IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR **LEON COUNTY**, FLORIDA

CASE NO. 2012 CA 859

Steven R. Andrews,

Plaintiff,

vs.

Governor Rick Scott, Attorney General Pam Bondi, Chief Financial Officer Jeff Atwater, and Commissioner Adam Putnam, as the Board of Trustees for the Internal Improvement Trust Fund,

Defendants.

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CASE NO. 2012 CA 3416

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Plaintiff,

vs.

GROVE PROPERTIES LIMITED, a Florida Limited Partnership and JOHN K. AURELL, as general partner of GROVE PROPERTIES LIMITED,

Defendants.

_____/

**ORDER GRANTING SUMMARY JUDGMENT AGAINST THE BOARD OF TRUSTEES OF THE INTERNAL TRUST FUND OF THE STATE OF FLORIDA**

This case is before the Court on the issue of whether Plaintiff ("Andrews") or the Defendant ("BOT") has the right to acquire the property in dispute in this action. The Court previously determined, at a hearing on January 15, 2013, that summary judgment is proper because the pending dispositive ruling depends on construction of contractual provisions. The

necessary undisputed facts relating to this issue are now before the Court are in writing, subject to the Court's prior order of March 7th, 2013 and therefore not in dispute. (App 23) It is the application of the law to those undisputed facts that is determined here.

The BOT was previously granted a Right of First Refusal ("ROFR") to purchase property now owned by Intervenor, Grove Properties Limited ("GPL") (App[1] 1 page 04-05). The property houses a law office occupied by Andrews, who entered into a contract to purchase the property through a historical process that ended in a final contract price of $580,000.

By email dated August 30, 2011, GPL accepted an offer from Andrews to purchase the property for $700,000 (App. 2 page 07). On September 4, 2011, GPL forwarded a form of contract to memorialize the transaction. (App. 3 page 09-13). The purchase price was initially reduced from $700,000 to $695,000 due to a repair cost. The form of the contract was an "as is" sale of the property. Andrews advised GPL on September 27, 2011, that an inspection of the property resulted in the discovery of approximately $134,000 in repairs that were needed for the property, including a new roof and asbestos abatement at a cost of approximately $65,000. (App. 4 page 015 -024) On October 18, 2011, GPL and Andrews entered into a written contract for sale of the property in "as is" condition for $612,500. By addendum dated November 15, 2011, the contract was amended to reduce the sale price to $580,000. (App. 5 page 026-030) The "as is" contract provision of the October 18, 2011 contract as modified by the November 15, 2011 Addendum required Andrews to assume the economic risk of the asbestos contamination of the property.

The terms of the ROFR (App. 1) gave the BOT the right to purchase the property at the

[1] The documents referenced in this order are assembled in an Appendix, which will be referred to herein as: "(App-#)".

same price of any proposed sale, but would expire six months from the date the BOT received written notice of such proposed sale.

The Court previously announced its ruling on preliminary issues by Court Order on March 7, 2013 (App. 23) and finding no disputed facts, the Court found as follows:

a. The required ROFR notice was received by the BOT no later than December 19, 2011 and the Right of First Refusal ripened into an option at that time. Coastal Bay Golf Club, Inc. v. Holbein, 231 So.2d 854, 857 (Fla. 3d DCA 1970). See also Taylor v. Cesery et al., 717 So. 2d 1112 (Fla. 1st DCA 1998).

b. The BOT had until June 19, 2012 to accept the terms of the Andrews Contract with GPL (hereinafter the Andrews Contract), specifically the price.

c. Matching the price offered to GPL by Andrews required the BOT to tender the same amount of money and to impose upon GPL no additional financial expense or liability than that imposed by the November 15, 2011 Andrews Contract with GPL. If the BOT offer imposed additional obligations, expense or financial risk on GPL, the BOT would not meet the essential terms and conditions of the Andrews Contract, and ipso facto, the requirements of the ROFR.

d. The terms of the Andrews Contract with its reduced purchase price and "as is" provisions are before the Court and constitute a valid and enforceable contract, subject to the ROFR.

e. The BOT's ROFR was valid and enforceable until June 19, 2012. The offers to GPL from the BOT are in writing and subject to the Court's interpretation.

f. The sole task of the Court at this time is to determine whether the price

offered by the BOT matches the price Andrews agreed to pay, taking into account whether the BOT offers imposed additional obligations, expense or financial risk on GPL. If the BOT offers imposed additional obligations, expense or financial risk on GPL, or were untimely, pursuant to the ROFR, the BOT did not effectively exercise its ROFR and Andrews has the right to close the transaction with GPL pursuant to the terms of the Andrews Contract.

