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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge



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January 29, 2016

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Re: Broadway-Somerset, LLC v. Township of Franklin
Docket No. 007297-2015

Dear Counsel:

This letter constitutes the court's opinion with respect to defendant's motion to compel plaintiff to produce an unconsummated contract for the sale of the subject property. For the reasons explained more fully below, the court grants defendant's motion and directs plaintiff to produce the contract subject to a Protective Order limiting dissemination of the contract and its terms.

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I. Findings of Fact and Procedural History

The following findings of fact are based on the submissions of the parties with respect to defendant's motion to compel.

Plaintiff is the owner of real property located in Franklin Township, Somerset County. The property, designated by the township as Block 468.01, Lot 26, is commonly known as 1850 Easton Avenue. For tax year 2015, the property was assessed as follows:

Land	\$3,700,000
Improvements	<u>\$1,420,000</u>
Total	\$5,120,000

Plaintiff challenged the tax year 2015 assessment by filing a timely Complaint in this court.

As of October 1, 2014, the relevant valuation date, plaintiff operated a motel and restaurant on the property. A health club vacated a portion of the property in October 2014.

During the course of discovery, defendant propounded on plaintiff standard form Interrogatories, including Interrogatory No. 12, which provides:

List the names and address of any person who either now holds or has held, at any time during the year of appeal or the preceding two years, an option to purchase the subject property, the date said option expires or expired, the amount paid for the option, the price at which said option can be exercised and the terms for payment of that amount. Attached a copy of the option agreement.

In response to Interrogatory No. 12, plaintiff replied,

A confidential contingent agreement to sell the property exists, but a number of contingencies need to be satisfied before any sale can occur.

Plaintiff did not produce a copy of the contract for the sale of the subject property. Subsequent efforts by defendant to secure production of the contract for sale of the subject property pursuant to a Consent Protective Order were rebuffed by plaintiff.

Defendant thereafter moved to compel production of the contract for sale of the subject property and for entry of a Protective Order limiting dissemination of the document. Defendant argues that the contract is relevant to the valuation of the subject property, may lead to the discovery of additional admissible evidence, and has been requested by defendant's expert real estate appraiser, who is formulating a report and opinion of value to be used at trial in this matter.

Plaintiff opposes the motion, arguing that the contract is not relevant to the subject matter of this action because it is unconsummated and contains many contingencies, is not likely to lead to admissible evidence, and contains confidential information, including the sales price, which the parties agreed not to disclose. A principal of plaintiff certifies that Section 35 of the contract provides as follows:

Confidential Agreement. The parties hereto agree that the terms of this Agreement are confidential and constitute proprietary information of the parties hereto. Seller and Purchaser each hereby agrees that neither it nor its partners, officers, directors, employees, agents, real estate brokers and salespersons, and attorneys shall disclose the terms of this Agreement to any other person without prior written consent of the other party, except to any consultant, auditors or accountants of the purchaser in connection with the review of the due diligence materials, or to an entity or person to whom disclosure is required by legal requirements or in connection with any action brought to enforce this Agreement.

II. Conclusions of Law

There shall be a substantial liberality in the granting of discovery in New Jersey courts. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987). A party may seek production of all information "relevant to the subject matter involved in the pending action" or which "appears reasonably calculated to lead to the discovery of admissible evidence," R. 4:10-2(a); In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). This court has the

discretion to determine the scope and manner of permissible discovery between the parties. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 559 (1997).

It is quite clear that the contract for the sale of the subject property is relevant to the subject matter of this action and its production is reasonably likely to lead to the discovery of admissible evidence. The central issue before the court is the true market value of the subject property on October 1, 2014. Although the motion record does not reveal the date on which the contract for the sale of the subject property was executed, plaintiff does not argue in opposition to defendant's motion that the contract is too remote in time from the valuation date to be relevant. It is reasonable, therefore, for the court to conclude that the contract of sale was executed near in time to the October 1, 2014 valuation date. The contract, which contains a sales price negotiated by market participants, surely contains information relevant to the true market value of the subject property.

The court understands that the contract for sale, according to plaintiff, is subject to a number of contingencies which must be satisfied before the purchaser is obligated to buy the property. Contingencies in a sales contract neither diminishes the relevancy of the contract to determining true market value, nor renders the contract inadmissible as evidence.

In Township of Little Egg Harbor v. Bonsangue, 316 N.J. Super. 271, 281 (App. Div. 1998), the Appellate Division expounded upon the relevancy and admissibility as evidence of unconsummated contracts for the sale of property where the Tax Court is charged with determining the true market value of the property:

Guidance as to the admissibility of unconsummated contracts is provided in Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 333 (Tax Ct. 1985):

In relying on unconsummated contracts of sale in the valuation of real property two very basic and established principles must be emphasized. First, no such contract may be taken on its face without a thorough review of its provisions and the circumstances surrounding its execution. Second, when such inquiry reveals that it is replete with contingencies and is in fact nothing more than an offer or option to purchase, the contract must be disregarded and given no probative effect.

Even with this proviso, objections to the validity of executory contracts affect the weight of the evidence rather than its admissibility.

