

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM AIKEN COUNTY CIRCUIT COURT

M. Anderson Griffith, Master in Equity

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Case No. 2020-CP-02-1173

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**RECEIVED**

JUL 05 2022

SC Court of Appeals

Mark B. Mitchell and Celine C. Mitchell, Plaintiff,  
v.

Ronald Joseph Albertelli and Mary Frances Snelling, Trustees of the Mary Frances Snelling  
Living Trust, Donnita C. Harmon and Jimmie Phillip Harmon, Defendants,

Of Whom Mark B. Mitchell, Celine C. Mitchell, Ronald Joseph Albertelli, and Mary Frances  
Snelling are the Respondents,

And Donnita Harmon and Jimmie Harmon are the Appellants.

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**FINAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES ON APPEAL**

I. DID THE MASTER IN EQUITY ERR IN RULING THAT THE RIGHT OF FIRST REFUSAL WAS UNENFORCEABLE?

## STATEMENT OF THE CASE

This dispute arose out of competing claims for a parcel of real estate in Aiken County. On August 21, 2018, the Jimmie Harmon entered into a contract with Ronald Joseph Albertelli and Mary Frances Snelling, Trustees of the Mary Frances Snelling Living Trust for the purchase of a parcel of real estate referred to generally as Tract 3A. Included in that contract is a right of first refusal of the adjoining parcel, referred to a Tract 3B. The language in the contract stated

“and first right of refusal of property adjoining outside of immediate family.”

(R. p. 81-88 Contract for Sale, Joint Exhibit 2).

The Harmons paid \$435,000 as consideration for the purchase of property Tract 3A, and right of first refusal on Tract 3B. The transaction closed on October 18, 2018 when the Harmons received a deed to the property. The right of first refusal survived, pursuant to the survivability clause in the contract.

In early 2020, Mark and Celine Mitchell began negotiating with Mr. Albertelli for the purchase of Tract 3B. Undisputed is the fact that the Mitchells were fully aware of the right of first refusal held by the Harmons. The Mitchells continued to inquire about purchasing the property. Mr. Albertelli informed the Mitchells that Donnita Harmon had indicated that they were not interested in purchasing the property. (R. p. 51). Undaunted, the Mitchells executed an undated contract to purchase a parcel of land. The contract imprecisely identified the land subject to the contract and listed the address for Tract 3A. No tract identification was included in the contract.

The Harmons did not waive their right of first refusal. After the contract between the Mitchells and Mr. Albertelli was executed, Mr. Albertelli informed the Mitchells that the Harmons were going to purchase the property. (R. p. 52, 56).

The Mitchells brought suit to quiet title on June 18, 2020. A hearing was held before a Master in Equity on November 8, 2021. After considering the briefs of the parties and the evidence submitted, the Master issued his order February 9, 2022, finding that the Right of First Refusal was not enforceable, and that the Mitchell's had a valid basis to obtain specific performance of their contract. The Notice of Appeal was filed on March 7 2022.

At the hearing, the parties stipulated that the Mitchells' contract was executed on or about May 6, 2020 (R. p 38). Mr. Mitchell testified that when he informed Mr. Albertelli that he and his wife were interested in purchasing Tract 3B, Mr. Albertelli indicated he had to check with the Harmons to see if they wanted the property (R. p. 48). Mr. Mitchell further testified that Mr. Albertelli came back and informed him that the Harmons did not want to go forward with the purchase and a contract for the tract was then executed. (*Id.*)

Mr. Mitchell testified that the contract to purchase specified the address of the property as 555 Kendall Pond Road, which he believed to be the parcel he wanted to purchase, but that he did not verify that information. (R. p. 49). Mr. Mitchell stated that after the contract was signed Mr. Alberelli called him and said it would be better if he sold the tract to the Harmons (R. p. 50).

Mrs. Mitchell testified that she never saw any written waiver of the Harmons' right of first refusal. (R. p. 53).

As to the Harmon's contract, Mr. Albertelli clarified that it was only in the name of Jimmie Philip Harmon (R. p. 57). Mr. Albertelli's testimony addressed the price issue within the right of first refusal.

·Q· ·And can you look at that and tell the Court what price

21· · · · you were going to sell 3-B to Mr. Harmon for?

22· ·A· ·There was no price stipulated. · It was whatever

23 · · · · happened by another offer being made would dictate the

24 · · · · price. That was my understanding.

(R. p. 58).

The listed price in the Harmon contract was understood by Mr. Albertelli to be the consideration for the purchase of Tract 3A, and the right of first refusal on Tract 3B (R. p. 61).

He also clarified that there was no dispute that right of first refusal could only apply to Tract 3B since no other property was owned by the Albertellis or adjoined Tract 3A (*Id.*).

Mr. Harmon testified that he also had not doubt as to how the price was to be determined.

· Let me ask it this way. · Do you have any confusion or

17 · · · · by the direct, specific language in that contract as

18 · · · · to how to determine the price when a right of first

19 · · · · refusal would be activated?

20 · A. · I do not. · I have no confusion.

(R. p. 72).

Both Mr. Albertelli and Ms. Mitchell testified that Donita Harmon was the individual who initially indicated that they did not intend to exercise the right of first refusal, and then indicated that they would (R. p.62). She was not a signator to the contract.

#### STANDARD OF REVIEW

[An] action for specific performance of his option contract is in equity. *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964). In equity actions an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544 (Ct. App. 1999). However, this Court is not required to disregard the findings of the trial judge who saw and heard the

witnesses and was in a better position to judge their credibility. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 391 S.E.2d 538 (1989); *Wright v. Trask*, 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1977).

*Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000).

In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775—76 (1976).

## ARGUMENT

### I. The Right of First Refusal was Enforceable

The law of South Carolina is in uniformity with other jurisdictions that in order to have a valid contractual undertaking there must be a meeting of the mind.

“South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.

*H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 475, 748 S.E.2d 72, 75 (Ct. App. 2013) (quoting *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989)).

The contracting parties, Mr. Albertelli and Mr. Harmon clearly understood the relevant terms of the right of first refusal. Both parties understood that if and when a third party offered to purchase the property the Harmons could meet the contract price or waive the right to purchase.

The undisputed evidence supports the conclusion that as between the Harmons and the Albertellis, there was a meeting of the minds as to all the necessary elements of the formation of the preemptive right of first refusal.

The Master in Equity concluded that the failure to include either a state price or a formal mechanism for determining the price rendered the right of first refusal ineffective. This conclusion ignores basic contractual principles recognized in South Carolina.

Furthermore:

[N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.

*Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct.App.1984) (internal citations omitted).

*Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 285, 672 S.E.2d 816, 820–21 (Ct. App. 2009).

To the extent the purchase price of Tract 3B was not set forth with specificity, the mechanics were clearly known and understood by the contracting parties, who both agreed that the price would depend on the purchase price offered by a third party, and that this course of conduct was unquestionably understood by the contracting parties.

A right of first refusal is a

pre-emptive right is a contingent, nonvested interest in that the grantee or the grantee's heirs might never choose to sell the property. It is an interest not conditioned on an event certain to occur. See R. CUNNINGHAM, W. STOEBUCK, & D. WHITMAN, *THE LAW OF PROPERTY* § 3.18, at 132 (2d ed. 1993) (“A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may ... buy at a price set out in the pre-emption agreement.”).

*Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997).

The contract between the Harmons and the Albertellis did not purport to bind any successors or heirs, and thus, may be deemed personal to the contracting parties.

Contrary to the conclusion of the Master in Equity, the Right of First Refusal at issue in the instant litigation is enforceable.

A right of first refusal (ROFO), requiring the vendor to notify the ROFO holder if and when it chose to sell the land, giving the holder the option to offer a price, and leaving the vendor free to reject the price and sell for more than that offer to any willing buyer, is not an unreasonable restraint on alienability, even though it is unlimited in duration, does not include a fixed price term, has no known purpose in embodiment of the document, and might deter charitable contribution, where the ROFO does nothing more than provide the prospective purchaser before the land is offered for sale to the general public and would not deter improvement or restrict marketability.

61 Am. Jur. 2d Perpetuities, Etc. § 109 (Westlaw 2022).

The contractual right created in the Harmon Contract to Purchase was not required to provide a stated price for which the Right of First Refusal to be enforceable. Insisting that the amount and duration be specified in the agreement indicates that the Master in Equity was improperly construing the agreement as an option to purchase, rather than a Right of First Refusal.

An option to purchase is a contract under which the owner agrees with another that he will have the right to buy at a certain price for a specified period of time. See *Tate v. Wood*, 169 W.Va. 584, 289 S.E.2d 432, 434 (W.Va.1982). Therefore, a document representing an option must evidence a contract by the parties.

*J.S.K. Realty Co.*, 9 F. App'x 89, 94 (4<sup>th</sup> Cir. 2001).

The differences between an option to purchase and a right of first refusal are pivotal to the dispute herein.

