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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914
Appellate Case No.: 2022-000813

Spring Valley Interests, LLC, ...Appellant,

v.

The Best For Last, LLC, ...Respondent.

BRIEF OF RESPONDENT

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RESTATEMENT OF ISSUES ON APPEAL

Respondent would restate the issues on appeal as follows:

I. Did the Trial Court properly grant Respondent's Motion for Partial Summary Judgment on the basis that a freely assignable and perpetual option to purchase a co-tenancy interest in property violated the Rule Against Perpetuities?

II. Did Appellant fail to preserve for appellate review its argument that the Purchase Option contains an implied term stating it would be exercised within a reasonable time?

As an additional sustaining ground,

III. Did Appellant waive its right to re-exercise the Purchase Option by exercising the option, agreeing to the terms of purchase, executing the Closing Documents, and then failing to proceed with the agreed-upon sale?

STATEMENT OF THE CASE

This case arises out of a written loan agreement between Respondent The Best For Last, LLC ("Respondent" or "TBFL") and Appellant Spring Valley Interests, LLC[1] ("Spring Valley" or "Appellant"), through which Appellant loaned TBFL money to assist in TBFL's acquisition of real property. As part of the loan, TBFL granted Appellant a freely assignable and perpetual option to purchase an undivided co-tenancy interest in the property ("Purchase Option"). (R. pp. 4-5, para 1-10; R. p. 18, para 29, 30). At the center of this appeal is the enforceability of the Purchase Option and, to the extent the option was ever enforceable, whether Appellant waived its right to exercise the Purchase Option after once doing so and failing to close the transaction.

Appellant filed this lawsuit on December 11, 2019, seeking specific performance of the Purchase Option, reformation of a mortgage, and an alternative claim for damages against TBFL. TBFL filed an answer and counterclaim for a declaratory judgment, pursuant to S.C. Code Ann. §

[1] White Interests Limited Partnership was the original lender on the loan but assigned its interest in the purchase option to Appellant. (R. p. 151, lines 7-10). Lynn White is the sole owner and manager of both White Interests and Appellant. (R. p. 145, lines 6-13).

15-53-10, et seq., that the Purchase Option was unenforceable because it violated the common law rule against perpetuities and/or the Uniform Statutory Rule Against Perpetuities (USRAP). TBFL also asserted a claim for equitable estoppel, arguing Appellant should be estopped from seeking specific performance due to Appellant's failure to close the agreement reached by the parties following its exercise of the Purchase Option.

On April 16, 2021, TBFL moved for summary judgment on its declaratory judgment claim arguing, in part, that the rule against perpetuities barred the enforcement of the Purchase Option. Alternatively, TBFL argued Appellant waived its right to enforce the Purchase Option by exercising the option and then failing to close the transaction negotiated by the parties. On April 29, 2021, Appellant filed a cross-motion for partial summary judgment as to its claim for specific performance of the Purchase Option. TBFL filed a reply in opposition to Appellant's motion on August 19, 2021.

The trial court heard oral argument on the parties' cross-motions for summary judgment on August 26, 2021. On September 10, 2021, the trial court denied Appellant's motion for summary judgment via a Form-4 Order. On May 18, 2022, the trial court granted TBFL's motion for summary judgment on the ground that the Purchase Option violated the common law rule against perpetuities. Appellant filed its Notice of Appeal on June 13, 2022.

STATEMENT OF THE FACTS

The record in this case tells a simple story. As explained below, TBFL and Appellant entered into a loan agreement in connection with TBFL's purchase of real property that gave Appellant a perpetual and freely assignable option to purchase a co-tenancy interest in the property. After Appellant exercised the option, the parties worked for weeks to negotiate the terms of a mutually acceptable co-tenancy agreement through which they would each share an interest in the

property. However, on the eve of the closing, with all of the necessary documents signed by the parties and awaiting recording, Appellant decided that it wanted a bigger piece of the pie and refused to cooperate further unless TBFL agreed to various last minute demands. TBFL refused to yield from the agreed upon terms, so Appellant sunk the deal. Appellant now wants to re-exercise the Purchase Option in order to have its second bite at the apple.

