Connery v Sultan
2007 NY Slip Op 34512(U)
November 2, 2007
Supreme Court, New York County
Docket Number: 401336/2005
Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

STEPHANE COSMAN CONNERY and
MICHELINE CONNERY,

Plaintiff,

- against -

BURTON S. SULTAN,

Defendant.

Index No.: 401336/2005

DECISION/ORDER

In this action for injunctive relief, appointment of a receiver, and damages, temporary receiver Robert Sikorski ("Receiver") moves for an order authorizing the Receiver to enter into a contract with the low qualifying bidder for repairs previously authorized by an arbitrator, and for other relief. Plaintiffs move for an order, pursuant to CPLR 6401(c), expanding the authority of the Receiver to make all repairs required to maintain the building pursuant to the by-laws of the condominium and confirming the appointment of the Receiver as permanent, and for other relief. Defendant cross-moves to remove the receiver and for other relief. By separate motion, defendant seeks leave to reargue and renew the Receiver's above motion, to the extent that it was determined, in part, by decision and order on the record on August 15, 2007, the transcript of which was so ordered on September 6, 2007 ("August 15, 2007 decision"). Oral argument on the motions was held on September 12, 2007.

The facts relating to this intractable dispute between the owners of a two-unit condominium townhouse have been discussed in numerous prior decisions, and will not be

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repeated here. The August 15, 2007 decision held the branch of the Receiver's motion for approval of a bid in abeyance pending the Receiver's submission of new bids broken down to show how each item corresponds to the items on Revised Exhibit 77 – the document showing the items ordered by the arbitrator to be repaired. The court further directed the Receiver to make a showing, with respect to any items that were not specifically authorized by the arbitrator, of the necessity of such work. (Aug. 15, 2007 Decision at 22.) In ordering the supplemental submissions, the court noted its concern that the current bids are double or more than the bids considered by the arbitrator. (Id. at 7.) The Receiver's supplemental submission contains a report by Maurice Schickler of Preventive Maintenance Inspections, Inc. ("Schickler"), the consultant whom the court previously authorized the Receiver to hire, which sets forth a comparison of the work specified in Exhibit 77 with the items in the bids. However, the actual bids are not attached, and it is not possible to determine from the comparison whether the bids provide for the minimum work necessary to complete the items in Exhibit 77 in a workperson-like manner, or whether the bids include work which might be optimal or desirable given the first-class nature of the dwelling (see By-Laws, § 6.10 [C]), but which is optional or not reasonably necessary to effect the Exhibit 77 repairs.

The court emphasizes that the April 19, 2006 order, in paragraph 2, appointed the Receiver for the limited purpose of performing the repairs previously ordered by the arbitrator. The order, in paragraph 3, granted the Receiver authority to take other actions "for repair or maintenance necessary to the preservation of the property, or otherwise required in the ordinary course of maintenance and the orderly functioning of the Condominium." However, this paragraph merely conferred incidental authority on the Receiver to maintain the building while

the repairs ordered by the arbitrator were being contracted for and effectuated. Thus, the order contemplated "very limited ordinary maintenance as well as the performance of the repairs ordered by the arbitrator." (Aug. 15, 2007 Decision at 24.)

It is within the Receiver's discretion to select a reputable contractor to perform the Exhibit 77 work. The fact that defendant has obtained lower bids does not bar approval of the Receiver's higher bid. As addressed in prior orders, defendant has consistently delayed and continued to oppose effectuation of the work ordered by the arbitrator, and defendant's bids do not appear to cover all of the work in Exhibit 77. Moreover, the Receiver's intent to ensure that the work is properly done and will last (see Sept. 12, 2007 Transcript at 3-10) is entirely proper. However, given the limited purpose for which the Receiver was appointed, the magnitude of the bids, and the amount of the increase of the bids over those considered by the arbitrator, the court deems it prudent and necessary to hold an evidentiary hearing on the Receiver's request for approval of the bid, in order to limit the work to that reasonably necessary to correct the Exhibit 77 items. At the hearing, the Receiver should produce the bids submitted by the contractors, and present a witness, either his consultant and/or his preferred contractor, who is prepared to address this issue.

The court is persuaded that the amount of repairs for ordinary maintenance for which the Receiver may contract without prior court authorization should be increased from $1000 to $5000. The April 19, 2006 order will be amended accordingly. The order will also be amended to incorporate an explicit directive that the Receiver will not incur any expenses for which there are not funds in the Receiver's account or which are not advanced by plaintiffs or defendants. In this regard, it is noted that in light of defendant's refusal to cooperate with the repairs ordered by

the arbitrator, plaintiffs previously represented that they were willing to advance the cost of the repairs.

The court declines at this time to authorize the receiver to perform major building-wide repairs, identified as additional work in the bids obtained by the Receiver, which exceed the Exhibit 77 repairs authorized by the arbitrator. The repairs that the court declines to order at this time include building-wide waterproofing, drainage work, and the complete renovation or replacement, as opposed to repair, of the elevator. In addition, while the New York City Environmental Control Board ("ECB") violation, dated May 3, 2007, must be corrected, this violation was placed under New York City Administrative Code § 27-127 which broadly requires maintenance of a building "in a safe condition." There is nothing on the face of the violation that identifies the specific condition which resulted in the violation or the work necessary to cure the violation. (See Ex. H to Receiver's Motion.) It appears that there was also a Department of Buildings ("DOB") violation of unspecified nature, which defendant may have instigated then certified to have been corrected. (See Sept. 12, 2007 Transcript at 40-42.) The Receiver therefore must obtain written clarification from the ECB and the DOB before such work can be authorized.

