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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-In-Equity

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

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

Crescent Homes SC, LLC,

Appellant/Plaintiff,

v.

CJN, LLC,

Respondent/Defendant.

FINAL REPLY BRIEF OF APPELLANT

By: *s/Ellis R. Lesemann*

Ellis R. Lesemann (S.C. Bar No. 15315)

erl@lalawsc.com

Benjamin H. Joyce (S.C. Bar No. 100949)

bhj@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

March 20, 2023

Charleston, South Carolina

Attorneys for Appellant Crescent Homes SC, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES **II**

ARGUMENT..... **1**

I. THE MASTER ERRED IN CONCLUDING A JUSTICIABLE CONTROVERSY EXISTS...... **1**

II. THE MASTER ERRED IN DETERMINING THE ROFR CREATED AN UNREASONABLE RESTRAINT ON ALIENATION. **2**

A. Unlike Clarke, There is no Dispute or Uncertainty as to the Property Encumbered by the ROFR. **2**

B. Unlike Clarke, the Record Confirms the Parties Understood the Method for Determining Price...... **3**

C. Unlike Clarke, the Record Confirms the Parties Understood Procedures Governing the ROFR and that Crescent had a Limited Time to Respond and Exercise its ROFR in Response to any Third Party Bona Fide Offers. **4**

CONCLUSION **5**

TABLE OF AUTHORITIES

Cases

Clarke v. Fine Housing, Inc., No. 2020-001371, 2023 WL 29046 (S.C. Jan. 4, 2023)..... passim

Peoples Fed. Sav. & Loan Ass'n fo S.C. v. Res. Plan. Corp., 358 S.C. 460, 596 S.E.2d 51 (2004)
..... 1, 2

Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903 (1983) 4

Other Authorities

Black’s Law Dictionary (11th ed. 2019)..... 4

ARGUMENT

In its Initial Brief, Respondent CJN, LLC (“CJN”) primarily relies upon *Clarke v. Fine Housing, Inc.*, No. 2020-001371, 2023 WL 29046 (S.C. Jan. 4, 2023) (hereinafter “Clarke”), an opinion published by the Supreme Court of South Carolina this month in which a Petition for Rehearing is pending. *Clarke* was decided in part as a matter of first impression based on facts not present in this case. Unlike this case, *Clarke* also presented a justiciable controversy ripe for adjudication by the court. Furthermore, as the court in *Clarke* appropriately acknowledged, the factors to be considered in assessing whether a right of first refusal (“ROFR”) unreasonably restrains alienation are not exclusive and should be applied in a case-by-case fashion. *Clarke* at *2. *Clarke* is not determinative of the issues presented in this appeal. For the reasons discussed herein and in Crescent Homes SC, LLC’s (“Crescent” or “Appellant”) Initial Brief, this Court should reverse the Master’s Order.

I. THE MASTER ERRED IN CONCLUDING A JUSTICIABLE CONTROVERSY EXISTS.

CJN quickly addresses the issue of justiciability in its Initial Brief. This issue is dispositive under *Peoples Fed. Sav & Loan Ass’n of S.C. v. Res. Plan. Corp.*, and the Master erred in finding that the facts at issue present a justiciable controversy. *See Peoples Fed.*, 358 S.C. 460, 476-77, 596 S.E.2d 51, 60 (2004) (“Because Peoples does not have a pending offer for the purchase of its property, there is currently no justiciable controversy concerning the validity of the preemptive right provision in the Covenants. Accordingly, the referee erred by ruling on the enforceability of the right of first refusal provision.”).

CJN concedes that *Peoples Fed.* is applicable to this case but broadly argues that the facts and circumstances at issue present a justiciable controversy. The ROFR is contingent and predicated on the existence of a third-party bona fide offer that triggers the right to match the terms

offered by the third party. Therefore, because there is no pending third-party bona fide offer for Crescent to consider, a justiciable controversy does not exist. Finding otherwise, as the Master did, is inconsistent with the established law under *Peoples Fed* and the course of dealing between the Parties. Therefore, the Master's Order should be reversed.

II. THE MASTER ERRED IN DETERMINING THE ROFR CREATED AN UNREASONABLE RESTRAINT ON ALIENATION.

CJN relies heavily upon *Clarke* in which the Supreme Court of South Carolina recently reiterated the prohibition of enforcement of unreasonable restraints on alienation of real property based on a specific set of facts absent from this case. Clarke (lessee and strip club owner) leased half of the parking spaces from Group Investment (lessor and neighboring strip club owner). Although Clarke was not entitled to use any portion of the subject property other than the parking spaces during the lease term, he claimed that the lease provided him a ROFR to buy the entire subject property. The ROFR stated, in its entirety,

“Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell.”

Clarke at *3.

There was a dispute as to whether the ROFR encumbered the leased parking spaces or all of the subject property, which included buildings, the leased parking spaces, other parking spaces, and other land. Clarke did not seek to exercise the ROFR at the time lessor conveyed the subject property to a new owner and was not tendered the opportunity to do so at the time the property was conveyed. Instead, Clarke initiated a claim for specific performance after discovering that the subject property had already been conveyed to a new owner.

A. Unlike Clarke, There is no Dispute or Uncertainty as to the Property Encumbered by the ROFR.

The court in *Clarke* held, as a matter of first impression, that because it was unclear as to

what property was encumbered, the ROFR was an unreasonable restraint on alienation. *Id.* In doing so, the Court considered the language of the lease agreement as a whole to provide clarity as to the property encumbered by the ROFR. Unlike *Clarke*, there is no dispute as to the property encumbered by the ROFR in this case, which is the neighboring property planned for Phase 2. This is clearly stated in the Agreement and further depicted in the exhibit to the Agreement. (R. pp. 289 – 290; R. p. 337, line 13 – p. 338, line 3; R. p. 380, lines 10 – 15.)

B. Unlike Clarke, the Record Confirms the Parties Understood the Method for Determining Price.

CJN argues that it was “unclear whether Crescent could exercise the [ROFR] by matching the price of a third-party offer.” (Respondent’s Initial Brief at 6.) This argument is disingenuous.

On two occasions, CJN tendered offers to Crescent for a determination of whether Crescent would like to exercise its ROFR on the terms or exceeding those terms of said offers. Nicholas Franchina of CJN further testified at trial:

Q. And what’s your general understanding of how they would work from your perspective?

A. Right of first refusal would give someone the option to come in basically and if this contract said I’m going to purchase the property for, like Mr. Clark, seven hundred and seventy-five thousand dollars, and I had this terms in it and these dates in it, **that you would match them. That’s the right of first refusal.** They turn it over to you, they give you so many days to basically say if you’re going to take it or not. Usually, you know, three or four days, something like that, and they come back to them.

(R. p. 340, line 20 – p. 341, line 6.) (emphasis added). The parties clearly understood the method for determining price, and that Crescent held a ROFR to match or exceed those terms of any third party bona fide offers received by CJN.

By definition, a right of first refusal is a potential buyer’s contractual right to meet the terms of a third party’s highest offer. RIGHT OF FIRST REFUSAL, Black’s Law Dictionary (11th

ed. 2019). CJN understood that the right of first refusal gives a person the right to match the offer. (R. p. 477, line 22 – p. 478, line 1.) The record shows that the Parties intended for Crescent to purchase the Phase 2 property at the price that was offered by a third party in a pending offer. (R. p. 377, lines 3 – 8.) The Parties intended for the price at which Crescent could purchase the Phase 2 Property would be equal to or greater than a bona fide third party offer that CJN seriously considered. (R. p. 377, lines 3 – 8; R. p. 477, line 22 – p. 478, line 5.)

The restraint on alienation may be lessened where the holder of the right may match the offer of a third party. *Clarke* at *3 (citing *Shiver v. Benton*, 251 Ga. 284, 304 S.E.2d 903, 905 (1983) (“If the holder of the preemption right is merely entitled to meet the offer of an open market purchaser, there is little clog on alienability.”)). Unlike *Clarke*, there is not a complete absence of any method for determining price. On the contrary, the record confirms Crescent and CJN understood that the price and terms would become ascertainable upon the occurrence of a bona fide offer by a third party. The course of dealing between Crescent and CJN on multiple property deals was absent in *Clarke* where the lease containing the ROFR was not entered between Clarke and Fine Housing but rather assigned through two separate conveyances.

C. Unlike Clarke, the Record Confirms the Parties Understood Procedures Governing the ROFR and that Crescent had a Limited Time to Respond and Exercise its ROFR in Response to any Third Party Bona Fide Offers.

CJN argues that the ROFR leaves the Parties unaware of the procedures governing the ROFR and the time period for Crescent to respond and exercise its ROFR in response to any third party bona fide offer. The record reflects otherwise. On two occasions, CJN tendered offers to Crescent for a determination of whether Crescent would like to exercise its ROFR on the terms or exceeding those terms of said offers. Nicholas Franchina of CJN conceded that CJN proposed a procedure for the exercising of the ROFR:

Q. What I'm going to ask you, this is the tender of this offer. On page 2 it looks like CJN proposed a procedure for exercise of right of first refusal when they tendered this offer?

A. Yes. Yes.

(R. p. 393, lines 10 – 14.) The Parties further understood that the time to respond was limited.

Q. And fifteen days you think is a reasonable time frame in order for a party to respond to an offer?

A. Yes.

Q. But you acknowledge that in certain communications between CJN and Crescent, longer time periods have been discussed; twenty days, thirty days. Is that right?

A. I guess, yeah.

Q. Okay.

A. They were in there.

(R. p. 392, lines 1 – 9.) This is consistent with the fact that the Parties negotiated a “Time is of the Essence” clause that was included in the Agreement, a provision that is commonly included in real estate contracts and was apparently not included in the lease agreement in *Clarke*.

CONCLUSION

Appellant Crescent Homes SC, LLC requests that the Court vacate the Order on the basis that this matter does not involve a justiciable controversy. In the alternative, Crescent respectfully requests that the Court impose the decision that the Master should have made and declare the Right of First Refusal enforceable and should be reformed rather than invalidated.

By: s/Ellis R. Lesemann
Ellis R. Lesemann (S.C. Bar No. 15315)
erl@lalawsc.com
Benjamin H. Joyce (S.C. Bar No. 100949)
bhj@lalawsc.com
LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403
(843) 724-5155

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Attorneys for Appellant Crescent Homes SC, LLC