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OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-168-22

ARTHUR SCHWARTZ,

Plaintiff,

v.

OPINION

JESSE SCHWARTZ, and
ROBERT SCHWARTZ,

Defendants.

FISHER, P.J.A.D. (t/a, retired on recall).

This is an action brought by one brother against his other two brothers for the partition of their jointly-owned farm in Farmington. Before the court are numerous motions concerning the actions taken in furtherance of a consent order entered slightly more than a year ago that called for the sale of the to-be-partitioned property through the assistance of Brian Ansell, Esq., and his law firm. To be sure, the February 2, 2023 consent order represented an appropriate step in this litigation since the brothers had demonstrated and continue to demonstrate an inability to agree on almost anything.

A pivotal issue concerns the third paragraph of the consent order and whether it established a February 17, 2023 deadline by which no later offers could be accepted or approved by the Ansell firm. Whether a deadline was established is pivotal to the motions at hand because The Sterling Development Group, LLC, whose pre-February 17 offer was, in the Ansell firm's view, second best to Regal Home LLC's offer, improved its offer after February 17, 2023, to the extent that the Ansell firm stated that it would recommend Sterling's revised offer if the consent order gave it the latitude. See Ansell Supplemental Certification, ¶ 7 (expressing that "had we received this latest version of Sterling's offer when we received and reviewed the other timely offers, we would have recommended this offer to the [c]ourt"). Because the Ansell recommendation turned on the significance of the February 17, 2023 date, both Sterling and Regal sought to intervene and, on the return date of these and other motions, they have argued the significance, or lack of significance, of the consent order's "deadline." So, at this stage, defining the meaning and intent of the consent order's so-called deadline has become imperative.

The consent order's third paragraph states: "The parties shall present any offers to purchase the [p]roperty to the court-appointed attorney by February 17, 2023." For starters, this provision would suggest only that the "deadline" was

for the parties' presentation of offers; the paragraph does not mention the Ansell firm's authority to solicit other offers that had not been received by the parties. But, even if the third paragraph was broad enough to include all offers no matter how conveyed or by whom, the court is satisfied there was no intent to preclude the recommendation of any revised or subsequent offers received after February 17, 2023.

Instead, what is revealed by an overall sense of the consent order is the then judge's intent – colored by a need to sell the property through the assistance of able counsel because the parties had shown an inability to agree – to move the litigation along in an expeditious manner. That desire, to the extent it might have carried the day if these motions were considered many months ago, as the parties undoubtedly anticipated, should not play much of a role because of the undue delay in the court's ability to entertain these motions until now. That is, motions were timely filed, starting with the Ansell firm's motion in June 2023, and followed by the other motions filed toward the end of summer of 2023, but the matter has unfortunately sat unconsidered until argument was heard last week. Considering the sequence and "speed" of these events, the February 17, 2023 date should play no large role in determining to whom the property should be sold or for how much. The alleged deadline, in fact, could now be prejudicial

to the parties if the property could be said to possess a greater value at this late date, a question not clearly illuminated by the motion papers filed to date.

But there are still other reasons why the February 17, 2023 date should have no further bearing on the task before us. Having weighed the parties' arguments, the court concludes that there was no intent to set a firm deadline. Indeed, for the reasons that follow, even now new offers might be presented and considered by the Ansell firm in fulfilling the charge they undertook with the entry of the consent order.

The consent order, while citing no authority, was undoubtedly a product of and governed by N.J.S.A. 2A:56-2, which empowers a court "in an action for the partition of real estate" to "direct the sale thereof if it appears that a partition thereof cannot be made without great prejudice to the owners, or persons interested therein." The court's "direct[ing]" of the sale of the parties' farm started with the appointment of the Ansell firm to gather offers and make a recommendation to the court. But, despite their best efforts and recommendations, it always remained – barring the unlikelihood the three parties might agree on one of the offers¹ – the court's obligation to identify the

¹ It should be noted that one of the brothers has argued the court need only be concerned with whatever offer a majority (two out of three) of the brothers finds

most acceptable offer or take other steps to ensure the attaining of the highest and best offer.