Having considered the filings of the parties and the arguments of counsel, I find that summary judgment is proper and that the material issues of fact relating to this issue are not in dispute. Therefore, the Court finds as follows:

1. The BOT submitted an offer to GPL on March 23, 2012, along with a binder deposit of $20,000. (App. 6 page 032-42) As a matter of law, the Court finds that this offer did not conform to the price of the Andrews Contract because it required several conditions and requirements of GPL that were not contained in the Andrews Contract and imposed additional obligations, expense or financial risk on GPL not contained within the Andrews Contract. The $20,000 binder deposit and non-conforming offer were returned to the BOT immediately by GPL. (App. 7 page 44-45)

2. By letter dated June 11, 2012 (hand delivered to GPL on June 12, 2012), the BOT again submitted its proposed March 23, 2012 offer to GPL, along with a $20,000 binder deposit. (App. 8 page 055-065)[2] This submission came with a cover letter withdrawing some, but not all

[2] The express terms of the BOT March 23, 2012 offer in paragraph 35, retendered to GPL on June 12, 2012, indicates in sum and substance that if GPL did not execute the contract "on or before **March 26th, 2012**" (emphasis added), the offer was automatically withdrawn. (App 8 page 062) The BOT offer tendered on June 11, 2012, included the previously tendered offer of March 23, 2012. Based on the above referenced language, the BOT offer of June 11, 2012 could, under Florida law, be determined a nullity when retendered on June 11, 2012 to GPL. Further in this regard, paragraph 27 of the BOT offers seem to suggest that the Division of State

(as discussed below) of the requirements of the March 23, 2012 offer but did not withdraw paragraph 11. (App. 8 Page 55) There is no dispute that the $20,000 binder deposit was again immediately returned to the BOT because the BOT offer did not meet the requirements of the ROFR. (App. 9 page 067-068)

The BOT's June 11, 2012 letter and accompanying March 23, 2012 proposed contract required (in paragraph 11) that GPL execute a warranty that there were no Hazardous Materials located upon or under the property. (App. 8 page 060). The Andrews Contract required no such Hazardous Materials warranty.

Additionally, the BOT offers utilizing the March 23, 2012 proposed contract, as referenced in the BOT offers of March 23 2012, June 11 2012 and June 18, 2012, contain a property cleanup provision also in paragraph 11. (Apps. 6, 8 and 10) This provision regarding GPL's obligations and cost exposure thereunder was not described with any degree of specificity and was both uncertain in scope and uncircumscribed in the amount GPL would have to pay to satisfy BOT regarding the site cleanup, *in BOT's sole discretion.* Hence, essential elements of the BOT offer remained open for further negotiation and agreement between GPL and the BOT. The cost of such site cleanup could have substantially reduced GPL's net proceeds from a sale to the BOT as compared to a sale to Andrews. Under the terms of the ROFR, the BOT ran out of time for negotiation or waiver of this clause at the close of business on June 19, 2012 when the ROFR expired.

Further, the Hazardous Materials warranty referenced in paragraph 11 of the BOT offer

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Lands may not have the delegated authority to contractually bind the BOT to the BOT offers if accepted by GPL, suggesting a lack of mutuality. (App 8 pages 061-62 ) However, the Court need not determine that such June 11, 2012 offer was void in order to make its ruling herein.

requires a continuing warranty which did not terminate upon closing, but would "remain in full force and effect". (App. 8) Further, paragraph 11 of the BOT offer required GPL "to clean up and remove all abandoned personal property, refuse, garbage, junk, rubbish, trash and debris from the Property to the satisfaction of DSL [BOT], prior to the closing". (App. 8) These terms acted to impose additional obligations, expense or financial risk on GPL.[3] These terms remained in the BOT offer and the proposed BOT closing documents tendered on June 18, 2012, up to and including the termination of the ROFR on June 19, 2012. (App. 10 page 77; see also foot note 5 supra)

3. The BOT made its final offer to purchase the property with a June 18, 2012 letter to GPL. (App. 10 page 70) This letter transmitted a $560,027 check and stated that GPL could apply the $20,000 deposit check, previously tendered to GPL but returned to BOT on June 12, 2012 (App. 9 page 067-68), toward the $580,000 purchase price. The June 18, 2012 letter transmitting the check indicates that it is intended to cover the purchase price and the buyer's closing costs "under the contract."[4] The BOT concedes that the $20,000 deposit, tendered with the July 11, 2012 letter, had been returned to the BOT (App 9) and had not been resubmitted by BOT to GPL or its agents on June 18, 2012 or June 19, 2012, the date the ROFR expired. The Court finds as a matter of law that BOT did not tender the full purchase price of $580,000 by June 19, 2012, the expiration date of the ROFR.[5]

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[3] The Hazardous Materials warranty was unlimited in time and not capped in amount if Hazardous Materials were later determined to be present.

[4] The reference to the "contract" in the June 18, 2012 letter refers to March 23, 2012 BOT offer, retendered in the June 11, 2012 BOT offer and referenced in the June 18, 2012 BOT offer.