Whether the Receiver should effectuate major repairs that were not authorized by the arbitrator cannot be decided until it is determined whether the Receiver's functions should be expanded. As discussed above, the Receiver was appointed for the limited purpose of performing the repairs previously ordered by the arbitrator. Plaintiffs now seek to expand the Receiver's authority to do everything necessary to run the building indefinitely and to undertake major repairs which were not previously considered by the arbitrator, at a cost of hundreds of

thousands of dollars in excess of the cost of the repairs ordered by the Arbitrator. Plaintiffs seek this relief on the basis that plaintiffs and defendant each have one vote on the condominium board, that they are deadlocked on a resolution to remove defendant as president, and that when such a deadlock occurs, "the only available mechanism for removal of a director and officer such as Defendant, is an action brought by the New York State Attorney General's office" which, however, will not become involved in private litigation. (Complaint, Second Cause of Action, ¶¶ 91, 92.) Plaintiffs thus conclude that "the only way * * * to provide for proper corporate governance of the Condominium is for this court to appoint a receiver and referee possessed of full power to decide all issues which cannot be mutually agreed upon by the owners of Unit 1 and 2, to manage and operate the Condominium, and to do all that is necessary or appropriate in the best interest of the Condominium, for the foreseeable future." (Id., ¶ 93.)

While it is undisputed that the condominium board is deadlocked, it is not clear that plaintiffs' remedy is appointment of a receiver for the indefinite future with authority to direct major rehabilitation of the premises. CPLR 6401 provides for appointment of a temporary, not a permanent, receiver. (See generally Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp., 14 AD3d 678 [2d Dept 2005].) Moreover, appointment of a receiver is limited to the circumstances "where there is danger that the property will be removed from the state or lost, materially injured or destroyed." (CPLR 6401[a].) The traditional situations in which a receiver may be appointed include mortgage foreclosure, matrimonial, and partition actions. Plaintiffs cite no authority for appointment in the circumstances presented, and this issue should not be decided without adequate briefing. In addition, the parties must submit legal authority on whether the condominium by-laws by their terms require arbitration of this dispute and, if so,

whether compliance with the arbitration requirement may be excused. Plaintiffs' motion will therefore be held in abeyance pending submission of legal memoranda which address these issues.

Turning to defendant Sultan's cross-motion which seeks, among other relief, to remove the Receiver for lack of impartiality, defendant wholly fails to make a prima facie showing of any impropriety on the part of Receiver Robert Sikorski or to raise a triable issue of fact in this regard. Finally, as to defendant's separate motion, the court declines to grant leave to reargue or renew. Defendant makes no showing that the court misapprehended applicable facts or law, or that the factual matter that defendant now seeks to present was not in existence at the time defendant submitted his opposition to the Receiver's and plaintiffs' motions.

It is accordingly hereby ORDERED that the Receiver's motion is set down for an evidentiary hearing in Part 57 of this Court on November 20, 2007 at 9:30 a.m. on the issue of whether the bid for Exhibit 77 items for which the Receiver seeks approval provides for the minimum work necessary to complete the items in Exhibit 77 in a workperson-like manner; and it is further

ORDERED that the branch of plaintiffs' motion to increase the monetary amount of repairs that may be made without prior court approval is granted to the following extent: The April 19, 2006 order of this court appointing a temporary receiver is hereby modified as follows: The insert to paragraph 3 of said order is modified to provide: "Provided that: In the event the cost of any such repair exceeds five thousand dollars, the Temporary Receiver shall apply for approval of this Court before entering into a contract for such repair."; and it is further

ORDERED on the court's own motion that the following new paragraph 14 is added to

the aforesaid April 19, 2006 order: The Temporary Receiver shall not incur any expense for which there are not funds in the Temporary Receiver's account, collected pursuant to ¶ 4 or advanced by plaintiffs or defendant. Nothing herein shall be construed as authorizing any expenditures by the Temporary Receiver which are not otherwise authorized by this order. Nothing herein shall be construed as modifying any prior order regarding the parties' respective shares of repair costs; and it is further

ORDERED that except as modified hereinabove, the April 19, 2006 order remains in full force and effect; and it is further

ORDERED that the branch of plaintiffs' motion to expand the authority of the Receiver is held in abeyance pending service and filing of legal memoranda on the issues of 1) whether legal authority exists for the requested expansion in the context of a deadlock of the condominium board, and 2) whether the condominium by-laws by their terms require arbitration of this dispute and, if so, whether compliance with the arbitration requirement may be excused. The memoranda of law shall be served so received by the following dates: Plaintiffs' memorandum by November 21, 2007; defendant's memorandum by December 5; plaintiffs' reply memorandum, if any, by December 14. The memoranda of law shall comply with the Rules of the Justices of Supreme Court, New York County, including but not limited to the 25-page limit. All memoranda shall be filed with the Clerk of Part 57 by December 17. No submissions may be made other than the legal memoranda on the legal issues identified in this paragraph; and it is further

ORDERED that defendant Sultan's cross-motion to remove the receiver is denied in its entirety; and it is further

ORDERED that defendant Sultan's motion to reargue and reargue is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
November 2, 2007

MARCY FRIEDMAN, J.S.C.