

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF KAY A. KUNTZ, DECEASED	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
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APPEAL OF: ROAN, INC.	:	
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	:	No. 1537 MDA 2017

Appeal from the Order Entered September 18, 2017
In the Court of Common Pleas of Lycoming County Orphans' Court at
No(s): 41-14-0322

BEFORE: STABILE, J., NICHOLS, J., and PLATT, J.*

MEMORANDUM BY NICHOLS, J.:

FILED OCTOBER 10, 2018

Appellant Roan, Inc. appeals from the order denying its claim against the Estate of Kay A. Kuntz (the Estate) for damages arising from an alleged breach of an auction agreement. Appellant contends that the orphans' court erred in concluding that the Estate did not breach the contract and by failing to apply equitable principles. We affirm.

Kay A. Kuntz (Decedent) died on May 25, 2014. Decedent had a will, which left \$1,000 to each of her four grandchildren and \$1,000 to her church. The will also left all of Decedent's personal property and the remainder of the Estate to her daughter, Lori Kuntz (Ms. Kuntz). The will named Patricia J. Hull and Richard E. Hull (Co-Executors) as the co-executors of the Estate and authorized Co-Executors to sell real or personal property in the Estate. Among

* Retired Senior Judge assigned to the Superior Court.

the Estate's assets was real estate located at 65 Hocker Lane in Jersey Mills, Pennsylvania (the Property). Decedent's will was probated, and letters of administration were granted in June of 2014.

In August of 2014, Co-Executors obtained an appraisal indicating that the market value of the Property was \$273,000. Co-Executors filed an inventory that listed the Property's value as \$28,600.

By April of 2015, disputes arose between Ms. Kuntz and Co-Executors. Ms. Kuntz wished to purchase the Property. Co-Executors, however, maintained that the will authorized them to sell the Property and that a sale of the Property was more appropriate to satisfy the debts and liabilities of the Estate. Co-Executors gave Ms. Kuntz until May 21, 2015, to obtain financing to purchase the Property. When Ms. Kuntz failed to meet that deadline, Co-Executors listed the Property for sale on May 22, 2015.

On June 16, 2015, Ms. Kuntz filed a motion for a protective order. In relevant part, Ms. Kuntz sought to preclude the Estate from entering into an agreement of sale of the Property without giving her an opportunity to purchase the property. Additionally, Ms. Kuntz wanted the Estate to provide an assurance of transfer of the Property and an informal accounting to allow her to obtain financing to purchase the Property and satisfy the debts and liabilities of the Estate. The orphans' court conducted a hearing on the motion for a protective order on July 8, 2015.

On July 16, 2015, the orphans' court issued an order (the First Protective Order) prohibiting the Estate from entering into an agreement of sale of the

Property without first allowing Ms. Kuntz sixty days to obtain a mortgage. The order directed the Estate, within ten days, to provide Ms. Kuntz with a letter of assurance to permit Ms. Kuntz to obtain a mortgage, as well as a formal accounting.

On April 14, 2016, Ms. Kuntz filed a petition for a citation to show cause why an account should not be filed. Ms. Kuntz alleged that the Estate provided her with a first and interim account that was not filed with the orphans' court. According to Ms. Kuntz, the first and interim account contained conflicting information, and she was not able to determine the amount of financing to satisfy the debts and liabilities of the Estate.

On April 15, 2016, Co-Executors entered into an auction agreement with Appellant to sell the Property at a reserve amount of \$200,000 and with advertising costs not to exceed \$3,000 paid by the Estate.¹ Paragraph 14 of the auction agreement stated:

In the event Seller cancels the auction sale or withdraws the Real Estate from sale within thirty (30) days prior to the auction date or refuses to sell the Real Estate once the reserve amount is attained at the auction, the Seller shall pay the Auctioneer ten percent (10%) of the reserve amount together with the advertising costs incurred, if applicable.

Auction Agreement, 4/15/16, at ¶ 14. The auction sale was scheduled for June 25, 2016.

¹ Although Co-Executors signed the action agreement, Co-Executors' attorney acted as an intermediary with Appellant when negotiating the agreement.

On June 9, 2016, Ms. Kuntz filed a motion for a protective order to prevent the auction sale.² Ms. Kuntz alleged that on May 20, 2016, the Co-Executors informed her of the scheduled auction sale. She reiterated that Co-Executors provided her with conflicting information regarding the assets, debts, and liabilities of the Estate and that she was not able to determine the final amount necessary to purchase the home and satisfy the Estate's debts and liabilities.