I. The Purchase Option.

TBFL is a South Carolina limited liability company formed in March of 2017 for the sole purpose of owning, developing, and managing a self-storage facility in Columbia, South Carolina (the "Property"). (R. p. 152, line 6 – p. 153, line 23; R. p. 206, lines 5-9; R. p. 270, lines 12-19). TBFL consists of four members, each of whom made an initial capital contribution of varying amounts totaling $275,000 towards the purchase of the Property. (R. p. 153, lines, 1-23; R. pp. 412-423). In order to obtain additional financing, Albert Heyward, the manager of TBFL, enlisted the help of Lynn White, the owner/manager of Appellant's predecessor, White Interests Limited Partnership ("White Interests"). (R. p. 152, line 6 – p. 153, line 10; R. p. 210, lines 1-16). After Lynn White agreed to invest in the venture, TBFL and White Interests hired Tim Gavigan, Esquire, a transactional attorney who had previously represented both White and Heyward in various business deals, to assist in the acquisition of the Property. (R. p. 144, line 20 – p. 145, line 1; R. p. 154, lines 12-23; R. p. 207, lines 1-16).

On May 3, 2017, TBFL and White Interests executed a written loan agreement (the "Loan Agreement") wherein White Interests agreed to loan TBFL the sum of $800,000.00 to assist TBFL in acquiring the Property. (R. p. 209, lines 1-9; R. pp. 365-368). As consideration for the loan, TBFL granted White Interests a "freely assignable" and "perpetual option" to purchase a 74.425% undivided co-tenancy interest in the Property (the "Purchase Option"). (R. p. 212, lines 13-19; R.

pp. 365-368). White Interests subsequently assigned its right to exercise the Purchase Option to Appellant. (R. p. 223, line 23 – p. 224, line 2). Both White Interests and Appellant are solely owned and managed by Lynn White. (R. p. 145, lines 6-13). The Purchase Option was exercisable at Appellant's sole discretion, had no time limitations, and provided that Appellant would take title to the co-tenancy interest subject to (i) no mortgages other than TBFL's then outstanding first mortgage, and (ii) "a mutually acceptable co-tenancy agreement." (R. pp. 365-368). Specifically, Section 2 of the Loan Agreement provides:

> **Lender's Purchase Option.** I[n] consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the **"Purchase Option"**) for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the **"Purchase Price"**). The Purchase Option shall be exercised at the Lender's sole discretion by delivery of a written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take [sic] title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.

(R. pp. 365-368).

The loan set forth in the Loan Agreement is evidenced by a promissory note (the "Note") from TBFL to Appellant and is secured by a second mortgage lien on the Property in favor of Appellant (the "Mortgage"). The Note provides that interest on the loan would be paid to Appellant "as if [Appellant] were an Initial Member" of TBFL. The principal of the loan was to be paid in full upon the first to occur of the following: "(i) at the closing of the exercise of the Purchase Option provided for in the Loan Agreement of even date herewith between [TBFL] and [Plaintiff], (ii) the refinance of [TBFL's] mortgage debt, and (iii) the sale of [TBFL's] real property." The Note also stated that TBFL "shall have the right at any time or from time to time prepay this Note in whole or in part." (R. pp. 369-371).

II. Appellant's Exercise of the Purchase Option.

Starting in the summer of 2019, TBFL began exploring options for refinancing the first mortgage lien encumbering the Property (the "Refinance"). On August 16, 2019, TBFL paid a $35,000 non-refundable application fee to secure a financing commitment of $3,100,000.00 from C-III Commercial Mortgage (the "Refinance Lender"). (R. p. 219, lines 21-25; R. p. 300, line 12 – p. 301, line 12). However, on August 21, 2019, upon learning that TBFL had tendered the $35,000 non-refundable application fee to the Refinance Lender, Appellant sent TBFL a letter stating it was exercising the Purchase Option. (R. p. 165, lines 9-17; R. p. 168, lines 2-21; R. pp. 372-373). The notice stated that the closing of the Purchase Option was "to occur at the earlier of (i) twenty-nine (29) days from the date of this Notice, or (ii) one (1) day immediately preceding a refinance of [TBFL's] existing outstanding mortgage indebtedness." (R. pp. 372-373).

According to Appellant, "it was important that I exercised my purchase option before the project was refinanced because I was entitled to 70 some percent of the excess loan proceeds[,] which means my purchase option would not have cost the full $800,000. It would have been less than that." (R. p. 165, lines 12-17). In other words, Appellant wanted to make sure it held a possessory interest in the Property at the time of the Refinance so that it could receive a windfall of any excess loan proceeds and offset the $800,000 it had contributed to TBFL.

III. The "Mutually Acceptable Co-Tenancy Agreement."

With a tentative closing date for the Refinance set in late September 2019, TBFL and Appellant began negotiating the "mutually acceptable co-tenancy agreement" contemplated by the Purchase Option. During the negotiations, TBFL took the position that the co-tenancy agreement should contain terms and conditions that reflected the economics and management structure

embedded in TBFL's operating agreement. (R. p. 283, line 9 – p. 286, line 19; R. pp. 412-423). As TBFL understood the deal, TBFL had agreed to grant Appellant the Purchase Option for a co-tenancy interest in the Property instead of a membership interest in the LLC in order to accommodate Appellant's desire for a future 1031 Exchange,[2] which would only be possible if Appellant took a possessory interest in the Property. (R. p. 162, lines 18-21; R. p. 273, line 11 – p. 274, line 4; R. p. 283, line 9 – p. 286, line 19; R. pp. 412-423). TBFL also understood that Appellant's interest in the Property would be the same "as if the [Appellant] were an Initial Member" of the LLC. (R. pp. 412-423).

This position was consistent with the language of the Note, which provided that "Interest shall be due and payable in the same manner as set forth in 9.1.1.1. of [TBFL's] Operating Agreement as if the [Appellant] were an Initial Member (as defined in such Operating Agreement) and the Interest was the [Appellant's] Preferred Return (as defined in the Operating Agreement)." (R. p. 163, line 11 – p. 164, line 16; R. pp. 369-371). However, When TBFL communicated to Appellant how it wanted to structure the co-tenancy agreement, Appellant insisted that it should receive an outright co-tenancy interest in the Property, not a corresponding membership interest in the LLC. (R. p. 162, lines 9-21; R. p. 175, lines 6-12; R. p. 290, line 7 – p. 291, line 13).

On September 12, 2019, Appellant, now represented by Timothy Gavigan, Esquire, sent TBFL an email containing a first draft of the transaction documents. (R. p. 223, lines 5-15; R. pp. 374-411). Thereafter, between September 13 and 18, 2019, Appellant and TBFL worked together on the key terms by which Appellant would take the co-tenancy interest in the Property. On September 19, 2019, the parties met at the office of Tim Gavigan, where they reached an agreement

[2] 26 U.S. Code § 1031 (providing that "[n]o gain or loss shall be recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for productive use in a trade or business or for investment.").

on the terms for converting the Purchase Option into a co-tenancy agreement. Per the agreement between Appellant and TBFL, Appellant's second mortgage would be satisfied in exchange for a conveyance of a 70% co-tenancy interest in the Property in favor of Appellant and a cash payment from Appellant to TBFL of approximately $141,000. (R p. 182, lines 7-16; R. p. 229, line 20 – p. 231, line 14; R. pp. 424-430). Following the meeting, Tim Gavigan wrote to TBFL's attorney: "I'm pleased to advise that we were able to get Lynn [White] and Albert [Heyward] to come to an agreement on moving forward." (R. p. 229, line 20 – p. 231, line 14; R. pp. 424-425).

On September 25, 2019, TBFL's attorney wrote to Tim Gavigan in response to the original September 12, 2019 email: "The conveyance documents you prepared for the option exercise are acceptable once corrected for the agreed 70% interest. If you can get those cleaned up and remove the watermarks, I will get Albert and friends scheduled for execution on Thursday or Friday." (R. p. 236, line 19 – p. 237, line 8; R. p. 431). On September 26, 2019, Gavigan responded with the revised closing documents reflecting the agreement reached by the parties during the September 19, 2019 meeting, which included a co-tenancy agreement, amendments to the Loan Agreement, form of deed, and other related documents (the "Closing Documents"). (R. p. 231, lines 1-13; R. p. 238, lines 13-23; R. p. 432). In that same email, Gavigan included an additional request that TBFL reimburse Appellant for "additional legal fees incurred to defend [TBFL's] challenge of the option." (R. p. 238, lines 5-9; R. p. 432). TBFL did not immediately respond to this portion of the email.

IV. Appellant Refuses to Close the Agreement Reached by the Parties.

In reliance on Appellant's representations that the loan would be satisfied by the conveyance of a co-tenancy interest, the cash payment, and Appellant's second mortgage lien on the Property thereafter being released, TBFL executed the Closing Documents on Friday, September 27, 2019.

That same day, TBFL, through its own counsel, tendered the executed Closing Documents to Appellant and offered to overnight ship the original deed executed by TBFL. (R. p. 241, lines 8-15; R. p. 435). Upon receiving the signed documents from TBFL, Appellant also signed and executed the Closing Documents, after which Gavigan advised TBFL's attorney: "I'll send you [Appellant's] signature pages on Monday." (R. p. 242, line 10 – p. 243, line 10; R. pp. 435-436). Through phone conversations later that day, Gavigan requested that TBFL hold the original deed to the Property for recordation simultaneous with the documents to be executed and recorded by TBFL in connection with the Refinance, which was scheduled to occur on October 2, 2019. (R. p. 241, lines 5-25).

Over the following weekend, Tim Gavigan sent an email to TBFL's attorney again asking about the reimbursement for $6,500 in legal fees "related to the challenge of the Purchase Option." (R. pp. 439-440). TBFL's attorney responded the following Monday, September 30, 2019, objecting to the characterization of the negotiations as a "challenge" and conveying TBFL's position that each party should be responsible for its own fees related to the conversion of the Purchase Option into the co-tenancy agreement contemplated by the Loan Agreement. (R. pp. 439-442). However, in order to ensure that the Refinance would close and that TBFL would not forfeit its $35,000 deposit, TBFL's attorney sent Gavigan an email two hours later indicating TBFL's agreement to pay Appellant's legal fees. (R. pp. 441-442).

Despite TBFL's agreement to pay the additional fees, Appellant responded that it believed the initial refusal to pay its legal fees "opened the deal up for retrade." (R. p. 246, lines 13-20; R. pp. 441-442). Appellant, fully aware that TBFL risked forfeiting the $35,000 Refinance fee if the deal failed to close and apparently determined to exploit this vulnerability to its full potential, thereafter refused to return the executed Closing Documents to TBFL unless TBLF agreed to

additional terms favorable to Appellant. In addition to the payment of the attorney's fees, these last-minute demands included giving Appellant a larger share of the funds from the Refinance and not requiring Appellant to share in the payment of certain fees and expenses. (R. p. 247, line 18 – p. 248, line 25; R. p. 441). After TBFL rejected Appellant's last minute changes, Appellant communicated that it would not participate in the closing, thereby ensuring the collapse of the Refinance and TBFL's loss of the $35,000 application fee. (R. p. 247, line 18 – p. 248, line 25; R. p. 309, lines 21-23; R. p. 441).

STANDARD OF REVIEW

In reviewing an order granting summary judgment, the appellate court applies the same standard as the lower court under Rule 56(c) of the *South Carolina Rules of Civil Procedure*. *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014). Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), *SCRCP*; *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008); *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct. App. 2004). However, "[o]nce the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleading. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.*

Appellate courts may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. *See* Rule 220, SCACR; *see also I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED TBFL'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PURCHASE OPTION VIOLATES THE RULE AGAINST PERPETUITIES.

A. The Purchase Option is Unenforceable Under the Common Law Rule Against Perpetuities.

At common law, the rule against perpetuities limited the remote vesting of contingent interests by providing that any interest is valid only if it is certain to vest, if ever, within the lifetime of a person living at creation of the interest, plus twenty-one years. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 369-70, 628 S.E.2d 902, 917 (Ct. App. 2006). The common law rule against perpetuities was born out of the idea that "[n]onvested property interests tend to restrain the free alienability of property and interfere with its beneficial use." *Id*. at 70 (citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 6 (2005) ("The rule against perpetuities is an ancient, but still vital, rule of property law intended to enhance the marketability of property interests by limiting the remoteness of vesting.")).