[5] The BOT letter of June 18, 2012 also included a "Title, Possession and Lien Affidavit" required to be signed by GPL at closing. ( App. 10, Page 077) The sworn averments required of GPL in paragraphs 4, 5, 9, 11 and 12 of the "Title, Possession and Lien Affidavit" would have required

4. The Court finds that the BOT offer did not comply with the ROFR applying longstanding Florida law. The BOT failed to purchase the property on or before June 19, 2012 for the price offered by Andrews. The Court further finds that the BOT offer of June 18, 2012 was a non-conforming offer, for at least two reasons. First, the price submitted was $20,000 short of the $580,000 final Andrews Contract price. The financial onus of paragraph 11 in the March 23, 2012 offer, referenced in the June 11, 2012 and June 18, 2012 letters (the clean-up provision), was never withdrawn and was a financial burden to be assumed by GPL especially since it was not quantified by a dollar limitation. Thus, the Court finds essential elements of the BOT offers remained open for further negotiation and agreement between GPL and the BOT at the expiration of the ROFR.[6]

Second, paragraph 11 of the BOT offers in the "As Is" Transaction" provision required GPL to execute a "Hazardous Materials" warranty which would have required GPL to abate the asbestos roof to comply with the "Hazardous Materials" warranty. This is tantamount to a

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GPL to execute a knowingly false affidavit. Lastly, it is uncertain which, if any, of the offending paragraphs in the affidavit BOT may have waived. Finally, paragraph 13 of the BOT offers (App. 6 page 037) gave the BOT an unlimited time to close if the BOT rejected any closing documents proposed by GPL including the title affidavit.

[6] In its Supplemental "Prices Match" memorandum, filed March 1, 2013, and in its Comments to Proposed Summary Judgment Orders, dated April 17, 2013, the Board of Trustees argued that the June 18, 2012, letter did not require that the GPL to execute the contract proposed by BOT. The June 18, 2012, letter clearly contemplated that the contract proposed by BOT controlled the transaction. The letter stated: "The contract also requires TIITF to provide forms for certain of the closing documents. You also will find enclosed those forms though you may substitute substantially similar documents if you prefer not to use the state's forms." Thus, the forms sent with the letter were sent pursuant to the contract proposed by BOT which, according to the June 18, 2012, letter still governed. In addition, there was nothing in the June 18 correspondence that in any way would relieve GPL of the liabilities associated with the environmental and other deficiencies that were known to exist. The Board of Trustees, in it comments to the plaintiffs' proposed summary judgment order, served August 2, 2013, argued that the "contract" referenced in the June 18, 2012, letter was a reference to the Andrews contract and not the BOT contract. The June 18, 2012, letter contained no direct or indirect reference to the Andrews contract. It does clearly reference the BOT contract as the "purchase contract memorializing the terms of TIITF's purchase of the Property." Thus, it was this contract referenced in the June 18, 2012, letter when the letter stated that the warrant tendered may be released upon delivery of the "documents required by it under the provisions of the contract, duly executed." The contract referenced in the June 18, 2012, letter was without doubt the BOT contract and not the Andrews contract.

$65,000 price reduction to GPL off the final Andrews Contract price. Further, the "Hazardous Materials" provisions of paragraph 11 imposed additional long term clean up liability contractually. The Andrews Contract did not. (App. 8 page 60) The Court finds as a matter of law, applying Florida law relating to statutory and contract construction, that paragraph 11 would have required GPL to abate the asbestos roof to comply with the "Hazardous Materials" provisions of paragraph 11 of the BOT offers and would subject GPL to potentially substantial contract liability. Under the terms of the ROFR, the BOT ran out of time to perform under the ROFR and failed to negotiate an extension of the ROFR prior the close of business on June 19, 2012. (App. 10) See Bay Club, Inc. v. Brickell Bay Club, Inc., 293 So. 2d 137 (Fla. 3d DCA 1974).[7]

5. It is undisputed that the cost to GPL to comply with the essential terms of paragraph 11 of the BOT offers, require that GPL provide BOT with a warranty of the absence of "Hazardous Materials" as a condition of closing. The express terms of paragraph 11 would have required GPL to expend approximately $65,000 to remediate and remove the asbestos contained on the property prior to closing. (App. 4 page 15-24). The Andrews "as is" Contract required Andrews to assume the financial risk of the asbestos contamination and other needed repairs. Under the Andrews Contract, GPL was at risk for nothing and would not be required to pay any

[7] 7-Eleven, Inc v. STIN L.L.C, et al, 961 So. 2d 977 (Fla 4th DCA 2007), is based on facts easily distinguishable from this case. There, the terms remaining to be negotiated were not essential to determine whether the right of first refusal was properly exercised. Here, the issues are timeliness of the offer and the price. By falling $20,000 short on the cash tender and imposing significant financial requirements on the seller, the BOT failed to meet the essential requirements of the ROFR.

abatement costs to close or assume continuing contractually liability of an unknown but potentially crippling amount in the event the Hazardous Materials warranty and paragraph 11 were found to have been breached by GPL.

