

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES A. FRIEDBERG, ESQ.,)
and SAMUEL ISRAL, ESQ., as)
Co-Trustees of the ERVIN and)
SUSANNE BARD FAMILY TRUST,)
Appellants,)
v.)
O'DOYLE RULES, LLC.,)
Appellee.)
_____)

Case No. 2D20-1417

Opinion filed April 14, 2021.

Appeal from the Circuit Court for
Hillsborough County; Gregory P. Holder,
Judge.

Todd M. Hoepker of Todd M.
Hoepker, P.A., Orlando, for Appellant.

Eric S. Koenig and Bradley A.
Muhs of Trenam, Kemker, Scharf,
Barkin, Frye, O'Neil & Mullis, P.A.
Saint Petersburg, for Appellee.

ATKINSON, Judge.

James A. Friedberg and Samul Israel, Trustees of the Ervin and Susanne Bard Family Trust (the Trust), appeal the entry of a summary judgment granting specific performance in favor of O'Doyle Rules, LLC (O'Doyle). We reverse.

On February 8, 2018, the Trust entered into a \$1,850,000 contract for the sale of real property to O'Doyle. SunTrust Bank, a tenant at the property, had the right of first refusal pursuant to the long-term lease agreement with the Trust (the Lease).

Paragraph 46 of the Lease (the right of first refusal) provides the following:

If, at any time during the term of this Lease, provided Tenant is not then in default under this Lease, the Landlord desires to sell the Premises or has received an offer to purchase the Premises which the Landlord is prepared to accept, the Landlord shall first notify the Tenant of Landlord's intentions with respect thereto. In such notice the Landlord shall specify the terms and conditions upon which it is prepared to accept an offer to purchase the Premises. Thereafter, the Tenant shall have the right, by notice to the Landlord within thirty (30) days after receipt of such notification, to require the Landlord to sell the Premises to the Tenant upon the terms and conditions specified in the Landlord's notice to the Tenant. If the Tenant shall so notify the Landlord the parties shall execute an appropriate formal purchase and sale agreement incorporating those terms and conditions relative to title and the mechanics of closing such sale as are appropriate to Landlord's notice to Tenant. Thereafter, the Parties will promptly close the purchase and sale. . . .

If the Tenant shall not give notice to the Landlord of its desire to purchase the Premises within such 30 day period, then, and only then, the Landlord shall have the right to conclude a sale with any other person, or the person initially making the offer so long as in all material respects the business terms and conditions of the transaction which Landlord concludes are fairly comparable to the business terms and conditions proposed in Landlord's notice to Tenant, and so long as such negotiations and the sale are concluded within one hundred fifty days from the date of Landlord's original notice to the Tenant.

Paragraph 10 of the sales contract between the Trust and O'Doyle made waiver of SunTrust's right of first refusal a condition precedent to closing:

10. *Seller's Conditions to Closing.* Seller's obligation to sell the Property to Buyer is subject to satisfaction or waiver by Buyer of the following conditions, which are for Seller's benefit only: . . .

10.2 *Right of First Refusal.* Tenant shall have waived its right of first refusal under Section 46 of the Lease, or Tenant shall not have exercised its right of first refusal within the exercise period.

The Trust notified SunTrust of the sales contract with O'Doyle and provided SunTrust thirty days to exercise its option under the Lease. SunTrust declined.

Before the close of the contractual due diligence period,¹ O'Doyle offered the Trust a reduced sales price of \$1,800,000 with an expedited closing date on or before March 14, 2018, which the Trust accepted (the Addendum). Pursuant to Paragraph 46 of the Lease, on March 6, 2018, eight days before the expedited closing date, the Trust provided SunTrust with notice of O'Doyle's offer to purchase the property at a reduced price. When it became clear that SunTrust would not be able to decide whether to exercise its right of first refusal by the time of the closing date, counsel for O'Doyle acknowledged that closing would have to take place at a later time and participated in negotiations with Friedberg regarding an appropriate extension. On March 27, 2018, SunTrust delivered a letter to the Trust in which it elected to exercise its option to purchase the property for \$1,800,000. The Trust then terminated the sales contract with O'Doyle.

¹The contractual due diligence period ended March 10, 2018, and closing was required to occur on or before April 9, 2018.

O'Doyle sued the Trust, seeking specific performance, damages for breach of contract, and a declaratory judgment determining that the purchase agreement remained in full force and effect and ordering the Trust to convey the property pursuant to its terms. On O'Doyle's motion for summary judgment, the trial court entered a partial final judgment in O'Doyle's favor on the specific performance and declaratory judgment counts and directed the Trust to convey the property to O'Doyle. The court also concluded that the Trust was liable under the breach of contract count, and it reserved jurisdiction to determine damages.²

The trial court explained:

The fact that the Trust elected to enter into an Addendum with [O'Doyle], which clearly would constitute a breach of the provisions in paragraph 46 of the . . . Lease executed by and between the landlord . . . is of no consequence as it relates to the mutuality of obligations by and between [O'Doyle] and the [Trust] relating to the Addendum that was signed and controlled obligations between these parties.

The court concluded that O'Doyle "had the right to enforce the obligation within the Addendum regardless of the fact that the . . . Trust had perhaps materially breached its obligations under its . . . Lease, more specifically [P]aragraph 46[, SunTrust's right of first refusal]."

The problem with the trial court's reasoning is that the sales agreement was contingent on the right of first refusal—not the other way around. Paragraph 10 of the sales contract made the Trust's obligation to sell the property "subject to" SunTrust's

²We review the order as an appealable nonfinal order that determines the right to immediate possession of property and that grants an injunction. See Fla. R. App. P. 9.130(a)(3)(C)(ii); All Seasons Condo. Ass'n v. Patrician Hotel, LLC, 274 So. 3d 438, 445 (Fla. 3d DCA 2019).

exercise or waiver of the right of first refusal. SunTrust initially waived that right. When O'Doyle subsequently offered to purchase the property at a reduced price—\$50,000 lower than the price in the original agreement—SunTrust also had the right to refuse *that* offer; thus SunTrust's waiver of its right to purchase the property "upon the terms and conditions specified" in O'Doyle's reduced-price offer was a condition precedent to O'Doyle's contractual right to purchase the property.

The right of first refusal entitled SunTrust to notice "any time" the Trust "received an offer to purchase" the property and then thirty days during which to decide to exercise its right to purchase the property from the Trust upon "the terms and conditions upon which [the Trust] is prepared to accept" the third-party offer. And the Trust's performance obligation under the Addendum was expressly contingent on SunTrust's waiver of or failure to exercise its right of first refusal under Paragraph 46 of the Lease. As such, SunTrust's exercise of its right to match O'Doyle's reduced-price offer excused the Trust's obligation to sell the property to O'Doyle, and O'Doyle could not be entitled to enforce an obligation that no longer existed. The trial court erred by entering summary judgment in O'Doyle's favor.

Reversed and remanded.

NORTHCUTT and STARGEL, JJ., Concur.