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Jan 19 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas for the Thirteenth Judicial Circuit

The Honorable Charles B. Simmons, Jr. Master-in-Equity

Appellate Case No.: 2022-000897
Lower Court Case Nos.: 2019-CP-23-05954 & 2020-CP-23-04351

Crescent Homes SC, LLC…….Appellant,

v.

CJN, LLC……...Respondent.

INITIAL BRIEF OF RESPONDENT

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January 19, 2023
Greenville, South Carolina

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COUNTER-STATEMENT OF FACTS

Respondent CJN, LLC ("CJN"), a property owner and developer, and Appellant Crescent Homes SC, LLC ("Crescent"), a home builder, are sophisticated entities with extensive real estate experience, and had multiple property dealings with each other prior to entering the agreement at issue herein. (Trial Tr. p. 75, lines 6-10.) In April of 2017, the parties were in preliminary discussions regarding development of the River Springs subdivision on property owned by CJN and signed a Letter of Intent generally setting forth an intent to buy/sell lots in both "Phase 1" and "Phase 2"[1] of River Springs. (Trial Tr. p. 12, lines 8-21; CJN Ex. 4.) However, although Crescent wanted to move forward with Phase 2, CJN ultimately declined to enter into a contract for the development of Phase 2 based on development cost concerns. (Trial Tr. p. 12-13; p. 53, lines 1-8; 55, lines 3-18.) In October of 2018, the parties entered into a contract entitled "Agreement for Purchase and Sale of Developed Lots" (the "Agreement"). (CJN Ex. 2.) The subject of the Agreement is the buy/sell of "developed lots" in Phase 1, with CJN developing the lots and selling them to builder Crescent. (Trial Tr. p. 13-14.) Paragraph 19 of the Agreement sets forth the following right of first refusal (the "Right"), the enforceability of which was the single issued determined by the Master in the ruling under appeal.

> 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.

[1] Referred to as "Phase 2" in the Letter of Intent but "Future Phase" in the Agreement.

The Future Phase, an approximately 36-acre undeveloped parcel owned by CJN, and the future "lots" therein are mentioned in the Right and on Exhibit A-2, but are not otherwise addressed in the Agreement. (Trial Tr. p. 141, lines 14-17.)

The Right lacks specific terms regarding price, terms and conditions of purchase, the time allowed for exercise of the Right by Crescent, and how long the right exists. The parties eventually proceeded with the "Initial Closing" in August of 2020, after multiple delays, and continued thereafter to transact the buy/sell of lots in Phase 1. This buy/sell of lots in Phase 1 had been substantially completed at the time of trial. (Trial Tr. p. 10, lines 9-19.) The parties never recorded the "memorandum" because they could not agree on terms. (Trial Tr. p. 44-50.)

With respect to the property encumbered by the Right, CJN contends that the Right does not apply to the sale of undeveloped Future Phase parcel because, by its plain terms, it only applies to the sale of lots should CJN decide to develop those lots. (Trial Tr. p. 14, lines 7-11; p. 58, lines 5-9.) Crescent contends that the Right also applies to the sale of the undeveloped Future Phase parcel. Crescent concedes that there is no requirement in the Agreement that CJN develop the Future Phase. (Trial Tr. p. 141-143.) Nevertheless, Crescent contends that there was an understanding, based on discussions prior to execution of the Agreement, that CJN would eventually develop the Future Phase. (Trial Tr. p. 142-143.) CJN denied that this understanding existed. (Trial Tr. p. 14, lines 7-11; p. 58, lines 5-9.) CJN denied that agreed to be bound to develop the Future Phase, and Crescent conceded that CJN was not obligated to do so. (Trial Tr. p. 142-143.) The Master declined to make any finding regarding the existence of a verbal agreement and instead found that the Agreement was the complete and final expression of the parties' agreement and the parties were bound by its terms. The parties are sophisticated entities with extensive real estate experience. Further, the Agreement states that it contains all of the terms and conditions

agreed to between the parties and that there are no oral agreements. (CJN Ex. 2, Paragraph 21.K.) Moreover, the Master found that, in any event, it was not possible to determine what additional terms, if any, the parties had agreed to based on the facts of the case and he would have been left to create and supply any additional terms.

The dispute regarding the Right first arose in June of 2020, when CJN entered a contract to sell the Future Phase, as an undeveloped parcel, to Mr. Clark, a neighboring property owner.[2] (Trial Tr. p. 17.) Crescent filed a lis pendens on the property to prevent the sale to Clark, contending that the proposed sale violated its rights under the right of first refusal because the Initial Closing had not yet occurred, among other reasons. (Trial Tr. p. 17.) Thereafter, the parties attempted to agree to specific terms for the right of first refusal but reached an impasse on multiple necessary terms. (Trial Tr. p. 44-50.) CJN then filed this action. In May of 2021, after this suit was filed and after the Initial Closing had occurred, CJN entered another contract to sell the undeveloped Future Phase, this time to Opus Petrus, LLC ("Opus"). (Trial Tr. p. 33-39, CJN Ex. 8.) Crescent again filed a lis pendens on the property in response, this time maintaining that the Opus offer was not bona fide. (CJN Ex. 9.) As of the date of trial, Opus had terminated its offer in response to Crescent's threats of litigation, and there was no active contract for sale on the property. (Trial Tr. p. 42.) However, CJN continued to actively market the property for sale. (Trial Tr. p. 43). The Future Phase remains an undeveloped, single parcel, and CJN has no current plan to develop it into lots. (Trial Tr. p. 11, lines 12-18.)

[2] While the parties asserted claims related to these third party offers, those claims were not addressed in detail by the Master because these offers were not dispositive to the ultimate conclusion regarding enforceability of the right of first refusal. In short, CJN contended 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. In short, Crescent contended that the right of first refusal was not impacted with respect to the Clark offer because the Initial Closing had not yet occurred at the time of that offer, and was not impacted with respect to the Opus offer because Crescent contends that Opus offer was not a bona fide offer.

STANDARD OF REVIEW

The appellate court applies a de novo standard of review as to findings of law made by a master-in-equity. *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009). The trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) .

ARGUMENT

I. THE MASTER CORRECTLY FOUND A JUSTICIABLE CONTROVERSY RELATING TO THE ENFORCEABILITY OF THE RIGHT OF FIRST REFUSAL

Crescent initially asserts that this litigation did not present an active case for controversy and that it was not ready or ripe for resolution by the Court. 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. *Peoples Fed. Sav. and Ass'n of S.C. v Resources Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004)("[A] case or controversy regarding the validity of a pre-emptive right does not accrue until the right has been asserted. …. Absent a pending sale or offer for sale, or purchase or offer to purchase, or the presence of a third party challenging right of first refusal, there is no justiciable controversy").

The Master rejected this argument at summary judgment and at trial, finding the issues were ripe and ready for resolution from multiple viewpoints. The "right has been asserted" multiple times. The dispute arose when Crescent asserted the Right by filing a lis pendens to prevent the sale to Clark. Crescent continued to assert the Right thereafter, including with respect to the Opus sale. 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. Additionally, the right of first refusal creates ongoing uncertainty regarding the present ability of

CJN to sell the Future Phase tract as a whole, as opposed to being limited to developing and selling the tract as lots only. In the latter case, even if CJN developed such lots, Crescent has no obligation to purchase them under the language of the Right. Further, there is an "active pending sale or offer for sale" as contemplated in *Peoples Fed.* under the facts and circumstances of this case, including the prior contracts with Clark and Opus, Crescent's response to those contracts including lis pendens filings, and CJN's "active offer for sale" of the property to the open market. (Order, p. 6.)

II. THE MASTER CORRECTLY FOUND THAT THE RIGHT OF FIRST REFUSAL CREATED AN UNREASONABLE RESTRAINT ON ALIENATION

A right of first refusal is a pre-emptive right. *Webb v. Reames,* 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. 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 (Am. L. Inst. 2000). "South Carolina law prohibits the enforcement of unreasonable restraints on alienation of real property." *Clarke v. Fine Housing, Inc.*, Op. No. 28126 (S.C. Sup. Ct. filed Jan. 4, 2023) (Howard Adv. Sh. No. 1 at 26, 28) (hereafter *Clarke*), *citing Wise v. Poston,* 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984). "[A]ny unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect." *Id.* "The question of whether a right of first refusal is enforceable turns upon whether the right unreasonably restrains alienation." *Clarke* at 28 (*emphasis in original*), *citing Wise,* 281 S.C. at 579, 316 S.E.2d at 415. "Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." *Clarke* at 28-29, *citing* Restatement (Third) of Property: Servitudes § 3.4 (Am. L. Inst. 2000). "[T]he factors to be considered in assessing whether a right of first refusal unreasonably restrains alienation include (1) the legitimacy of the purpose of the right, (2) the price at which the right may be exercised, and (3) the procedures for exercising the right." *Clarke* at 29

(adopting Restatement factors). Under relevant facts, another factor to be considered is (4) uncertainty as to what property is encumbered by the right of first refusal. *Clarke* at 30-31.

A. Legitimacy of purpose

CJN agrees that the purpose of the Right is legitimate if it is construed as applying only to the development and sale of lots in the Future Phase. CJN disputes that the purpose of the Right is legitimate if, as Crescent maintains, it prevents CJN from selling the undeveloped the Future *Phase property.*

B. Price

The Right contains no price provisions at all. "Although a right of first refusal that is silent as to price might not restrain alienation to the same degree as a right of first refusal containing a fixed price, a right of first refusal should contain some method for determining the price at which it may be exercised." *Clarke* at 32. "If the Right provided that [the right holder] could acquire the Subject Property by matching the terms of a third-party offer, the restraint on [the seller's] power of alienation would perhaps have been minimal." *Clarke* at 32 (internal quotations omitted). However, "[w]here a right of first refusal provides no price terms, a dispute may arise as to whether the holder of the right may purchase the property by matching a third-party offer or only after participating in a bidding war with other prospective buyers." *Clarke* at 32.

Here, the Right lacks any specific price terms. It was unclear whether Crescent could exercise the Right by matching the price of a third-party offer. Equally important in this case, it was unclear whether Crescent must match multiple related *payment terms,* including the time for payment and closing, financing terms, the amount of earnest money, and the conditions for refund of earnest money. Under the facts of this case, the complete absence of any method for determining price strongly weighs in favor of a finding an unreasonable restraint on alienation.

C. Procedures governing the exercise of the Right

The Right contains no provisions whatsoever governing the exercise of the Right. "[W]here the . . . procedure for exercising the right is clear, and the time for exercising the right when it arises is reasonably short, its practical effect on alienation is de minimis." *Clarke* at 33, (internal quotations omitted). However, "[a]lienation can be substantially restrained when the holder of the right has an extended time to decide whether he will purchase the property." *Clarke* at 33 (internal quotations omitted). Further, "[l]ack of clarity" in the procedure for exercising "may cause substantial harm by making it difficult to obtain financing and exposing potential buyers to threats of litigation." *Clarke* at 32, *quoting* Comment f to section 3.4 of the Restatement. A preemptive right which "states no time limit within which the holder must act and sets forth no procedural requirements that the holder must follow to exercise the right…permits the holder to frustrate a sale to a third party simply by stalling and then threatening litigation when a controversy develops." *Clarke* at 33 (internal quotations omitted). "The whole point of the Restatement is to predetermine a limited time within which a right of first refusal must be exercised to protect the owner's power of alienation." *Clarke* at 34 (emphasis added). "A judicially implied 'reasonable time' requirement would do little to protect the owner's power of alienation. Lengthy litigation over what is or is not a reasonable time under the facts of any given case will necessarily restrain alienation." *Clarke* at 34. Here, the Right contains no time limit within which Crescent must act and sets forth no procedural requirements that Crescent must follow to exercise the right. When Crescent argues that a court can simply imply a reasonable time requirement in which a right of first refusal must be exercised, it misses the point.

D. Uncertainty as to property encumbered

"[L]ack of clarity as to the real property encumbered by a right of first refusal is a factor to consider [,in appropriate factual circumstances,] in determining whether a right of first refusal is an unreasonable restraint on alienation. *Clarke* at 34. In this case, although CJN maintains that the Right plainly applies only to lots in the Future Phase, Crescent asserts rights in relation to the sale of the undeveloped Future Phase, and, in fact, used these asserted rights to prevent sales to Clark and Opus. As the Master noted,

> Under the broad and open-ended language of [the Right], 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, [the Right] 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 [the Right].
>
> (Order, p. 7.)

The lack of clarity as to the real property encumbered contributes to the unreasonableness of the restraint on alienation.

E. No memorandum

The fact that the parties were never able to come to terms for a memorandum demonstrates that the Right lacks the "predetermined terms" necessary to avoid unreasonable restraint under the Restatement approach.

III. THE MASTER CORRECTLY DECLINED TO RULE ON THE RULE AGAINST PERPETUITIES AND THE REFORMATION PROVISIONS OF THE STATUTORY RULE AGAINST PERPETUITIES

Once the Master found that the Right was an unreasonable restraint for other reasons, it was not necessary for him to decide the rule against perpetuities ("RAP") issue. The Right was

separately unenforceable as an unreasonable restraint, regardless of whether it also violates the common law RAP. For the same reason, it was immaterial whether this separate, additional violation might be remedied by reformation under the statutory RAP.

Assuming, *arguendo*, that the RAP analysis is relevant, the Right violates the common law RAP because it contains no expiration date whatsoever, as Crescent appears to acknowledge. (App. Brief, p. .) A right of first refusal is subject to the rule against perpetuities. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997). South Carolina's common RAP provides that 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." S.C.Code Ann. § 27-6-20. The Right violates the common law RAP and is invalid for that additional reason.

Moreover, the statutory reformation provision cited by Crescent does not apply to the commercial transaction at issue here. The South Carolina Uniform Statutory Rule Against Perpetuities, S.C.Code Ann. § 27-6-10 et. seq. ("SCURAP") does not apply to "nondonative transfers":

> SECTION 27-6-50. Exceptions to rule.
>
> Section 27-6-20 does not apply to:
>
> (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer,…
>
> S.C.Code Ann. § 27-6-50

The transaction at issue here is a nondonative transfer. Therefore, the SCURAP, including the reformation provision therein (S.C.Code Ann. § 27-6-40), would not apply. This exclusion of nondonative transfers under the SCURAP is not expressly addressed in the relevant South Carolina cases. *See Webb*, 326 S.C. at 446, 485 S.E.2d at 385. However, *Webb* implicitly rejects

application of the SCURAP because it does not apply SCURAP or its reformation provision but does expressly apply the common law rule. *Id.* The North Carolina Court of Appeals case addresses this issue in detail, applying North Carolina's version of the Uniform Statutory Rule Against Perpetuities (which is substantially similar to South Carolina's version). *New Bar Partnership v. Martin*, 729 S.E.2d 675, 221 N.C. App. 302 (2012). The *New Bar* Court concluded the following: (1) The statutory RAP does not apply to nondonative transfers, (2) commercial transactions are nondonative transfers and the statutory RAP does not apply to them, and (3) the common law RAP does apply where the statutory RAP does not apply and therefore applies to commercial transactions. *Id*. at 683.

IV. THE MASTER CORRECTLY EVALUATED ENFORCABLITY OF THE RIGHT BASED ON ITS PLAIN LANGUAGE

A. Restrains on alienation of land are to be strictly construed based on their plain language such that extrinsic evidence of intent is irrelevant to the unreasonable restraint analysis and reformation cannot be used to cure the unreasonable restraint

The Master applied the appropriate unreasonable restraint analysis set forth in *Clarke*, which asks whether the plain language of the clause, strictly construed, unreasonably limits the owner's ability to sell the property. If so, the clause is unenforceable. *See also Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (applying strict construction in favor of unrestricted use of property: "A restriction on the use of property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property."); *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968) (applying principle that when the granting clause in a deed conveys a fee simple title, it cannot be reduced or cut down by subsequent language in the instrument).

In contrast, the improper analysis suggested by Crescent asks whether the clause, applying standard contract interpretation principles (rather than restraint on alienation analysis), can be judicially reformed based on extrinsic evidence to make the restraint reasonable. This approach is fatally flawed because it necessarily allows right holders to freely restrain alienation by threatening litigation when a controversy develops (as Crescent did in this case). *Clarke* at 33 (A preemptive right which "states no time limit within which the holder must act and sets forth no procedural requirements that the holder must follow to exercise the right…permits the holder to frustrate a sale to a third party simply by stalling and then threatening litigation when a controversy develops."). Crescent's approach is simply contrary to *Clarke* and all applicable authority, and Crescent has failed to identify even a single authority applying its approach to the unreasonable restraint analysis. (See generally App. Brief, p. 12-18.) The Right is unenforceable based on its plain language, regardless of whether in other circumstances it would be subject to judicial reformation based on extrinsic evidence.

