{¶ 19} On July 6, 2006, the receiver notified Midwest in writing of the "election to terminate the Agreement at the end of the Term," and "effective September 30, 2006."

{¶ 20} On September 8, 2006, the original plaintiff in the action filed a motion to substitute appellee L & R Investment Company, the company to which the plaintiff had assigned the mortgage note and all interest in the proceeding, as plaintiff.

{¶ 21} On September 11, 2006, the Cuyahoga County Sheriff sold the property at public auction. L & R purchased the property for $4,466,667. The trial court issued a decree of confirmation of the sale on September 20, 2006.

{¶ 22} On December 8, 2006, Midwest filed its application in the trial court for an order approving the payment of a brokerage fee to it with respect to the sale of the property. Midwest alleged it "faithfully performed all obligations required of it under the Agreement." Midwest requested a fee in the amount of $178,666.68. However, Midwest neither verified the documents attached to its application, nor submitted a complete copy of the brokerage agreement, nor requested an oral hearing.

{¶ 23} After L & R filed an "objection" and a motion for summary judgment with respect to Midwest's application, Midwest responded with an opposition brief, and, subsequently, an additional brief in support of its application. The last line

in Midwest's "Response in Opposition to Plaintiff L & R Investment Company's Motion for Summary Judgment" finally indicated that Midwest requested the "scheduling of an oral hearing on Midwest's pending application for brokerage fees."

{¶ 24} Midwest attached several exhibits to these briefs, but never provided any evidence that it obtained a purchaser for the property. The receiver eventually filed a response to Midwest's application, pointing out the omission. The receiver thus asked the trial court to deny Midwest's application.

{¶ 25} Ultimately, on March 9, 2010, the trial court issued a journal entry denying Midwest's application. Midwest argues in this appeal that the trial court abused its discretion in doing so without conducting a hearing. This court does not agree.

{¶ 26} Pursuant to Loc.R. 11(A), the trial court was not obligated to conduct an oral hearing. *Starr v. Dotsikas* (Aug. 6, 1998), Cuyahoga App. No. 73201. This rule especially pertains to a matter in which the movant waited so long to request one. *Mahoney v. Robert Thomas Securities, Inc.* (June 15, 1995), Cuyahoga App. No. 67881.

{¶ 27} Moreover, unless the appellant demonstrates that a trial court's judgment was unreasonable, arbitrary, or unconscionable, an appellate court will not disturb a trial court's ruling in a receivership matter. *Campbell Investors v. TPSS Acquisition Corp.*, 152 Ohio App.3d 218, 2003-Ohio-1399, 787 N.E.2d 78,

¶15, citing *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 573 N.E.2d 62.

{¶ 28} A review of the brokerage agreement Midwest entered into with the receiver demonstrates Midwest did not meet the condition precedent to earning its sales commission. Simply put, in order to be entitled to such a fee, Midwest undertook to secure for *the receiver* a purchaser for the property. The record reflects the original plaintiff found the purchaser, not Midwest, and the original plaintiff was not defined as the "Owner" in the agreement.

{¶ 29} Furthermore, Midwest did not submit any evidence to show that it complied with all of its obligations to secure a purchaser for the property. *Farina Realty, Inc. v. Zellers* (Jan. 25, 2001), Cuyahoga App. Nos. 77647 and 78149. The evidence indicates, instead, Midwest focused its attention on obtaining lessees for the property's various office spaces. At most, Midwest informed the receiver during the relevant time period that some entities expressed "interest" in purchasing the property.

{¶ 30} Based upon the foregoing, the trial court did not abuse its discretion in denying Midwest's "application for an order approving payment of a brokerage fee" without conducting a hearing.

{¶ 31} Midwest's assignment of error, accordingly, is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR