Stavinsky v Prof-2013-S3 Legal Tit. Trust by U.S. Bank N.A.
2018 NY Slip Op 30913(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 653162/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **2**

Justice

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MAKSIM STAVINSKY,

Plaintiff,

- v -

PROF-2013-S3 LEGAL TITLE TRUST BY U.S. BANK NATIONAL ASSOCIATION, FAY SERVICING AKA FAY SERVICING LLC, and CITIMORTGAGE INC,

Defendants.

INDEX NO. 653162/2017

MOTION SEQ. NO. 001

DECISION, ORDER & JUDGMENT

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29, 30, 31, 32, 33, 34, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for JUDGMENT - DECLARATORY.

This action concerns an auction of the shares and proprietary lease associated with a unit in a cooperative corporation pursuant to UCC article 9. Plaintiff Maksim Stravinsky, the winning bidder's assignee, seeks a judicial declaration and modification annulling the provision of the terms of sale and memorandum of sale that requires him to pay the prior shareholder-tenants' unpaid maintenance arrears and assessments up to the date of the sale, as well as the maintenance and assessments that accrued while the prior shareholder-tenant contested the auction in court.

Plaintiff now moves, by order to show cause, for the ultimate relief sought in the complaint. Defendants Prof-2013-S3 Legal Title Trust, by U.S. Bank National Association, as legal title trustee, and Fay Servicing A/K/A Fay Service, LLC, which serviced the loan (hereinafter collectively referred to as defendants) cross-move for an order denying plaintiff's motion, granting them a declaration directing plaintiff to pay the outstanding maintenance, and

dismissing the complaint. The action has been discontinued as to defendant Citimortgage, Inc. (Doc. No. 38.) It is noted that, at the oral argument date, the parties represented that the closing had taken place, and $87,000 has been placed in escrow pending this Court's determination. For the reasons that follow, **the motion is denied and the cross motion is granted.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In April 2008, Guy J. Palumbo and Samantha R. Santoro (the prior shareholder-tenants) pledged 1340 shares of capital stock in the cooperative corporation known as 211 Thompson Owners Corp., and the proprietary lease associated with apartment 2J and 2K of 211 Thompson Street, New York, NY as collateral for a loan with Citimortgage, Inc. On July 28, 2015, following the prior shareholder-tenants' default on the loan, Citi, through its servicer, defendant Fay Servicing, sought to recover the debt through a private auction pursuant to article 9 of the Uniform Commercial Code.

As is relevant to this action, several paragraphs of the terms of sale dictated that the winning bidder would be responsible for any maintenance arrears. Paragraph 8 provided that the "Successful Bidder assume[s] responsibility for maintenance payments, including all outstanding maintenance arrears, and shall reimburse the Secured Party for all maintenance and any other payments made by the Secured Party to the Apartment Corporation." Paragraph 22 of the terms of sale provided that:

> In addition to paying the successful bid, and all other fees required to be paid as set forth in the Terms of Sale, the Successful Bidder shall be obligated to pay all outstanding maintenance, maintenance arrears, impositions by the Co-op corporation, including but not limited to fees, late charges, assessments, as demanded or required to satisfy all sums due and owing the Co-op corporation at auction through and including the time of the closing on the transfer of the stock and lease. The Successful Bidder is also required to pay any maintenance arrears, or expenses, paid by the Secured Party prior to the time of the closing on the

> transfer of the stock and lease, together with any flip tax, other transfer fees, including attorney's fees, or other fees legally imposed by the Co-op Corporation against the debtor or Secured Party, as transferor, in connection with the transfer of the stock and lease.

Finally, paragraph 33 provided that "[t]he sale is subject to . . . any unpaid maintenance due at the Closing to the Co-op Corporation." (Doc. No. 47.)

William B. Mannion, the auctioneer, read the terms of sale aloud before the bidding commenced, but he did not state the amount of maintenance arrears that had accrued. Amit Louzon, a non-party, was the highest bidder at the auction with a $475,000 bid. He paid a $50,500 deposit and, on July 31, 2015, he assigned the winning bid to plaintiff. (Doc. No. 17.)[1]

In November 2015, prior to the closing, Santoro commenced an action in this Court, bearing index No. 162115/2015, in which she sought, in essence, to vacate the sale. In January 2016, Santoro obtained a stay of the sale, and the stay remained in place until August 2016, when Santoro's order to show cause was denied and her complaint dismissed. (Doc. No. 53.) Plaintiff was not named as a party to Santoro's action, and was not served with the order to show cause. Following the dismissal of Santoro's action, plaintiff immediately requested that a closing on the property take place. At that point, plaintiff was provided with a document entitled "Explanation of Arrears," which indicated that $31,041.38 total in maintenance arrears and assessments was due for Unit 2K, and $34,356.92 was due for Unit 2J. Letters between the parties indicate that

[1] Although the relationship between Louzon and plaintiff was not made clear in plaintiff's moving papers, plaintiff, in reply, submits an affidavit in which he explains their relationship. (Doc. No. 61.) Plaintiff avers that Louzon made the winning bid as his agent rather than in his individual capacity. He contends that the money used as a deposit was his own, withdrawn from his bank account by Luozon pursuant to a power of attorney for the purpose of bidding on the subject property. Plaintiff refers to Louzon as his "figurehead" or "representative," and states that, although there was a three-day gap between the auction itself and the assignment of the winning bid, he had no more opportunity to conduct due diligence than did Louzon.

they wished for the closing to proceed, but that they disagreed as to who would pay the maintenance arrears. (Doc. Nos. 20-21.)

The disagreement as to which entity should bear the costs associated with maintenance arrears led plaintiff to commence the instant action and order to show cause in June 2017.

POSITIONS OF THE PARTIES

Plaintiff argues that UCC article 9 prescribes the mandatory order in which the proceeds of a sale pursuant thereto must be distributed. He contends that, according to the UCC, the secured party must apply the proceeds of the sale to any maintenance or other charges that may have accrued to the cooperative corporation, and is only then entitled to take whatever is left over. Plaintiff asserts that the terms of sale thus violate both the UCC as well as the loan documents, and may be modified on that basis. They argue that, although some terms of the UCC may be modified by agreement, this particular provision is mandatory. Alternatively, they argue that the alteration purporting to allow banks to pass on an undisclosed, and ultimately quite large, sum of maintenance arrears is invalid because it is not commercially reasonable.

Plaintiff next argues that a different set of rules applies to contracts entered into at auctions such as the one at issue in this case, since they occur under hasty, sometimes chaotic, conditions during which there is no opportunity to negotiate or investigate all of the relevant facts. He asserts that these altered rules of contract interpretation render certain vague or indefinite terms invalid.

Finally, plaintiff asserts that the term must be removed from the agreement because it is unconscionable.

In response, defendants argue that plaintiff is bound by the terms of sale, as recited by the auctioneer before bidding commenced. They contend that provisions of the UCC can be, and were, amended by contract. They reason that banks frequently pass the cost of maintenance arrears onto the winning bidder, and that industry custom of doing so shows that it is commercially reasonable. They explain, in this regard, that auctions of this nature are inherently risky, entailing the possibility that the debtor owes the building money, or that the debtor may commence litigation to thwart the sale. They argue that those are the risks that plaintiff knowingly took when he placed his bid.

Defendants further assert that plaintiff's argument as to unconscionability is without merit.

CONCLUSIONS OF LAW

LEGAL STANDARD

Neither party specifies the applicable legal standard considering the procedural posture. Since issue has been joined, and both the motion and cross motion request that the court determine all of the issues raised in the complaint and grant the parties ultimate relief, this Court construes the motion and cross motion as applications for summary judgment. (*See generally Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95 [1st Dept 2017]; *Great AM. Ins. Co. of N.Y. v L. Knife & Son, Inc.*, 138 AD3d 531 [1st Dept 2016]; Siegel, NY Prac § 438 at 845-846 [6th ed 2018].) Thus, on each respective application, the movant bears the initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," after which the burden shifts to the

opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Schmidt v One N. Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 [1st Dept 2017].)

CONTRACT MODIFICATION

"[A] sale of land in the haste and confusion of an auction room is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire." (*Sohns v Beavis*, 200 NY 268, 271-272 [1911]; *see also Lane v Chantilly Corp.*, 251 NY 435, 438 [1929] [holding that "[t]he rule that a buyer must protect himself against undisclosed defects does not apply in all strictness to a purchaser at a judicial sale"]; *Northern Blvd Corona, LLC v Northern Blvd Prop., LLC*, 157 AD3d 895, 896 [2d Dept 2018] [holding that courts have the "inherent equitable power" to set aside sales conducted pursuant to their judgments to ensure that they are "not made the instrument[s] of injustice"] [internal quotation marks and citation omitted].) However, rescission is the relief usually available to a bidder who has won an auction for real property that is subject to complications that are both significant enough to affect the marketability of title and unascertainable considering the haste of the auction. (*See e.g. Sohns v Beavis*, 200 NY at 274; *Shomron v* Griffin, 70 AD3d 406, 407 [1st Dept 2010]; *Howell v Brozetti*, 246 AD2d 929, 930 [3d Dept 1998].) Plaintiff here studiously avoids requesting rescission. He also does not assert that the provision requiring him to pay maintenance arrears is so burdensome that it has utterly destroyed any financial interest he has in the property. Instead, he seeks a judicial declaration excising the term that requires him to pay maintenance arrears, so as to increase his profit margin.

Generally speaking, "modification" by the court is "not legally available in a contract action." (*Didley v Didley*, 194 AD2d 7, 11 [4th Dept 1993]; *see Term Indus. v Essbee Estates*, 88 AD2d 823, 824-825 [1st Dept 1982]; *see generally* 22A NY Jur 2d Contracts § 475.) "The fact that with the benefit of hindsight, a party believes that it had agreed to an unfavorable contractual term, does not provide courts with authority to rewrite the terms of a contract or to extricate parties from poor bargains." (*159 MP Corp. v Redbridge Bedford, LLC*, ___AD3d ___, 2018 NY Slip Op 00537 [2d Dept 2018].) In the context of the sale of real property, courts have recognized very limited circumstances, however, in which an exception may apply. In *Bank of N.Y. v Love* (3 AD3d 303, 304-305 [1st Dept 2004]), which concerned a foreclosure sale, a judgment of foreclosure governed the terms of the subsequent auction. The Court held that the provision in the terms of sale purporting to require the bidder to pay outstanding taxes was unauthorized by the judgment of foreclosure, which specifically delineated the manner in which the taxes would be paid. The judgment required that the taxes be paid from the sale amount rather than separately by the winning bidder. Hence, the Court found that the referee exceeded the authority granted to him by the judgment of foreclosure in conducting the sale in an alternative manner. Here, there is no judgment of foreclosure, and plaintiff has not alerted this Court of any authority expanding the availability of excision of specific terms to these circumstances. Nor has this Court identified any such authority.

Even if plaintiff prevails on his claims as to the applicability of the provisions of UCC article 9, he has not shown that a departure from the statute would entitle him to the only relief he seeks: modification. Assuming, for the sake of argument, however, that plaintiff can rely on UCC article 9 to establish a right to modification of the contract term, the next question is whether the statute indeed applies.

UCC ARTICLE 9

Pursuant to UCC 9-615 (a), "[a] secured party shall apply or pay over for application the cash proceeds of a disposition under Section 9-610 in the following order to: (1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party; (1-a) *in the case of a cooperative organization security interest, the holder thereof in the amount secured thereby*; (2) the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made." (emphasis added). This section does not directly define the term "the amount secured thereby." However, UCC 9-102 (74) defines "security agreement" as "an agreement that creates or provides for a security interest." It then clarifies that "[a] cooperative record that provides that the owner of a cooperative interest has an obligation to pay amounts to the cooperative organization incident to ownership of that cooperative interest and which states that the cooperative organization has a direct remedy against that cooperative interest if such amounts are not paid is a security agreement creating a cooperative organization security interest."

While the cooperative's bylaws and the proprietary lease terms are not before this Court, it is not disputed that those documents provide that the cooperative obtains a security interest against the shares in the event that a shareholder defaults on his or her maintenance obligations. (*See generally Berkowners, Inc. v Dime Sav. Bank of N.Y.*, 286 AD2d 695, 696 [2d Dept 2001]; N.Y. Condo. & Coop. Law § 11:6 [2017].) Thus, plaintiff is correct that the UCC's default position is that maintenance arrears, if any, which constitute a secured debt pursuant to the terms of the proprietary lease and bylaws of a cooperative corporation, are to be paid from the proceeds of the sale directly after the expenses are paid.

Plaintiff contends that this statutory default position is mandatory, but has alerted this Court of no authority to support that position. UCC 1-302 permits provisions of the Code to be "varied by agreement," except that "[t]he obligations of good faith, diligence, reasonableness and care prescribed [thereby] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable." Specifically with respect to secured transactions, "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." (UCC 9-610 [a].) However, "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms." (UCC 9-610 [b].)

In support of their cross motion, and particularly their contention that the alteration of the order set forth in the UCC was commercially reasonable, defendants submit the affidavit of Mannion, the auctioneer. Mannion avers that, in his "professional experience," terms of sale "typically contain provisions that obligate a successful bidder to pay all amount[s] due to the co-op corporation prior to closing." (Doc. No. 45.)

In opposition to the cross motion, plaintiff submits his own affidavit, as well as several affidavits from non-parties claiming to have knowledge of UCC article 9 auctions. Plaintiff avers that he is "informed by [his] attorney that the law requires secured lenders to pay maintenance arrears from the proceeds of sale, and that [this practice] has indeed been [his] experience in closing on other properties [he has] purchased from UCC [article] 9 sales whose

terms of sale contained similar terms." (Doc. No. 61.) Adam Plotch (Doc. No. 63), Gerard Rem (Doc. No. 66), and Biajoun Xie (Doc. No. 67), all of whom claim to be real estate investors with experience in UCC article 9 sales of cooperative shares, aver, in identical language, that "in [their] experience, upon closing on a cooperative apartment purchased from auction, secured lenders pay for any maintenance that accrued *prior* to the auction date. Whether, and how much, of *post*-auction maintenance [they are] typically required to pay varies from acquisition to acquisition." In Rem's affidavit, he adds that, "in his 15 years of purchasing apartments at foreclosure sales of cooperatives, [he has] never had to pay *pre*-auction maintenance at closing." (Doc. No. 66.) Although plaintiff submits affidavits from other individuals, they attest only to the fact that the terms of sale are non-negotiable – not that this particular deviation from the UCC is commercially unreasonable. (Doc. Nos. 64-65.)

Taken together, plaintiff's submissions present, at best, a question of fact as to whether it is standard in the industry to require the winning bidder to pay maintenance arrears. The affidavits fall short of explaining why the deviation from the industry norm rises to the level of being commercially unreasonable. If the terms of sale at issue in this action were ambiguous, this Court could rely on this industry custom to interpret the writing. However, since the terms of sale unambiguously place the requirement to pay maintenance arrears on the bidder, they cannot be explained or supplanted by a contradictory usage of trade. (*See generally* UCC 1-303 [c], [e]; *General Elec. Capital Commercial Automotive Fin. v Spartan Motors*, 246 AD2d 41, 51 [2d Dept 1998] ["Only when a consistent construction would be 'unreasonable' must express terms control over course of performance, and course of performance prevail over course of dealing and usage of trade."].) Thus, the only remaining theory available to plaintiff is unconscionability.