It is “essentially a conditional option dependent upon the decision or the desire of the landlord to sell [or lease].” *Last v. Puehler*, 19 Wis.2d 291, 297, 120 N.W.2d 120 (1963). Like an option contract, a right of first refusal must be supported by consideration. 3 E.M. Holmes, *Corbin on Contracts* § 11.3 (rev. ed.1996) (hereinafter *Corbin*).

However, a right of first refusal is not an option contract. A right of first refusal is

a right to buy before or ahead of others, thus, a pre-emptive right contract is an agreement containing all the essential elements of a contract, the provisions of which give to the prospective purchaser the right to buy upon specified terms, but, and this is the important point, only if the seller decides to sell. It does not give the pre-emptioner the power to compel an unwilling owner to sell, and therefore is distinguishable from an ordinary option.

*Edlin v. Soderstrom*, 83 Wis.2d 58, 68, 264 N.W.2d 275 (1978) (citing J.A. Bryant, Jr., Annotation, Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation, 40 A.L.R.3d, 920, 924 (1971)). “The holder of an option can compel a sale by an unwilling owner. The holder of a right of first refusal on a piece of land only has the right to receive an offer to buy the land.” Corbin, *supra*, § 11.3.

*MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr.*, 2015 WI 49, ¶¶ 24-25, 362 Wis. 2d 258, 273–74, 864 N.W.2d 83, 91 (2015).

Indeed, by specifically requiring a price, the Master in Equity would turn the preemptive right of first refusal into an option contract. *Est. of Schmidt By & Through Schmidt v. Downs*, 775 P.2d 427, 431 (Utah Ct. App. 1989) (“By stating the price at which Downs and Sanone could purchase the property and agreeing to that price, the parties created an option rather than a right of first refusal.”)

The critical difference between an option contract and a preemptive right of first refusal is squarely addressed under the principles of the Restatement (Third) of Property (Servitudes).

e. Options. The reasonableness of an option in gross to purchase land is determined by the duration of the option and the price. If the price is set at fair market value when the option is exercised, the practical effect of the restraint is much less than if the price is fixed, and a longer duration is justifiable. If the price is fixed, the effect of the option is to discourage improvement of the land, and the option is unreasonable unless its duration is specified. Even if the duration is specified, an option for a lengthy period may be unreasonable unless the length is justified by the purpose, or unless it is clear that the parties expressly bargained

over the specified duration. If the duration is not specified, an option terminates after a reasonable time under rules stated in §§ 4.3 and 7.2.

Restatement (Third) of Property (Servitudes) § 3.4 (2000).

The requirement that both the duration of the option and the price determine the viability of an option contract is consistent with the rule applied by the Master in Equity. That was not the interest in the adjoining property the Harmons purchased.

f. Rights of first refusal. Rights of first refusal are used to give the seller and others the right to purchase the property when the buyer decides to sell. They may be used to control entry into a development, to assure development of an area, to prevent undercutting of prices of unsold units in a new development, to retain property in a family, or for other purposes. 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 (Servitudes) § 3.4 cmt f (2000).

As noted by multiple courts in other jurisdictions, when a right of first refusal specifies the purchase price, as the Master in Equity seemed to believe was necessary, the preemptive right then faces challenges as both an unreasonable restraint on alienation and potential violation of the rule against perpetuities. *Low v. Spellman*, 629 A.2d 57, 58 (Me. 1993) (“Because this preemptive right of first refusal is limited by a fixed price but endures forever, it violates the rule against perpetuities.”).

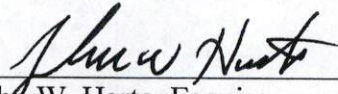
The agreement entered into between Mr. Albertelli and Mr. Harmon was a valid and enforceable right of first refusal. Neither of the contracting parties disputed its terms of conditions and all parties clearly recognized that the right purchased had not been waived.

## CONCLUSION

The Master in Equity failed to give effect to the meeting of the minds of the contracting parties. The valuable consideration paid by the Harmons included not only the tract of land, but

the right of first refusal of the adjoining parcel. By disregarding the right of first refusal, the Master in Equity denied the Harmons a valuable property right they had purchased. For the reasons and authorities set forth above, it is respectfully requested that the Court reverse the Master in Equity's Order of February 9, 2022 granting specific performance of the Mitchell contract and that the Court reinstate the Right of First Refusal of the Harmons.

Respectfully submitted,

  
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*July 28, 2022*

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CERTIFICATION OF COUNSEL

I certify that the appellants final brief(s) complies with Rule 211 SCACR.

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