

EXHIBIT 1

May 27, 2022 Order on May 4, 2022 Non-Jury Trial

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
CRESCENT HOMES SC, LLC)
)
Plaintiff,)
)
v.)
)
CJN, LLC,)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2019-CP-23-05954

RECEIVED
Jun 29 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
CJN, LLC)
)
Plaintiff,)
)
v.)
)
CRESCENT HOMES SC, LLC)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2020-CP-23-04351

ORDER

A bifurcated portion of the above-captioned consolidated matter was before the Court for a non-jury trial on May 4, 2022. Appearing as counsel were F. James Warmoth for CJN, LLC (“CJN”) and Ellis R. Lesemann for Crescent Homes SC, LLC (“Crescent”). Representatives of each party testified as witnesses.

PROCEDURAL BACKGROUND

The above cases were referred to the undersigned Master in Equity by consent of the parties. The Court consolidated the two matters upon the motion of Crescent and then bifurcated this limited issue for the current trial upon the motion of CJN.

The bifurcated issue for the current trial relates to the enforceability a right of first refusal. In October of 2018, CJN and Crescent entered an agreement related to the development of “Phase 1” of the River Springs subdivision. This agreement contains right of first refusal at issue, which purports to give Crescent a right of first refusal on “lots” in the “Future Phase” (also sometimes referred to as “Phase 2”) using the following language:

19. Right of First Refusal: At the Initial Closing, Seller will grant to Purchaser a right of first refusal with respect to the lots cross-hatched and shown on Exhibit "A-2" as “Future Phase” and any additional lots that may from time to time may be annexed or otherwise included in the Subdivision. A memorandum of such right of first refusal in a form reasonable acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.

The Future Phase parcel is adjacent to Phase 1, is owned by CJN, and, to date, remains as a single parcel of undeveloped land. The dispute regarding the right of first refusal first arose in June of 2020 when CJN entered a contract to sell the entirety of the Future Phase. Shortly thereafter, Crescent filed a lis pendens to prevent the sale, contending that the proposed sale violated its right of first refusal. CJN then filed this action, in relevant part to the bifurcated issue, seeking a declaration from the Court that the right of first refusal is unenforceable and that Crescent has no enforceable rights related to the sale or development of the Future Phase.

CJN presented multiple theories in support of this claim,¹ including that the right of first refusal creates an unreasonable restraint on alienation of interest in land because it lacks specificity as to duration of the right, the property subject to the right, the purchase price, and the procedures for exercising the right, among other things. Crescent disputes that CJN is entitled to such a declaration, arguing first that the present litigation does not present an active case for controversy and that it is not ready or ripe for resolution by the Court. Alternatively, Crescent argues that the right of first refusal created a binding promise for CJN to develop lots in the Future Phase (and to then give Crescent a right of first refusal on such lots) such that CJN is not

entitled to sell the Future Phase as a single undeveloped parcel. Additionally, Crescent argues that that the right of first refusal is enforceable because it was specifically bargained for by sophisticated commercial entities who were represented by counsel. The parties extensively briefed the above legal theories in memoranda submitted in connection with CJN's Motion for Partial Summary Judgment filed on March 19, 2021.

For the reasons discussed hereinbelow, the Court finds that the right of first refusal is an unreasonable restraint on alienation of interest in land and is therefore unenforceable. Because this conclusion is dispositive, the Court need not address in detail the various additional contentions and theories presented.

FINDINGS OF FACT

CJN and Crescent are both sophisticated entities with extensive real estate experience. Moreover, the parties have had multiple dealings with each other over the years relating to development and sale of both undeveloped real estate and ready to build on lots in Greenville County. In April of 2017, the parties signed a Letter of Intent generally setting forth an intent to buy/sell lots in River Springs, with the Letter of Intent including both "Phase 1" and "Phase 2" (also referred to as the "Future Phase"). However, CJN ultimately decided not to develop Phase 2, despite including Phase 2 in the Letter of Intent and Crescent's continuing desire for CJN to develop buildable lots in Phase 2 (in addition to Phase 1), based on concerns regarding the cost of development of Phase 2.

In October of 2018, the parties then entered into an "Agreement for Purchase and Sale of Developed Lots" (the "Agreement"). This is a lengthy written agreement for the buy/sell of "developed lots" in Phase 1. Aside from the right of first refusal, the Agreement contains no terms related to Phase 2, no obligations for CJN to develop lots in Phase 2 and no obligation for Crescent to purchase any such buildable lots. Crescent concedes there are no such terms but

contends that CJN verbally agreed it would eventually develop Phase 2 in discussions prior to execution of the Agreement. CJN denies that it verbally agreed to develop Phase 2. The Court does not make any finding regarding the existence of a possible verbal agreement. Instead, the Court finds that the written Agreement is the complete and final expression of the parties' agreement and the parties are bound by its terms. The parties are sophisticated entities with extensive real estate experience. Further, the Agreement itself states that it contains all of the terms and conditions agreed to between the parties and there are no oral agreements relating to the transaction.