UNCONSCIONABILITY

To establish unconscionability, a party must show that "the contract was both procedurally and substantively unconscionable when made — i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (*Ortegas v G4S Secure Solutions [USA] Inc.*, 156 AD3d 580, 580 [1st Dept 2017] [internal quotation marks and citation omitted]; *see Matter of Lawrence*, 24 NY3d 320, 336-337 [2014]; *Green v 119 West 138th Street LLC*, 142 AD3d 805, 808-809 [1st Dept 2016].) With respect to the procedural element, "[t]he focus is on such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10-11 [1988] [citation omitted]; *accord Green v 119 West 138th Street LLC*, 142 AD3d at 808; *see Dabriel Inc. v First Paradise Theaters Corp.*, 99 AD3d 517, 520 [1st Dept 2012].)

Plaintiff cannot establish that the circumstances of the transaction give rise to procedural unconscionability. Although the auction was fast-paced and did not allow for the possibility of negotiation of the terms of sale, the papers before this Court indicate that this is standard practice in the industry. Plaintiff must be considered a sophisticated party with substantial knowledge of the conduct of auctions such as the one at issue in this action and, as such, not only would he not have been surprised by the lack of knowledge as to many facts about the property going into the auction, he would have expected it. Furthermore, the terms of sale were read aloud prior to the auction, and they indicated unequivocally that the winning bidder would be responsible for any

maintenance arrears. Nothing in the papers indicates that plaintiff, or his agent, was somehow pressured to bid on the property. His agent was free to walk away from the auction at any time, or to bid on a property that did not include such a term. Thus, the element of procedural unconscionability is not established.[2]

Nor is the element of substantive unconscionability established. The auctions such as the one at issue here are fraught with risk. A bidder will not know the full extent of any problems with the property until he or she takes possession. While sales under such circumstances can be invalidated where hidden, unknowable problems with the property are so great that they render title unmarketable (*see e.g. Sohns v Beavis*, 200 NY at 274; *Shomron v* Griffin, 70 AD3d at 407; *Howell v Brozetti*, 246 AD2d at 930), plaintiff has not alleged that that this the case here. Indeed, plaintiff has not even alleged that he is unable to turn a profit as a result of the sum of maintenance arrears, and defendants have provided this Court with an appraisal of the property indicating that it is valued at a sum significantly higher than the purchase price. (Doc. No. 79.) While this Court can imagine a possible situation in which the unascertainable amount of maintenance arrears is so high in comparison to what the property may be sold for that it results in an unjust windfall to both the bank and the cooperative, here, the "fair market value" of the property "[as] determined by [an] appraisal was not so low that it was substantively unconscionable." (*192nd S. LLC v 569 West 192nd St., LLC*, 140 AD3d 592, 593 [1st Dept 2016], *lv denied* 28 NY3d 907 [2016].)

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[2] This Court finds that procedural unconscionability is not met even assuming that plaintiff stood in the shoes of his alleged agent, who made the actual bid. It is therefore unnecessary to address defendants' ratification argument that is based on the three-day gap between when the winning bid was placed and when it was assigned to plaintiff.

Finally, as for the maintenance that accrued during the attempt by the former shareholder-tenant to stay the sale, the papers indicate that, although plaintiff was not joined, defendants took all available steps to expedite the process of having the complaint dismissed. Further, plaintiff would have been free to move to intervene had he believed that defendants were not taking the necessary steps with respect to the property. (*See generally* CPLR 1012 [a] [3].) He has certainly not established that a delay was caused solely as a result of defendants' conduct. (*See South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1978].)

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross motion is granted; and it is further

ADJUDGED and DECLARED that plaintiff Maksim Stavinsky is responsible for the payment of all unpaid cooperative maintenance arrears and assessments through the date of the closing.

5/10/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
CHECK IF APPROPRIATE:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE