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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2022-001547

Paige N. Lorberbaum

Appellant,

v.

Turner's Marina, LLC; Jeffrey A. Klapper, Diane L. Klapper

Respondents.

APPELLANT PAIGE N. LORBERBAUM'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court commit an error of law by failing to find that the subject Right of First Repurchase violated the Uniform Statutory Rule Against Perpetuities (S.C. Code Ann. § 27-6-10 *et seq.*).

STATEMENT OF THE CASE

This is an appeal of the Trial Court’s decision to enforce a right of repurchase held by the Respondent, Turner’s Marina, LLC (“Turner”) on a lot in a recreational vehicle (“RV”) development. On June 18, 1981, Outdoor Resorts R.V. Resort and Yacht Club (“Developer”) recorded that certain Declaration of Covenants and Restrictions at Deed Book 325 at Page 920 in the Beaufort County Register of Deeds (“1981 Covenants”) (Tr. Turner Ex. 3) as part of its development of a seventeen (17) acre parcel located near the entrance to the Town of Hilton Head Island. The development consisted of 200 RV lots, marina, fuel dock, and related amenities (collectively “RV Resort”). Paragraph 12.9 of the 1981 Covenants created a right of repurchase (“Right of Repurchase”) in favor of the Developer under the following language

12.9 In the event the Unit Owner desires to sell his Lot, then said Lot shall be offered for sale to the Developer at the same price at which the property is about to be sold, and the said Developer shall have thirty (30) days within which to exercise its option to purchase said property; and should the Developer fail or refuse (within thirty (30) days after receipt of notice of the price and terms) to exercise its option to purchase said property at the price at which it is about to be sold, then the Owner of said property shall have the right to sell said property subject to all covenants and limitations herein contained.

On May 18, 2007, the Respondents, Jeffrey A. Klapper and Diane L. Klapper (collectively “Klapper”) purchased Lot 158, an RV lot which was subject to the 1981 Covenants. On or about December 21, 2017, Turner acquired certain assets and rights at the RV Resort, including the Right of Repurchase under § 12.9 under the 1981 Covenants.

In late 2017, Klapper agreed to sell Lot 158 to Paige N. Lorberbaum (“Lorberbaum”) for a price of \$54,500. Turner timely sought to exercise its claimed Right of Repurchase. Despite said efforts, Klapper on April 22, 2019, closed on its sale to Lorberbaum (Tr. Turner Ex. 10 – Deed/HUD). On May 13, 2020, Turner filed suit against Lorberbaum and Klapper for breach of contract, seeking damages in excess of \$100,000, specific performance, and recovery of attorney fees and costs. (Turner Complaint). Lorberbaum timely filed an Answer and Counterclaim on June 12, 2020. (Lorberbaum Answer and Counterclaim). Turner timely responded to Lorberbaum’s Counterclaim on June 22, 2020. (Turner Answer to Counterclaim).

After a non-jury trial, the Trial Court issued an Order on August 4, 2022, finding Turner properly held the Right of Repurchase, timely exercised same, and ordering Lorberbaum to convey Lot 158 to Turner for \$54,500. The Trial Court declined to award attorney fees to any party. Lorberbaum timely filed a Motion to Alter or Amend on August 16, 2022, under Rule 59(e), SCRPC, asserting among other issues, that the Right to Repurchase in § 12.9 of the 1981 Covenants was unenforceable as violative of the Uniform Statutory Rule Against Perpetuities (S.C. Code Ann. § 27-6-10, *et seq.*) (“Motion”). The Trial Court on September 26, 2022, denied the Motion.

Lorberbaum timely appealed said decision by the filing of a Notice of Appeal on October 27, 2022.

STANDARD OF REVIEW

Plaintiff’s Complaint asserted both legal and equitable claims. “When legal and equitable actions are maintained in one suit, each retains its own identify as legal or equitable for purposes of the applicable standard of review on appeal.” *Consignment Sales, LLC v. Tucker Oil Co.*, 391

S.C. 266, 270, 705 S.E.2d 73, 75 (Ct. App. 2010) (quoting *Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997)).

A. Action at Law

“An action for breach of contract is an action at law.” *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). “In an action at law, on appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law.” *Id.* “The trial [court’s] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” *Id.* “The trial court’s findings are equivalent to a jury’s findings in a law action.” *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009).

B. Action at Equity

“In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence.” *Inlet Harbour v. S.C. Dep’t of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). “However, we are not required to disregard the findings of the trial [court] who saw and heard the witnesses and was in a better position to judge their credibility.” *Straight v. Goss*, 383 S.C. 180, 192, 678 S.E.2d 443, 449 (Ct. App. 2009). “Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

Lorberbaum in this appeal is asserting the Trial Court committed an error of law in its misapplication of The Uniform Statutory Rule Against Perpetuities, as discussed below. There are no disputed or contested factual findings in this appeal.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR BY FAILING TO FIND THE SUBJECT RIGHT OF REPURCHASE VIOLATED THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES (S.C. CODE ANN. § 27-6-10 *ET SEQ.*).

The Trial Court expressly found, without discussion or explanation, the Right of Repurchase under Paragraph 12.9 of the 1981 Covenants (P. Ex. 3 – “Right of Repurchase”) did not violate the South Carolina Uniform Statutory Rule Against Perpetuities (S.C. Code § 27-6-10 *et seq.*).

A review of South Carolina case law finds this conclusion to be in error. S.C. Code Ann. § 27-6-20 modified the common law rule against perpetuities. It reads as follows:

- (A) A nonvested property interest is invalid unless:
 - (1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or
 - (2) the interest either vests or terminates within ninety years after its creation.