B. Even assuming standard contract interpretation principles apply, the Master properly found that the plain language of the Right was dispositive

i. The parties are sophisticated entities and agreed to be held to the plain language of the Right

It was proper to hold the parties to the plain language of the Agreement because the parties are sophisticated entities who included a clause in the Agreement stating that the written Agreement contains all of the terms and conditions agreed to between the parties and that there are no oral agreements. (CJN Ex. 2, Agreement Paragraph 21.K.) The fact that Crescent failed to secure certain rights it would like to have had under the Agreement does not mean that the Agreement should be reformed. A party's failure to adequately guard its rights does not render a contract subject to reformation. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 240, 665 S.E.2d 618,

626 (Ct. App. 2008). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* at 242 (citations omitted).

ii. Even with extrinsic evidence, it was not possible to determine what additional terms the parties may have agreed to, such that extrinsic evidence is immaterial to enforceability

The Master took a wait and see approach to extrinsic evidence,[3] which allowed him to hear the evidence and then determine even with that evidence it would not have been possible to reform the Right. The Master consider evidence as to: the context surrounding entry into the Agreement, performance of the Agreement, the circumstances related to the attempted sale of the Future Phase, and failed negotiations of the memorandum of the Right. (See generally Order, p. 3-5.) Based on this, he concluded that it was not possible to determine what additional terms, if any, the parties had agreed to based on the facts of the case, much less the substance of those additional terms. (Order, p. 8.) This conclusion is a factual finding entitled to a deferential standard of review.

There is no support for Crescent's argument that the Master disregarded clear extrinsic evidence showing that agreement existed as to all necessary terms. Lack of agreement on these terms is obvious throughout the record and is the basic reason for this protracted litigation. By way of significant examples:

- The parties disagree on whether the right applies to the raw land. CJN maintains it was intended to apply only to lots. (Trial Tr. p. 14, lines 7-11; p. 58, lines 5-9 ("We had this conversation about lots, but not raw land on it. But the understanding was if I did not develop it there was not ever going to be lots put on there so it never should be tied up. I mean that's just the long and short of it. I mean it says lots, lots only.") Crescent maintains that the sale of undeveloped land was not permissible. (Trial Tr. p. 141, lines 6-10). Crescent contends that both parties intended to develop phase 2, but agrees there is no technical obligation for CJN to develop the

[3] "I have no problem if y'all go ahead and build the record, because it may very well be that the Court says I'm limited by the language used by the parties. We don't use any extrinsic evidence. But at the same time, until that determination is made, I think it's fair game." (Trial Tr. p. 22, lines 16-20.)

lots. (Trial Tr. p. 142, line 6- p. 43, line 4.)

- The parties disagree on the time for response to a third-party offer. CJN stated that three or four days for response was reasonable. (Trial Tr. p. 19, lines 1-8, Crescent asked CJN to allow 30 days for response. (Trial Tr. p. 30)

- The parties disagree on the procedures for exercise of the right. Crescent wanted CJN to provide a means of access, meaning a bridge over the creek. (Trial Tr. p. 29-30.) Crescent concedes that this is not in the Right (Trial Tr. p. 157-158.)

- The parties disagree on when the right should expire. Crescent asked for the Right to expire in July 2030 while CJN thought this was too long. (Trial Tr. p. 30-31.)

- The parties attempted to negotiate terms for the Right well after the Agreement was entered but could not agree to terms. (Trial Tr. p. 44-50.)

There was simply no basis to conclude that the parties had agreed to anything beyond the terms of the Right, much less all of the specific terms necessary for an enforceable right of first refusal. The Master therefore could not find a basis to reform without suppling additional terms: "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." (Order, p.8.) "Courts are without authority to alter a contract by construction or to make new contracts for the parties." *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984).

CONCLUSION

For the foregoing reasons, Respondent CJN requests that the Court affirm the Master's Order.

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