The trial court did not hold a hearing, but on June 9, 2016, entered an order (the Second Protective Order) prohibiting the Estate from selling the Property until Co-Executors filed an account. Co-Executors filed a motion for reconsideration of the June 9, 2016 order, which the orphans' court substantially denied on June 21, 2016.³

On June 28, 2016, Appellant filed a notice of claim against the Estate for \$20,000.⁴ Following additional disputes between Ms. Kuntz and Co-Executors not relevant to this appeal, the orphan's court entered an order on

² Ms. Kuntz apparently did not serve Co-Executors or Appellant with the motion.

³ Upon reconsideration, the orphans' court denied reconsideration but amended the order to strike the requirement that the account be approved by the court.

⁴ There is no indication that Appellant filed an action for breach of contract against Co-Executors.

November 10, 2016, directing closing on the sale of the Property to Ms. Kuntz with money claimed by Appellant to be held in escrow.⁵

In January of 2017, Appellant filed an application to release the escrowed funds. Although Appellant asserted that its application was unopposed by the Estate and Ms. Kuntz, Ms. Kuntz filed an objection to the payment of Appellant's damages.

In May of 2017, Co-Executors filed a third and final account that listed Appellant's claimed damages of \$20,000 as an unpaid debt of the estate. Additionally, the third and final account listed \$3,000 for advertising costs related to the auction sale as an expense of the Estate. The docket indicates that on April 7, 2017, Appellant's counsel filed a motion for a hearing. On April 21, 2017, Ms. Kuntz filed objections to the third and final account and, in relevant part, challenged the debt and expenses related to the planned auction sale.⁶

On July 14, 2017, the orphans' court held a hearing at which counsel for Appellant, Co-Executors, and Ms. Kuntz appeared. Appellant called Michael T.

⁵ The court directed that \$23,000 be held in escrow. However, it is undisputed that Appellant had been paid the \$3,000 in advertising costs.

⁶ Ms. Kuntz objected and requested surcharges because Co-Executors did not fulfill their fiduciary duties. Specifically, she asserted that the debts and expenses related to the auction sale would not have been incurred if Co-Executors respected her efforts to purchase the Property.

Roan to testify about Appellant's requested damages under paragraph 14 of the auction agreement.⁷ Following the hearing, the parties filed briefs.

In an opinion and order entered on September 18, 2017, the orphans' court determined that Appellant was not entitled to damages under the auction agreement. The court concluded that because the court issued the Second Protective Order preventing the sale, the Estate did not breach the agreement.

Appellant timely appealed.⁸ Appellant and the orphans' court have complied with Pa.R.A.P. 1925.

Appellant presents the following questions for review:

1. Was it abuse of discretion or error of law to deny the claim of Appellant . . . on the basis of "strict reading of the contract terms," finding that the Seller/Estate had not cancelled or abandoned the scheduled sale since it was following a [c]ourt's [Second Protective O]rder, where Appellant had no privity or involvement in the Motion and Court Order, the Order did not directly cancel the sale but only directed the Estate not to sell the real estate until certain preconditions were met, where the Estate then followed the Order by abandoning the scheduled sale, where the Estate had admitted that it owed the claim due to its breach

⁷ During cross-examination by counsel for Ms. Kuntz, Mr. Roan testified he was aware that a beneficiary wanted to buy the property. N.T., 7/14/17, at 47. However, Mr. Roan asserted that he was unaware that a prior sale of the Property was cancelled by the First Protective Order until after he was informed that the auction sale would not proceed. *Id.* at 37. Counsel for Appellant later argued that even if Mr. Roan was aware of the First Protective Order, the terms of that order did not prohibit the Co-Executors from entering into the auction agreement. *Id.* at 52. Appellant thus asserted that it was entitled to rely on Co-Executors' representation that it possessed the authority to move forward with a sale. *Id.* at 52.

⁸ **See** Pa.R.A.P. 342(a)(3), (5).

of contract, and where in any event the Order directing the Estate to not sell yet was based solely on allegation of the Estate's own wrongful conduct of neglect and malfeasance towards [Ms. Kuntz]?

2. Was it abuse of discretion or error of law to deny the claim of Appellant . . . without utilizing the Orphan[s' c]ourt's equity powers, where Appellant had argued that the Estate "should not have contracted in the first place," and had "improperly contracted" it in the first place, a fraudulent attempt at sale which was corrected by the Court in its [First Protective] Order[?]

Appellant's Brief at 1-2.

We address Appellant's two challenges to the orphans' court ruling together. Appellant claims that it was entitled to damages under paragraph 14 of the auction agreement as a matter of contract law and under equitable principles. *Id.* at 9-10. Under its contract theory, Appellant contends the Estate breached the auction agreement by cancelling the auction sale. *Id.* at 14-15. In support, Appellant argues that Ms. Kuntz, as the residual beneficiary, and Co-Executors caused the court to intervene. *Id.* at 15, 17. Appellant further asserts that all parties admitted the breach. *Id.* at 18. Appellant notes that Co-Executors listed Appellant's damages and costs in the third and final account and Ms. Kuntz, in her objection to the third and final account, sought surcharges against Co-Executors. *Id.* at 18-19.

In arguing for equitable relief, Appellant emphasizes that it acted in good faith and that Co-Executors' alleged misconduct resulted in the Property not proceeding to the auction sale. Appellant further contends that the orphans' court finding that it knew or should have known that the Property was in dispute was improper. *Id.* at 20-21. According to Appellant's brief,

Mr. Roan only “testified that he knew a sale was postponed once in the past.” *Id.* at 21. Appellant argues that even if Mr. Roan was aware of the First Protective Order, that order required Appellant to obtain financing by September of 2015. *Id.* Thus, Appellant asserts that it was entitled to rely on Co-Executors’ assurances that it was lawful for the Estate to sell the Property in 2016 notwithstanding the First Protective Order. *Id.* at 20-21. Lastly, Appellant asserts that 20 Pa.C.S. § 3360 supports its argument that an innocent party should not bear the costs of a cancelled sale. *Id.* at 22.

The standards governing our review are as follows:

The findings of a judge of the orphans’ court division, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury, and will not be reversed by an appellate court in the absence of an abuse of discretion or a lack of evidentiary support. . . . In reviewing the [o]rphans’ [c]ourt’s findings, our task is to ensure that the record is free from legal error and to determine if the [o]rphans’ [c]ourt’s findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence. However, we are not limited when we review the legal conclusions that [the] [o]rphans’ [c]ourt has derived from those facts.

In re Estate of Cherwinski, 856 A.2d 165, 167 (Pa. Super. 2004) (citation omitted).

Because the orphans’ court rejected Appellant’s claim for damages under paragraph 14 of the auction agreement, we are mindful that

[t]he interpretation of any contract is a question of law and this Court’s scope of review is plenary. Moreover, “[w]e need not defer to the conclusions of the trial court and are free to draw our own inferences. In interpreting a contract, the ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement.” When

construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties' understanding. This Court must construe the contract only as written and may not modify the plain meaning under the guise of interpretation.

Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 509-10 (Pa. Super. 2013) (citation omitted).

Pennsylvania courts have long held that "where the performance of a contract is prevented, without fault on the part of the promisor, by a proper judicial order, the obligation to perform is discharged." ***School Dist. of Borough of Olyphant v. American Surety Co. of New York***, 184 A. 758, 761 (Pa. 1936); ***see also Step Plan Servs., Inc. v. Koresko***, 12 A.3d 401, 412 (Pa. Super. 2010); Restatement (Second) of Contracts §§ 261, 264 (1981) ("If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made").

Instantly, paragraph 14 of the auction agreement provided for damages of 10% of the reserve price if "Seller cancel[led] the auction sale or withdr[ew] the [Property] from sale within thirty (30) days prior to the auction date." ***See*** Auction Agreement, ¶ 14. It is undisputed that Co-Executors were the "Sellers," that the auction sale was prevented by the Second Protective Order, and that Appellant received notice that the sale could not proceed less than thirty days before the scheduled auction date.

Although Ms. Kuntz requested that the orphans' court issue the Second Protective Order, she was not representing the Estate. Therefore, she could not be considered a "Seller" within the meaning of the auction agreement. **See *Humberston***, 75 A.3d at 509-10. Accordingly, Appellant's arguments based on the conduct of Ms. Kuntz fail.

As to Co-Executors, the "Sellers" under the auction agreement, Appellant insists that they were at fault for the breach. However, Appellant presented no evidence as to Co-Executors' liability at the hearing, and instead relies solely on the motions and filings by Ms. Kuntz. Although Ms. Kuntz's motions and filings repeatedly allege that Co-Executors failed to meet their fiduciary duties to her, such allegations do not establish Co-Executor's contractual liability to Appellant. In addition, these allegations were not admitted by Co-Executors or resolved by a trier of fact.

Similarly, Appellant asserts that Ms. Kuntz and Co-Executors admitted the breach of the auction agreement based on the allegations in the filings of Ms. Kuntz and Co-Executors. However, a review of the motions and filings reveal that Ms. Kuntz and Co-Executors acknowledged the existence of Appellant's request for damages, but they did not admit the validity of the claim against the Estate.

Even assuming that Co-Executors failed to perform as required by the auction agreement, Appellant has not establish its entitlement to relief in light of the Second Protective Order. Again, Appellant presented no evidence that Co-Executors acted in bad-faith when entering into the auction agreement or

were at fault for the issuance of the Second Protective Order.⁹ Instead, Appellant, as noted above, relied on allegations in the filings of Co-Executors and Ms. Kuntz, none of which were admitted or established as true. Therefore, they do not support a finding of fault on the part of Co-Executors. ***Cf. Olyphant School Dist.***, 184 A. at 761.

As to Appellant's claim for equitable relief, the record suggests that Mr. Roan was not aware that a prior sale was cancelled and was only informed of that fact after the auction sale did not proceed. Nevertheless, Mr. Roan testified that when entering into the auction agreement, he was made aware that a beneficiary wanted to purchase the Property, but was allegedly "setting [sic] on her hand." ***See*** N.T. at 47. Accordingly, we discern no basis to disturb the orphans' court conclusion that Appellant lacked clean hands and knew or should have known about the dispute surrounding the Property.¹⁰ ***See Estate of Cherwinski***, 856 A.2d at 167.

⁹ Indeed, Appellant argues that the First Protective Order did not bar Co-Executors from entering into the auction agreement or vest Ms. Kuntz with an absolute right to purchase the Property.

¹⁰ Appellant's passing reference to 20 Pa.C.S. § 3360 provides no support for Appellant's equitable argument. Section 3360 states:

(a) Inadequacy of consideration or better offer.--When a personal representative shall make a contract not requiring approval of court, or when the court shall approve a contract of a personal representative requiring approval of the court, neither inadequacy of consideration, nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the personal representative of the obligation to perform his

In sum, we conclude that Appellant fails to establish any abuse of discretion or error in the orphans' court conclusion that Appellant did not establish a right to damages under paragraph 14 of the auction agreement or as a matter of equity.¹¹

Order affirmed.

contract or shall constitute ground for any court to set aside the contract, or to refuse to enforce it by specific performance or otherwise: Provided, That this subsection shall not affect or change the inherent right of the court to set aside a contract for fraud, accident or mistake. Nothing in this subsection shall affect the liability of a personal representative for surcharge on the ground of negligence or bad faith in making a contract.

(b) Brokers' commissions.--When a personal representative shall enter into an agreement of sale of real estate in good faith, which is not binding under subsection (a) of this section and which is set aside upon receipt of a higher offer for such real estate, he shall not be relieved from the payment of real estate broker or broker's commissions to the broker who had procured such agreement of sale, and in the event that more than one real estate broker is entitled to commissions for said agreements of sale, then such commissions shall be equally divided between or among such real estate brokers: Provided further, That the total aggregate commission paid as a percentage of the gross consideration of the final sale shall in no event exceed a fair commission for a single sale of the property involved.

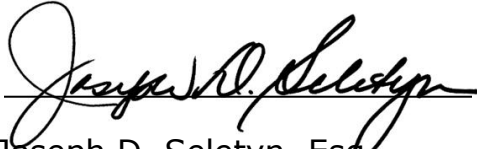
Although Section 3360 provides some protection against the forfeiture of commissions when an agreement of sale is cancelled by the court, it bears no relationship to the circumstances of this case or the damages sought by Appellant. **See *Estate of Bennett***, 409 A.2d 12, 16 n.7 (Pa. 1979) (noting Section 3360(b) extends some protection to a broker's right to a commission when an agreement is set aside, but asserting that the mere transmission of an offer or bid does not bring a broker within the statute).

¹¹ We note that although Appellant undertook research of the Property and advertising of the auction sale, the Estate already paid Appellant \$3,000 for those costs.

Judge Platt joins the memorandum.

Judge Stabile concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2018