The Right of Repurchase under § 12.9 in the 1981 Covenants (P. Ex. 3) states as follows:

12.9 In the event the Unit Owner desires to sell his Lot, then said Lot shall be offered for sale to the Developer at the same price at which the property is about to be sold, and the said Developer shall have thirty (30) days within which to exercise its option to purchase said property; and should the Developer fail or refuse (within thirty (30) days after receipt of notice of the price and terms) to exercise its option to purchase said property at the price at which it is about to be sold, then the Owner of said property shall have the right to sell said property subject to all covenants and limitations herein contained.

The South Carolina Courts have found such a right of repurchase to violate the Uniform Statutory Rule Against Perpetuities since the 1997 decision of *Webb v. Reames*, 326 S.C 444, 485 S.E.2d 384 (Ct. App. 1997). In *Webb*, the Court ruled a 1956 right of repurchase reserved in a deed from the grantee (Blease) to the grantor (Webb) was not valid and was void. *Id.* at 446, 465

S.E.2d at 385. The Court ruled said right of repurchase was a pre-emptive right that was “a contingent, non-vested interest in that the grantee or the grantee’s heirs might never choose to sell the property. *Id.* It is an interest not conditioned on an event certain to occur. *Id.* (citing *R. Cunningham, W. Sloebuck & D. Whiting The Law of Property*, § 3.18 at 132 (2d ed. 1993)). While the right of repurchase in *Webb* did provide that the seller had to sell to the holder of said right of repurchase at the original sale price of \$64, that was not a factor in finding the conditional right violated the Uniform Statutory Rule Against Perpetuities. *Id.*

The Court in *Webb* explicitly ruled that because the interest reserved by the Seller Blease, his heirs and assigns, might not vest within a life in being when it was created in 1956, or until twenty-one years thereafter, the right of repurchase violated the rule against perpetuities and was void, citing numerous cases that reached the same result in various jurisdictions. *Id.* The same is true for the Right of Repurchase claimed by Turner in this case. If the owner, and his/her heirs, of an RV lot never decides to sell, the Right of Repurchase would never vest within the statutory time period of twenty-one (21) years after the death of an individual then alive, or ninety (90) years after its creation under S.C. Code Ann. § 27-6-20(A)(2).

The decision in *Webb* has been subsequently cited with approval in two reported South Carolina decisions.¹ In *Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 596 S.E.2d 51 (2004) the Court did not apply *Webb* because the right of first refusal was not ripe for review, but it did cite *Webb* twice with approval as to legal principal of a right of refusal violating rule against perpetuities. *Id.* at 477, 596 S.E.2d at 60. Similarly, in *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 901 (Ct. App. 2006),

¹ *Webb* has also been cited by the South Carolina Court of Appeals in two unreported decisions. See *Page v. Page*, Op. No. 2004-UP-110 (S.C. Ct. App. Dated Feb. 24, 2004); *Clark v. Fine Hous., Inc.*, Op. No. 2020-UP-238 (S.C. Ct. App. Dated Aug. 12, 2020). Appellant acknowledges these cases are not of precedential value pursuant to Rule 220(a), SCACR.

the court cited *Webb* with approval for holding right of first refusal was void for violating rule against perpetuities but did not apply same because the developer did not assert right of repurchase. *Id.* at 369, 629 S.E.2d at 917.

The law in South Carolina, at least since the *Webb* decision in 1997, is clear. A right of repurchase, such as that claimed by Turner, is void as a violation of the common law rule against perpetuities and the Uniform Statutory Rule Against Perpetuities. It is a pre-emptive right that is contingent, and non-vested, and might not vest during the lifetime of an individual alive in 1981, or twenty-one (21) years thereafter, or within ninety (90) years of the creation of said right, since the owner of said property may never sell.

It should be noted that Lorberbaum is not asserting Turner's claimed Right of Repurchase is unenforceable as an unreasonable restraint or alienation. Thus, the authorities where the validity of a right to repurchase is discussed as an unreasonable restraint of alienation are not applicable to this appeal. *See Clark v. Fine Hous., Inc.*, Op. No. 2020-UP-238, *2 (S.C. Ct. App. Aug. 12, 2020); 61 Am. Jur. 2d Perpetuities, Etc. §§ 109-110; Restatement (Third) of Property (Servitudes), § 3.4 cmt.f (2000). Additionally, it should be noted that Turner's Right of Repurchase, unlike *Webb*, is not at a fixed price, but at a price currently offered by a third party.

As the Trial Court's conclusion that Turner's Right of Repurchase was valid and enforceable is a clear error of law, the requirement that Lorberbaum is required to transfer the RV Lot is also erroneous and should be reversed.

CONCLUSION

The Trial Court committed an error of law finding the Right of Repurchase in the 1981 Covenants did not violate S.C. Code Ann. § 27-6-20 and numerous cases on point. Thus, the Trial Court's decision requiring Lorberbaum to convey the RV Lot to Turner for \$54,500 should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, counsel for Respondent was served with a copy of the Appellant's Initial Brief and its Designation of the Matter to be Included in the Record on Appeal by U.S. Mail on the date set forth below.

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The Hon. Jenny Abbott Kitchings
Clerk of Court
Via One Drive

Re: Paige N. Lorberbaum, Appellant v. Turner's Marina LLC, Jeffrey A. Klapper,
Diane L. Klapper, Respondents
Case No.: 2022-001547

Dear Ms. Kitchings:

Please find enclosed Appellant's Initial Brief and Designation of Matter for filing in the above referenced matter.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions.

Sincerely,
RUSSELL P. PATTERSON, P.A.

Russell P. Patterson

Russell P. Patterson

RPP:djd
Enclosures
cc: Counsel of Record (w/encl.)