ADMINISTRATIVE APPEAL
1 DOS APP. 00
(62 DOS 99)

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF THE SECRETARY OF STATE
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DIVISION OF LICENSING SERVICES,

Appellant,

-against-

DECISION AND ORDER

ABSOLUTE AUCTION AND REALTY, INC.,
Real Estate Broker,

ROBERT A. DOYLE,
Real Estate Broker,
and Representative Real Estate Broker,

JOHN P. LYNCH,
Associate Real Estate Broker,

Respondents.
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The Division of Licensing Services ("Appellant") appeals to the Secretary of State from a decision of the Office of Administrative Hearings that dismissed the complaint against Absolute Auction and Realty, Inc., Robert A. Doyle, and John P. Lynch ("Respondents").

Appellant submitted a Memorandum of Appeal objecting to the determination below.

Respondent submitted a Response to the Memorandum of Appeal.

ISSUE

This appeal considers (1) whether Respondents committed misconduct by failing to disclose to bidders that their corporate affiliate would bid at an auction of the listed property; and (2) whether Respondents failed to fully inform or obtain the consent of bidders that the Respondents would receive compensation from more than one party.

SUMMARY OF THE EVIDENCE

In deciding this appeal, the following documents were considered:

(A) Pleadings, consisting of a notice of hearing, Appellant's Memorandum of Appeal, and Respondent's Response to the Memorandum of Appeal.

(B) Copy of the hearing transcripts, with the exhibits appended.

FINDINGS OF FACT

The findings of fact of the decision of the Office of Administrative Hearings are adopted for purposes of this appeal.

OPINION

Sellers of a leasehold interest in real property in Oak Beach, Babylon, New York entered into a listing agreement with Respondent Absolute Auction and Realty Inc. to sell their interest at public auction. The auction was advertised as a "no minimum, no reserve" auction. One of the bidders at the auction was Auction Opportunities Inc., president of which is Respondent Robert A. Doyle, and other officers of which were all associated with Respondent Absolute Auction and Realty Inc.

The sales agent for Absolute Auction and Realty Inc., who acted as auctioneer, prior to the auction advised one of the sellers that out of concern that the property would be sold for a low price, "they" would bid on the property, and the seller agreed to this arrangement. Auction Opportunities Inc. was the successful bidder at the auction.[1]

UNTRUSTWORTHINESS

Appellant alleges that Respondents failed to deal openly, honestly and fairly with members of the public and demonstrated untrustworthiness by failing to disclose to other prospective purchasers that they (through their affiliate) would bid on the property at auction. Appellant also alleges that in doing so, Respondents derivatively breached their fiduciary duties to their principal.

Appellant cites UCC §2-328(4) in support of its position. However, the Uniform Commercial Code applies only to transactions in goods, and not to real property transactions. UCC §2-102. In any

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[1]The Town of Babylon exercised its right of first refusal, and Auction Opportunities, Inc. never acquired the leasehold interest. Another bidder ultimately purchased the leasehold interest from a court-appointed referee.

event, UCC §2-328(4) merely provides a remedy to a successful bidder at an auction where a bid has been made on or behalf of a seller of goods. In this case, the bid by Auction Opportunities Inc. was on its own behalf, and not on behalf of the sellers. The dicta in Drew v. John Deere of Syracuse, Inc., 19 A.D.2d 308, 241 N.Y.S.2d 267 (4th Dept. 1963) cited by Appellant is not applicable, since that case dealt with a bid at auction by the owner of the property.

Appellant cites several cases from other states that found that a real estate broker committed misconduct when it purchased the property of a seller for itself without advising other prospective buyers of its intentions. However, these cases involved the more traditional offer/counter-offer negotiation, and not the sale of real property at auction. At auction, the affiliate of the broker had no advantage over other bidders, because the bids of all participants were announced and the bidding had to be kept open until the highest price was found. The decision of the Office of Administrative Hearings found that, "[a]t the auction sale, all bids were publicly made by a registered bidder and publicly received and acknowledged by the auctioneer." 62 DOS 99, 9.

It is clear from the record that the affiliate of Respondents was bidding on its own behalf, not as an agent for the sellers, and was prepared to acquire the leasehold interest for itself at the bid price, plus pay any purchaser's commission due the Respondents. There is no evidence that Auction Opportunities Inc. would not go through with the purchase of the property, as required by the rules of the auction, and that it was only bidding to enable the sellers to hold on to the property so that it could be advertised and sold at a later date or in a different manner. In fact, upon the acceptance of its high bid, Auction Opportunities Inc. executed a sales contract.

There is no evidence that Auction Opportunities Inc. participated in the auction for the purpose of forcing the bids higher. Auction Opportunities Inc. was a duly registered bidder that by its conduct evidenced an intention to purchase the property on its own behalf. Respondents had no duty to disclose to other bidders their relationship with Auction Opportunities Inc.

No law, rule or regulation requires disclosure to other bidders at an auction of real estate that an affiliate of the listing real estate broker will bid on its own behalf. The need to impose such a requirement should be addressed through the legislative or rulemaking process, and not in the context of an adjudicatory proceeding.

In order to support a charge of untrustworthiness, it would be necessary to provide evidence that the participation in the auction by an affiliate of the broker was in some way a sham, and that the bidder had no intention to go through with the purchase of the real estate. Applying the standard in Gold v. Lomenzo, 29 N.Y.2d 468, 329 N.Y.S.2d 805 (1972) cited by Appellant, there has been no factual presentation concerning acts or conduct by the licensees or their agents as would warrant a conclusion of unreliability, and which establishes that any confidence or reasonable expectation of fair dealing with the public would be misplaced.

Appellant offers no support for its contention that Respondents breached their fiduciary duties to their principals, the sellers.

Appellant has failed to support its contention that Respondents demonstrated untrustworthiness.

FRAUD/FRAUDULENT PRACTICE

Appellant bases its allegation of fraud or fraudulent practice on a misrepresentation to the other bidders that agents of the sellers would not bid on the property. As discussed above, Auction Opportunities Inc. bid on its own behalf, and not as an agent of the sellers.

Nothing in the record supports Respondent's assertion that Appellants stated that sellers and sellers' agents would not be bidding on the property. The record clearly shows that agents of the seller did not bid on the property. In fact, Auction Opportunities Inc. bid on its own behalf and not on behalf of the seller. In any event, the complaining witness signed a "Terms & Conditions Agreement for Real Estate Auction" that provides in paragraph 7, "Auctioneer reserves the right to bid on behalf of the Seller." Respondent's Exhibit G.

The essential constituents of an action in fraud are representation of a material existing fact, falsity, scienter, deception and injury. Channel Master Corporation v. Aluminium Limited Sales, Inc., 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958); Douglas R. Hutchins et al. v. Utica Mutual Insurance Company et al., 107 A.D.2d 871, 484 N.Y.S.2d 686 (3d Dept. 1985). In the absence of any evidence that other bidders were actually injured, the allegation of fraud cannot stand.[2]

FAILURE TO INFORM OR OBTAIN CONSENT OF BIDDERS TO RECEIVE COMPENSATION FROM MORE THAN ONE PARTY

Respondents were to receive a 5% commission on the selling price from the sellers and a 10% commission on the selling price from the ultimate purchaser. Appellant argues that Respondents failed to inform and obtain the consent of prospective purchasers to receiving compensation from both the sellers and the ultimate purchase in violation of 19 NYCRR §175.7.

The record supports the finding of the Office of Administrative Hearings that each registered bidder received a packet of information that contained, among other items, a terms and conditions agreement for real estate auction that included the terms of compensation of both the fee to the seller and the buyer's premium. The Administrative Law Judge found that each registered bidder knew, or should have known, of the terms of compensation and whom the real estate broker represented in the auction sale.

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[2]The case cited by Appellant, New York Central Insurance Company v. National Protection Insurance Company 14 N.Y. 85 (1856), was not an action in fraud, and does not support Appellant's contention that actually injury is not a necessary element of an action in fraud.

Appellant argues that the foregoing does not fulfill the requirement of 19 NYCRR §175.7 to impart full knowledge and consent upon the successful bidder, but does not suggest what more must be done to comply with this requirement. In any event, the decision of the Office of Administrative Hearings correctly found that the information concerning compensation in the bidder's packet fulfilled Respondents' obligation to registered bidders.

CONCLUSIONS OF LAW

Appellant has failed to demonstrate that Respondents committed misconduct when an affiliated corporation bid on the property being sold, or that Respondents failed to fully inform or obtain the consent of bidders that the Respondents would receive compensation from more than one party.

DETERMINATION

The determination of the Administrative Law Judge is confirmed.

So Ordered on:

ALEXANDER F. TREADWELL
Secretary of State