Subsequent to the execution of the Agreement, there were multiple delays in moving ahead with the "Initial Closing", which was to be the first of several multi-lot closings specified in the Agreement to effectuate the buy/sell of lots in Phase 1. Responsibility for those delays, which were in part caused by CJN, is not at issue in this bifurcated portion of the trial except insofar as the Court finds that the parties did eventually proceed with the Initial Closing in August of 2020, and continued thereafter to transact the buy/sell of lots in Phase 1. For the most part, it appears that Phase 1 has been completed.

To date, Phase 2 remains raw, undeveloped land, and CJN has no current plan to develop lots in Phase 2. The dispute regarding the right of first refusal first arose in June of 2020, when CJN entered a contract to sell Phase 2, as an undeveloped parcel, to Mr. Clark, a neighboring property owner. Crescent filed a lis pendens on the property in response and otherwise contended that the proposed sale violated its rights under the right of first refusal. Likewise, in May of 2021, CJN entered a contract to sell Phase 2, as an undeveloped parcel, to Opus Petrus, LLC. Crescent filed a lis pendens on the property in response in response and otherwise contended that the proposed sale violated its rights under right of first refusal. As of the date of trial, there was no active contract for sale on the property, but CJN was actively marketing the

property for sale. While the parties have asserted claims related to the events surrounding these third party offers,² those claims will be not be addressed here because this Order is focused solely upon the issue of whether the right of first refusal is enforceable under South Carolina law.

As relates to the present issue, the critical and dispositive language in the Agreement is found in paragraph 19, Right of First Refusal, which provides as follows:

19. Right of First Refusal: At the Initial Closing, Seller will grant to Purchaser a right of first refusal with respect to the lots cross-hatched and shown on Exhibit "A-2" as "Future Phase" and any additional lots that may from time to time may be annexed or otherwise included in the Subdivision. A memorandum of such right of first refusal in a form reasonable acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing.

Exhibit A-2 referenced in Paragraph 19 is attached to the Phase 1 Agreement and depicts a "Future Phase" with lots shown and crosshatching drawn over those lots.

The language in paragraph 19 is lacking in any number of specific and critical areas. This includes terms and conditions of purchase by Crescent, the time allowed for exercise of the Right of the First Refusal by Crescent, the procedures for exercising the right, the purchase price of the lots, how long the right exists, among other things.

Aside from these shortcomings, the parties also agreed that "a memorandum of such right of first refusal in a form reasonabl[y] acceptable to the Parties will be recorded in the public records of Greenville County at the Initial Closing." This Initial Closing occurred in August 2020, and while there were discussions between the parties about the terms and conditions of the memorandum, and disagreements about why the memorandum was not entered or recorded, it is undisputed that no memorandum was ever entered or recorded. Even as of the date of trial,

despite the Agreement being executed in October of 2018 and the Initial Closing occurring in August of 2020, no memorandum has been agreed upon or recorded.

ANALYSIS

As an initial matter, Crescent asserts that the present litigation does not present an active case for controversy and that it is not ready or ripe for resolution by the Court. Peoples Fed. Sav. and Ass'n of S.C. v Resources Planning Corp., 596 S.E.2d 51 (SC 2004). Crescent maintains that since there is no active pending sale or offer for sale, there are no issues to currently litigate relating to the right of first refusal.

Under the unique facts of this case, and under the broad language of paragraph 19, the Court finds that the issues are ripe and ready for resolution by the Court. Under the broad and open-ended language of paragraph 19, without a judicial resolution, Crescent would effectively be able to indefinitely have rights relative to CJN's ability to transfer, sell or otherwise develop the lots in the Future Phase. Further, paragraph 19 also relates to the present ability of CJN to sell the Future Phase tract as a whole or being limited to develop and sell the tract as lots only. And, even if CJN developed such lots, Crescent has no obligation to purchase them under the language of paragraph 19. As discussed hereinbelow, paragraph 19 creates an unreasonable restraint of alienation of interest in land, and that issue is ripe and ready for resolution by the Court. Further, the Court concludes that the rule set forth in Peoples Fed. is satisfied under the facts and circumstances of this case, including the prior contracts with Clark and Opus, Crescent's response to those contracts, and CJN's active and ongoing marketing of the property for sale.

A right of first refusal is a pre-emptive right. Webb v. Reames, 485 S.E.2d 384 (SC App 1997). Pre-emptive rights are subject to the rule against restraint of alienation of interest in land. 61 Am Jur 2d Perpetuities and Restraints on Alienation § 110 (2002); Restatement (Third) of

Property (Servitudes) § 3.4 cmt. f (2000). “Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect.” *Wise v. Poston*, 316 S.E.2d 412, 415 (SC. App. 1984). “Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right.” Restatement (Third) of Property: Servitude § 3.4 cmt. (f) (2000).