The BOT offers were non-conforming offers in another respect. GPL would have been required, pursuant to paragraph 11 of the BOT offers, "to clean up and remove all abandoned personal property, refuse, garbage, junk, rubbish, trash and debris from the Property to the satisfaction of DSL [BOT] prior to the closing". This was an essential "price" term not yet negotiated. (App. 6 page 048) These non-conforming terms contained in each BOT offer necessarily changed the net proceeds GPL would receive from the sale by increasing GPL's financial burdens associated with the consummation of the sale to the BOT. The Andrews "as is" Contract did not require GPL to incur these clean-up expenses, including the $65,000 asbestos abatement. Accordingly, these additional burdens of the BOT offers were a substantial "price" reduction to GPL, making the BOT offers non-conforming to the Andrews Contract including most importantly the final June 18, 2012 offer non-conforming.

7. Under Florida law, it is appropriate for the Court to look to the "net proceeds" to determine whether the price terms of the BOT offers match the sales price in the Andrews Contract. The imposition of additional costs or burdens upon a seller by one purportedly exercising a ROFR is similar to one who attempts to require the seller to pay a real estate commission on the sale under a ROFR. Florida Courts have held that such an additional financial burden renders the offer under the ROFR non-conforming. See E.G. Green, Trustee v. First American Bank and Trust, 511 So. 2d 569, 574, 575 (Fla. 4th DCA 1987). See also Lehr v.Breakstone, 472 So.2d 1333 (Fla. 3d DCA 1985); City National Bank of Miami Beach v.

Lundgren, 307 So.2d 870 (Fla. 3d DCA) and Coastal Bay Golf Club, Inc. v. Holbein, 231 So.2d 854 (Fla. 3d DCA 1970).

8. The Court finds that the BOT failed to properly exercise its ROFR within the option period of December 19, 2011 to June 19, 2012, and failed to tender the purchase price of the Andrews Contract on or before June 19, 2012, as required by the ROFR.

9. The Court has considered the BOT's argument that the BOT was denied access to the property during the option period which expired on June 19, 2012. The docket indicates that all BOT members were served with the initial Complaint no later than March 20, 2012. (App. 12) The docket further indicates that the BOT filed a Motion to Dismiss on April 16, 2012. (App. 13) Under Fla. R.Civ.Proc. 1.350 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes") the BOT could have sought inspection of the property as early as March 20, 2012, the date of service. The BOT did not exercise its right to obtain discovery allowing BOT's access to photograph and inspect the property during the option period. The BOT could have requested, pursuant to Rule 1.350 (b), to expedite discovery if it needed access to the property in making its decision prior to the expiration of the option period. BOT's access to the property was a right over which the Court had ultimate authority. The BOT never sought to enter and inspect the property until February 11, 2013 (App. 14), after the expiration of the ROFR. BOT withdrew its February 11, 2013 request to inspect pursuant to Rule 1.350 on February 14, 2013. (App. and 15)

Additionally, the BOT was aware of the asbestos within the property at least by the deposition of John Aurell taken on May 15, 2012. (App. 20 and 22) Despite this actual knowledge of contaminants as early as April 2012, the BOT did not seek to inspect the property

until after the expiration of the ROFR.

10. The Court is guided by longstanding Florida law of contract interpretation, that contracts should be interpreted in a manner that is reasonable, practicable, sensible and just. Contract terms should be given their natural meaning or the meaning most commonly understood in relation to the subject matter and circumstances, and reasonable construction is preferred to one that is unreasonable. Thompson v. C.H.B., Inc. 454 So. 2d 55, 57 (Fla. 4th DCA 1984). The Court has used this rule to interpret the ROFR and the contracts discussed herein.

11. The differences in price between the BOT offers and the Andrews Contract outlined above are not trivial, nominal or minimal. The BOT attempted to introduce its terms into the acquisition, something that is not permitted in the exercise of the ROFR. Within the six month period permitted by the ROFR, the BOT never matched the price in the Andrews Contract.

The Court therefore declares that Plaintiff Andrews has the right to purchase the property in question pursuant to the terms of his contract with Intervener GPL.

The Court reserves jurisdiction to award compensable costs to GPL and Andrews and to determine if GPL and Andrews are entitled to Supplemental Relief as plead.

Done and Ordered in Tallahassee, Leon County, Florida, this 12th day of August, 2013.

JOHN C. COOPER
Circuit Judge

CERTIFICATE OF SERVICE

Copies to all parties of record:

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