As set forth above, the Purchase Option gave Plaintiff a "freely assignable," "perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property for a purchase price of Eight Hundred Thousand and 00/100 Dollars." The Purchase Option constitutes a contingent, nonvested preemptive right to purchase an interest in the Property at any point in the future. *Love v. Love*, 208 S.C. 363, 374, 38 S.E.2d 231, 236 (1946) ("It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule against Perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote."). The Purchase

Option is likewise not conditioned on an event certain to occur in the future. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997) (holding that a contingent, nonvested interest not conditioned on an event certain to occur violated the rule against perpetuities). Because the Purchase Option is one that might not vest either within a life in being at the time of the creation of the interest or until later than twenty-one years thereafter, the Purchase Option violates the common law rule against perpetuities and is therefore void from its creation.

B. The Trial Court Correctly Held that the USRAP Does Not Apply to the Purchase Option.

While it appears undisputed that the Purchase Option violates the common law rule against perpetuities, the crux of Appellant's argument is that the Purchase Option is nevertheless encompassed by the Uniform Statutory Rule Against Perpetuities (USRAP) because it supersedes the common law rule.

The USRAP codified the common law rule by providing 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 (1991). Subsection (2) of § 27-6-20 added a 90-year "wait and see" period to transactions that would otherwise violate the common law rule against perpetuities. S.C. Code Ann. § 27-6-20(A)(2). Under this section, certain nonvested property interests that would violate the common law rule can survive if the interest actually "vests or terminates within 90 years after its creation." *Id.*

In addition to the "wait-and-see" provision in the USRAP allowing for an instrument to actually vest or terminate after 90 years, the statute provides that certain "nondonative" transfers – which generally encompass commercial transactions – are excluded from operation of the USRAP. *See* S.C. Code Ann. § 27-6-50(1) (stating that the rule "does not apply to . . . a nonvested

property interest . . . arising out of a nondonative transfer"). The implication of this exception is that commercial transactions, such as the one entered into between TBFL and Appellant, are never subject to the USRAP.

In its order granting TBFL's motion for summary judgment, the trial court agreed that the USRAP "supersedes" the common law rule against perpetuities. However, because the USRAP does not apply to nondonative transfers, the trial court held that there was nothing to supersede, or with which to replace, the common law rule. Accordingly, the trial court determined that the common law rule remained in effect with respect to commercial transactions. (R. pp. 1-3).

i. The application of the common law rule against perpetuities to commercial transactions is consistent with the policy of preventing unreasonable restraints on alienation.

This Court should affirm the trial court's holding. No South Carolina court has interpreted the USRAP to mean that the rule against perpetuities is never, under any circumstances, applicable to commercial transactions. Appellant's brief nevertheless wholeheartedly endorses this reading. In doing so, Appellant argues that the common law rule's application to commercial settings invariably leads to harsh results incongruent with what some commentators cite as the original intent of the rule, *i.e.*, preventing family dispositions which were unreasonably long or unlimited in duration. (Brief of Appellant, pp. 12-14).

Notwithstanding the fact that *any* restraint on the alienation of land is generally viewed disfavorably regardless of its purpose, Appellant's argument holds that commercial transactions, as opposed to conveyances involving family members, are unlikely to encounter the same issues that often restricted the free alienability of property, *e.g.*, the "fertile octogenarian" and the "unborn widow." (Brief of Appellant, p. 12). Proponents of this idea, including Appellant, also argue that parties to a commercial transaction are typically sophisticated actors who do not need the

protection of the common law rule and who are instead more likely to weaponize the rule in order to avoid a bad deal, thereby resulting in commercial inequities and unjust enrichment. (Brief of Appellant, pp. 12-13). Using the case at hand as an example, Appellant argues that the trial court's order resulted in a "windfall" to TBFL by giving TBFL the benefit of Appellant's loan payment while depriving Appellant of the benefit of the Purchase Option. (Brief of Appellant, pp. 13-14).

Contrary to Appellant's assertion, the same policy concerns with respect to the free alienation of property are just as likely to be implicated in the commercial setting as they are in domestic situations. The key difference is that parties in a commercial transaction should actually be in a better position to avoid the consequences of the common law rule against perpetuities by drafting the instrument in such a manner that the rule would not be implicated in the first place. Here, it is noteworthy that Appellant's Purchase Option was not actually tied to, or extinguished by, the payoff of the loan itself. One of the primary benefits that TBFL conferred on Appellant in exchange for the loan were the interest payments Appellant received on the principal. However, unlike a mortgage which can be satisfied upon a payoff, the Purchase Option could have remained effective in perpetuity, even after TBFL had paid off the loan in full and satisfied the second Mortgage on the Property.

Case law around the country is relatively consistent that the three most important factors involved in determining the validity of a pre-emptive right under the common law rule concerning restraints on alienation are "(1) the purpose of the preemption, (2) its duration, and (3) the method of determining the price to be paid." 40 A.L.R. 3d 920 (Originally published in 1971); *RTS Landfill, Inc. v. Appalachian Waste Systems, LLC Inc.*, 267 Ga. App. 56, 598 S.E.2d 798, 802 (2004) ("[I]n determining the validity of a preemptive right, a court must take into consideration its duration, price, and the purpose for which it was imposed."). Courts generally hold that a

repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint; however, "the situation changes substantially when the price is fixed in the option. It is the generally accepted rule that a fixed price repurchase option of unlimited duration, independent of the lease, is an unreasonable restraint." *Iglehart v. Phillips*, 383 So. 2d 610, 615 (Fla. 1980) (citing *Missouri State Highway Comm. v. Stone*, 311 S.W. 2d 588 (Mo. App. 1958)).

As set forth above, the Purchase Option is unreasonable on its face. The Purchase Option was neither recorded nor otherwise present in the Property's chain of title. This would have allowed Appellant to lie in wait for years after the loan was paid off and the second Mortgage was satisfied, or even after the Property had been sold to a bona fide purchaser, only to arise out of the blue and exercise the option. There is also little incentive for TBFL, as the holder of the possessory interest, to contribute towards the improvement of the Property when Appellant, as the holder of the Perpetual Option, can swoop in at any moment to reap the benefits of the investment while incurring little to none of the costs, just as it attempted to do here. These factors – the lack of notice of servitude to potential purchasers and the disincentive to current owners to invest – as well as the unlimited duration of time in which Appellant could exercise the Purchase Option at a fixed price, are all key indicators that the Purchase Option constitutes an unreasonable restraint on alienation of property that is disfavored under the law.

Furthermore, TBFL did not receive a "windfall" from the trial court declaring the Purchase Option void. TBFL has never taken the position that it does not have to repay Appellant the $800,000, plus interest, under the terms of the Loan Agreement and, in fact, TBFL has continued to make those payments during the pendency of this action. What Appellant's exercise of the Purchase Option does illustrate is the degree to which a perpetual option in gross can deter a party with a possessory interest in land from investing resources into improving its property. *See*

Thomas F. Bergin & Paul G. Haskell, *Preface To Estates And Future Interests*, 207 (2d ed. 1984). ("[T]he option in gross tends to discourage the development of land by the holder of the possessory interest, whereas the option held by one who is also lessee tends to encourage the development of the land by the lessee-optionee."). There is little incentive for the holder of a possessory interest to contribute towards the development or improvement of its property when the holder of a perpetual option can swoop in at any moment to reap the benefits of the investment while incurring none of the costs.[3] Indeed, that is precisely what Appellant intended to do when it exercised the option.

In short, the application of the common law rule against perpetuities to commercial transactions is entirely consistent with South Carolina's and other states' longstanding policy "that nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use." *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 369, 628 S.E.2d at 917 (citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 6 (2005)). As the North Carolina Supreme Court observed in *Pinehurst v. Regional Inv. of Moore, Inc.*, "[i]f a restraint on alienation is bad, we see no reason why it is made good because it is part of a commercial transaction or the property is used for business purposes." 330 N.C. 725, 728-29, 412 S.E.2d 645, 646-47 (1992). Here, the alienability of title to the Property was fettered for longer and in a manner far beyond that allowed by the rule.[4]

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[3] *See, e.g., Rich, Rich & Nance v. Carolina Const. Corp.*, 558 S.E.2d 77 (N.C. 2002) (stating that a preemptive right may be a direct restraint on the alienability of property, barred by the rule against perpetuities, in that it has the potential to deter would–be buyers by creating uncertainty and unwillingness to invest time and energy into purchasing the burdened property);

[4] 61 Am. Jur. 2d Perpetuities, Etc. § 8 ("The rule against perpetuities is a rule of law, and not simply a rule of construction, and its purpose is not to determine intent but to prevent illegality, and when the rule is applied, it defeats intent. The rule against perpetuities is a positive mandate of law to be applied irrespective of the intent of the grantor. Since the purpose of rule is the furtherance of a social policy, that is, the free and ready transfer of property, a court's object in applying the rule to void an interest is to defeat, rather

ii. The trial court's order is consistent with the plain language of the USRAP.

The common law rule against perpetuities does not contain any general exclusions for "nondonative" transfers, and in that regard the common law rule differs from the USRAP. Section 27-6-80 of the South Carolina Code provides that the USRAP "supersedes the common law rule against perpetuities." The word "supersede" means "to annul, make void, or repeal by taking the place of[.]" *Black's Law Dictionary* 1479 (8th ed. 2004). On the other hand, the word "abolish" means "to annul, eliminate or destroy[.]" *Id.* Had the General Assembly wanted to "abolish" the entirety of the common law rule against perpetuities by passing the USRAP, it would have done so. Instead, the specific use of the word "supersede" only means that the USRAP replaced the common law rule with the statutory provisions regarding the types of transfers to which the USRAP applies, but left the common law in place as to the types of transfers to which it does not. Because the USRAP explicitly excludes nondonative transfers from its ambit, there is nothing to "supersede," or with which to replace the common law.

While no South Carolina case has squarely decided the issue of whether the adoption of the USRAP means that commercial transactions can never violate the rule against perpetuities, our Supreme Court in *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.* had the opportunity to apply the USRAP to a right of first refusal in a commercial transaction but expressly declined to do so. 368 S.C. at 370, 628 S.E.2d at 917 ("We decline to resolve this issue because there is no justiciable controversy surrounding the right of first refusal provision.").

The only other noteworthy case in South Carolina decided after the enactment of the USRAP is *Webb v. Reames*, in which this Court reversed a trial court order to hold that a contingent, nonvested right of first refusal to purchase real estate at a price of $64 violated the rule

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than carry out, the parties' intent; in other words, the parties' intent must be deemed subordinate to the policy goals sought to be achieved by preventing impermissible restraints upon the transferability of property.").

against perpetuities. 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997). In reversing the trial court, this Court noted that the pre-emptive right amounted to 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 any event certain to occur." *Id*. at 446.

The case at hand is no different. The Purchase Option is unquestionably a nonvested, contingent interest that Appellant was free to assign or exercise in perpetuity at its leisure. *Id.* ("The right represented an attempt by the grantor Blease to reserve to the [sic] himself his heirs, and assigns a perpetual option to purchase the property described at the price of $64. Because the right or interest was one 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, the interest violates the rule against perpetuities and is therefore void."). This Court should follow the precedent established in *Webb* and affirm the trial court's ruling.

Courts in other jurisdictions have likewise expressly declined to read the USRAP as excluding all nondonative transfers from operation of the rule against perpetuities, instead finding that the common law rule remains in effect for certain nondonative, commercial transfers. In response, Appellant argues that the cases which have held that the USRAP does not entirely displace the common law rule with respect to commercial transactions are either anomalies or were wrongly decided.

One such case is that of *New Bar Partnership v. Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012).[5] In *New Bar*, the North Carolina Court of Appeals was tasked with determining

[5] *See also Malad, Inc. v. Miller*, 219 Ariz. 368, 373, 199 P.3d 623, 628 (Ct. App. 2008) ("We agree with the Millers that the USRAP does not apply here. Arizona Revised Statutes § 14–2904 specifies that Arizona's version of the USRAP does not apply to a "nondonative transfer," except in certain enumerated circumstances, none of which apply here. The contract between Maxus and Malad did not involve a donative transfer, so the USRAP does not apply. The controlling law here is the common law rule against perpetuities codified in A.R.S. § 33–261 (2007)"); 70 C.J.S. Perpetuities § 50 ("The Uniform Statutory

whether a lessee's right of first refusal violated the common law rule against perpetuities following the enactment of the USRAP. Applying the same logic as the trial court did in granting TBFL's motion for summary judgment in the present case, the North Carolina Court of Appeals held that the explicit exclusion of nonvested property rights arising out of commercial transactions from the USRAP meant that there was nothing with which the USRAP could supersede the common law rule. Because the statute could not replace something to which it does not apply, the common law rule was left intact for the nondonative transfers excluded from the USRAP. *Id*. at 312, 729 S.E.2d at 683 ("Thus, we conclude that the USRAP did not replace the common law [rule against perpetuities] as to preemptive rights arising from nondonative transfers such as that at issue here").