And further, even if the February 17, 2023 date in the consent order's third paragraph drew a line in the sand and imposed a deadline after which no offers could be entertained or considered by the Ansell firm, events beyond our control leave to be considered whether – in law or in equity – there remains any legitimate or sensible purpose in holding to that alleged deadline.

If principles of equity alone guide the way, an interpretation of the consent order as imposing a deadline would be easily rejected for the reasons already expressed. The point of a judicially-imposed or judicially-controlled sale of property is to gain for the parties the highest and best offer available. That goal alone suggests the propriety of allowing for post-February 17 offers.

By the same token, the court should consider whether legal rights have attached. In essence, the two would-be intervenors – Regal, which made what the Ansell firm viewed as the best offer up until February 17, 2023, and Sterling, which made a later offer that the Ansell firm would recommend if it could

acceptable and that unanimity should not be required because the documents that caused the conveyance of the property to them only required the consent of two of the three. Because of today's holding, the court finds that argument to be premature and rejects it, but without prejudice to its further consideration should it become relevant.

traverse the February 17, 2023 date – debate whether legal rights were established by the February 17, 2023 date. Considering the express terms – or rather the absence of clearer terms – in the consent order, the court rejects the argument that the party making the best offer by February 17, 2023, was legally entitled to purchase the property.

In that regard, it is important to note that the consent order did not expressly require that the property be auctioned, either publicly or privately, by a date or time certain. Had it, then, as in In re Fairfield General Corp., 75 N.J. 398, 412 (1978), some interest or legal rights would have been conferred once the hammer fell on February 17. But, even if there was an auction and even if the hammer in fact fell on February 17, that still would not bind the court. When a party submits a bid on property offered at a judicial sale, “it is with the understanding that the bid . . . remains open until it is either confirmed or rejected by the court.” Ibid.; see also Freehill v. Greenfeld, 204 F.2d 907, 908-09 (2d Cir. 1953). That is, the bid may have been binding on the highest bidder, but not on the court. And so, the offerors should be deemed to have understood the legal ramifications appended to the process. They must have understood that the Ansell firm’s discharging of its role allowed the firm considerable discretion in seeking the highest and best offer. N.J.S.A. 2A:61-3, for example, provides:

When a sale of real estate is ordered by the superior court in any action, wherein the order or judgment under which such sale is ordered, is founded upon a cause of action of an equitable nature, except mortgage foreclosure sales, the officer or person authorized or directed to make the sale may, in his discretion, make the same at public or private sale and on such terms as he may deem to be most advantageous to the parties concerned therein.

[Emphasis added.]

The emphasized terms not only allowed the Ansell firm considerable “discretion” but continue to provide a polestar for the Ansell firm’s exercise of that discretion, namely, to do that which is “most advantageous” to the parties in this partition action. Finding the consent order imposed no limit on the Ansell firm’s exercise of discretion in fulfilling the task imposed by the consent order and finding that discretion allowed them, in these circumstances, to traverse the February 17, 2023 date in the consent order, the court concludes that the Ansell firm was entitled to consider amended offers received after February 17, 2023.

In short, whatever rights may have arguably ripened once February 17, 2023 came and went, were never binding on this court in discharging its obligation to determine how or to whom the property may be sold, as Fairfield held. As noted, the unexpected passage of time since entry of the consent order and the actions taken in fulfillment, warrants relief not sought in the pending

motions that rests well within the court's discretion to ensure the acceptance for the brothers of the highest and best offer. That is, in light of the passage of a considerable amount of time since the parties sought the court's guidance, it seems most appropriate to allow – even at this late date, indeed, because of this late date – a short period of additional time by which the Ansell firm may invite modified or additional offers on the property. The manner of proceeding in that regard lies within the discretion of the Ansell firm. N.J.S.A. 2A:61-3. In acting within the letter and spirit of this order, and to bring the circumstances to a close, the Ansell firm must move, on notice to all the parties, including the proposed intervenors, for approval of whatever recommendation the Ansell firm deems appropriate that was received by any time the Ansell firm deems appropriate, but no later than March 8, 2024, as may be extended only by the court's express approval.

So ordered.