The weight, if any, to be attributed to such contracts depends on many factors not the least important of which is its contingent or noncontingent nature. If an agreement is so replete with contingencies which thereby seriously detract from the likelihood that it will be consummated, the less supportable is an opinion that it reflects a freely bargained price between a willing buyer and a willing seller.

[Linwood Properties, Inc. v. Borough of Fort Lee, supra (7 N.J. Tax at 331-332). See also United States v. Certain Parcels of Land in City of Philadelphia, 144 F.2d 626, 620 (3d Cir. 1944).]

The use of unconsummated contracts for valuation purposes is recognized in New Jersey. “[I]n the absence of a completed sale, evidence of the price agreed upon in a binding contract of sale for property between the owner and a purchaser, both acting in good faith, would be of substantial significance in arriving at the fair market value of such property.” City of East Orange v. Crawford, 78 N.J. Super. 239, 244, 188 A.2d 219 (Law Div. 1963).

* * *

The fact that a contract is unconsummated does not ipso facto render the contract inadmissible to establish a property’s fair market value. If a litigant establishes evidence to support a finding of “reasonable probability” or “likelihood” that the contingencies would be fulfilled, then the contract’s relevance and admissibility would be

established.” See, e.g., Linwood Properties, Inc. v. Borough of Fort Lee, supra, (7 N.J. Tax at 331-332).

The court continued, “[w]hether a contingent contract stands a reasonable probability of becoming non-contingent, and thus probative of the property’s value, bears upon the relevance of the proposed evidence, and is properly decided by the trial judge.” Bonsangue, supra, 316 N.J. Super. at 282.

Plaintiff’s argument that the contingencies in the contract for the sale of the subject property render it irrelevant is unpersuasive. The mere fact that the contract is subject to a number of contingencies, which may or may not ultimately be satisfied, does not mean the contract is irrelevant as evidence of value. Should the contract ultimately be offered as evidence at trial it will be the obligation of the court to examine the contract and consider testimony with respect to the likelihood of the contingencies being satisfied before determining whether the contract will be admissible as evidence of value. The fact that the contract may or may not be admissible as evidence does not remove the contract from the scope of permissible discovery, given the contract’s relevancy to value.

In addition, the contract for the sale of the subject property is reasonably likely to lead to the discovery of admissible evidence. Although a copy of the contract was not submitted for in camera review, in correspondence plaintiff’s attorney stated that one or more the contingencies in the contract concern obtaining land use approvals for the subject property. Uses of the subject property contemplated by a sales contract would be directly relevant to the determination of the subject property’s highest and best use on the valuation date. A finding with respect to a property’s highest and best is a key factor in determining market value. Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267-269 (Tax 2013), aff’d o.b., 28 N.J. Tax 337 (App. Div. 2015).

A contract between plaintiff and a potential purchaser contingent on securing approvals for a change in use of the subject property might well be admissible evidence with respect to whether the proposed change in use is the highest and best use at which the property should be valued.

Plaintiff also argues that production of the contract should not be compelled because its terms are proprietary information in which both plaintiff and the potential purchaser have an interest in privacy. Plaintiff contends that the negotiated purchase price, contingencies, and “other terms” reflect “confidential business practices, judgments and strategies with respect to respective real estate undertakings in general.” Plaintiff also states that should the contract become public “it might negatively impact the prospects for the potential deal and for [plaintiff’s] continued business operations.” Finally, plaintiff notes that the confidentiality provision of the contract is evidence that “the purchaser places great emphasis on keeping confidential all deal related information.”¹

The court has no reason to doubt that plaintiff has a legitimate business interest in keeping the terms of the contract confidential. Yet, it is plaintiff that filed this action and elected to put the true market value of its property in contest in a public forum. Plaintiff cannot file suit alleging that its property is assessed at above its true market value and subsequently claim that a contract which it executed for the sale of that property cannot be produced in discovery because it contains a sales price plaintiff considers confidential. The initiation of suit necessarily involves acceptance by plaintiff of some measure of intrusion into its private affairs. While plaintiff retains the right to seek protection of its proprietary information, defendant also has the right to defend the assessment on the subject property. A balance can be struck by the court crafting appropriate

¹ Although the confidentiality provision of the contract indicates that plaintiff may disclose the terms of contract with the purchaser’s written permission, plaintiff submitted no evidence that such permission was sought or that the purchaser refused to permit disclosure.

limitations on the dissemination of information disclosed in discovery. Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 456-59 (1988).

Defendant does not contest plaintiff's right to preclude public disclosure of the terms of the contract for the sale of the subject property. In fact, defendant's motion includes a request for entry of a Protective Order to safeguard against unnecessary dissemination of the contract. The court finds the terms of the Protective Order, with some modifications, to be sufficient to protect plaintiff's interest while effectuating defendant's right to discovery.

Defendant's motion is, therefore, granted. A Protective Order will be filed along with this letter opinion. The Protective Order will provide that plaintiff has 30 days to produce the contract for the sale of the subject property, to provide sufficient time for plaintiff to seek relief in the Superior Court, Appellate Division, should it elect to do so.

/s/Hon. Patrick DeAlmeida, P.J.T.C.