The language of the right of first refusal in paragraph 19 is lacking in any number of specific and critical areas. This includes terms and conditions of purchase by Crescent, the time allowed for exercise of the Right of the First Refusal by Crescent, the procedures for exercising the right, the purchase price of the lots, how long the right exists,³ among other things. Under the broad and open-ended language of paragraph 19, without a judicial resolution, Crescent would effectively be able to indefinitely have rights relative to CJN’s ability to transfer, sell or otherwise develop lots in the Future Phase. Further, paragraph 19 also relates to the present ability of CJN to sell the Future Phase tract as a whole or being limited to develop and sell the tract as lots only. Finally, even if CJN developed such lots, Crescent has no obligation to purchase them under the language of paragraph 19. As a result, paragraph 19 creates an unreasonable restraint of alienation of interest in land.

In addition to these shortcomings, the parties specifically agreed to incorporate and agree upon all such critical terms and set forth the same in a memorandum of right of first refusal, with the memorandum to be “recorded in the public records of Greenville County at the Initial Closing.” This Initial Closing occurred in August of 2020, and while there were discussions between the parties about the terms and conditions of the memorandum, the parties have never been able to agree on terms and no memorandum was entered into and obviously no memorandum has been recorded.

It is well established that where an agreement is clear and capable of interpretation, the Court's function is to interpret its meaning and enforce the same. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC* 649 S.E.2d 494 (SC App 2007). However, based upon the language used in paragraph 19, the Court is unable to interpret and/or give meaning to the parties' agreement without substantially and significantly creating terms and conditions that the parties themselves could have and should have included. While there is authority for a court to determine the parties' intent from the scope and language used (*see, Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc.*, 538 S.E.2d 672 (SC App 2000)), the Court is unable to do so under the facts herein based upon the language of paragraph 19. Further, in that a right of first refusal is a restraint on alienation, it is to be narrowly construed.

The Court simply concludes that under the language and facts involved herein, the right of first refusal in paragraph 19 is not enforceable. The Court notes that its ruling in no way limits the parties' ability to ultimately reach a deal; both are still free to negotiate upon any terms and conditions that may be mutually agreeable.

The remaining issues between the parties shall move to trial as soon as possible.

AND IT IS SO ORDERED

[COURT'S SIGNATURE PAGE TO FOLLOW]

¹ In Paragraph 51 of its Amended Complaint, CJN asserted the following theories, which the Court lists herein solely for purposes of background relating to the procedural history:

- a. The ROFR does not apply to a sale of the undeveloped CJN Property by CJN, and CJN was and is free to sell the undeveloped CJN Property free and clear of any claim under the ROFR;
- b. Additionally or alternatively, the ROFR violates the rule against perpetuities and is therefore void because it is an interest that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter;
- c. Additionally or alternatively, the ROFR is void as an unreasonable restraint on alienation because it lacks specificity as to duration of the right, the property subject to the right, the

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- purchase price, and the procedures for exercising the right, among other things;
- d. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN's tender of the Clark Offer on June 26, 2020, not the invalid ROFR itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer.
 - e. The Opus Offer was a bonified offer
 - f. Because the ROFR was void and/or did not apply to the CJN Property, any rights Crescent had to purchase the CJN Property arose from and were limited by the terms of CJN's tender of the Opus Offer on May 18, 2021, not the invalid ROFR itself, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.
 - g. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Clark Offer on June 26, 2020, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the July 15 closing deadline in the Clark Offer. CJN's tender of the Clark Offer on June 26, 2020 was valid despite being prior to Initial Closing because (1) the Initial Closing would have occurred prior to June 26, 2020 but for delays by Crescent (2) the timing of the tender was not prejudicial to Crescent and (3) Crescent asserted its rights to the CJN Property were ripe by filing Lis Pendens 1 prior to the Initial Closing, among other things, and Crescent should therefore be estopped from asserting those rights did not arise until after the Initial Closing.
 - h. Assuming the ROFR was valid and applied to the CJN Property, which are specifically denied, Crescent was given any and all rights it had under the ROFR when CJN tendered the Opus Offer on May 18, 2021, and all such rights were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase on or before the June 7, 2021 tender response deadline.

² CJN contends that any rights Crescent had under the right of first refusal (assuming it was enforceable) were terminated and extinguished by Crescent's failure to make an equal or better offer for purchase and that Crescent improperly prevented these sales. Crescent contends this is not the case with respect to the Clark offer because the Initial Closing had not yet occurred at the time of that offer, and is not the case with respect to the Opus offer because Crescent disputes that the Opus offer was a bona fide offer.

³ With respect to indefinite existence of the Right of the First Refusal, the parties presented extensive arguments regarding applicability of the rule against perpetuities in memoranda submitted in connection with CJN's Motion for Partial Summary Judgment filed on March 19, 2021. The Court has found that the right of first refusal is an unreasonable restraint on alienation applying the indefinite existence of the right as one of many factors. Accordingly, the Court need not address whether or not the right of first refusal is separately unenforceable as in violation of the rule against perpetuities.



Greenville Common Pleas

Case Caption: Crescent Homes SC LLC vs. C J N Llc

Case Number: 2019CP2305954

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)