Appellant contends the North Carolina Court of Appeals' logic suffers from a glaring fallacy. That is, the statutory provision that identifies the exceptions to the USRAP does not exclude nondonative transfers from the operation of the USRAP in its entirety. Rather, that provision – appropriately titled "Exceptions to rule" – only excludes nondonative transfers from application of what Appellant defines as the "Invalidation Section." (Brief of Appellant, pp. 20-21). Under South Carolina's version of the USRAP, the "Invalidation Section" is codified in S.C. Code Ann. § 27-6-20. That section, however, is quite literally the "rule" that forms the core of the Uniform Statutory *Rule* Against Perpetuities and upon which the remaining sections in that Chapter are based.

Appellant also argues that it was logically inconsistent for the court in *New Bar* and the trial court in this case to apply the provision in the USRAP that says the USRAP does not apply to nondonative transfers to reach the conclusion that the USRAP does not apply to nondonative

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Rule against Perpetuities does not replace the common law rule against perpetuities as to preemptive rights arising from nondonative transfers such as commercial leases, and it does not apply to the future interest created before its effective date in the state.").

transfers. This argument defies common sense. Acknowledging that an exception to a rule means that the rule does not apply to the thing being excepted is not logically inconsistent. Furthermore, the holding in *New Bar* that Appellant maligns was reaffirmed in a subsequent case involving the same issues. *Khwaja v. Khan*, 239 N.C. App. 87, 90, 767 S.E.2d 901, 903 (2015) ("[B]ased on our holding in *New Bar Partnership v. Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012), we are compelled to conclude that the Lease provision granting the Tenant a preemptive right violates the common law rule against perpetuities and is, therefore, void and unenforceable.").

Here, the trial court held that the Purchase Option, which on its face reserved to Appellant a "freely assignable," "perpetual option" to purchase the Property at a fixed price, was void on the basis that it violates the rule against perpetuities. Because the USRAP does not apply to the nondonative transfer at issue in this case, this Court should affirm the order of the trial court.

II. APPELLANT FAILED TO PRESERVE FOR APPEAL ITS ARGUMENT THAT THE PURCHASE OPTION CONTAINS AN IMPLIED TERM THAT IT WOULD BE EXERCISED WITHIN A REASONABLE TIME.

Appellant argues, in the alternative, that to the extent the common law rule against perpetuities does apply to commercial transactions, it would not automatically bar enforcement of the Purchase Option due to the existence of an implied term that the option would be exercised within a reasonable time. This argument has not been adequately preserved for appellate review.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp*, 368 S.C. at 372, 628 S.E.2d at 919. "The rationale for the rule is that until the trial court considers the matter and

makes a ruling, an appellate court is unable to find error." *Id.* at 372-373. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Id.* at 373.

To preserve an issue for appeal, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011). Even under a generous reading of the hearing transcript and Appellant's motion, this argument fails both prongs (1) and (4). Namely, assuming *arguendo* that the issue was adequately raised by the Appellant, the trial court never ruled on the issue, and Appellant failed to file a motion under Rule 59(e), SCRCP to allow the trial court the opportunity to do so. *Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."). With respect to the fourth prong, the issue was never raised with sufficient specificity to allow the trial court the opportunity to rule on the issue. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("[T]he issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.").

Because Appellant's second issue on appeal was not adequately raised to or ruled upon by the trial court, or argued with sufficient specificity to allow the trial court the opportunity to rule on the issue, this argument is not preserved for appellate review and the order of the trial court should be affirmed.

III. AS AN ADDITIONAL SUSTAINING GROUND, APPELLANT WAIVED ITS RIGHT TO RE-EXERCISE THE PURCHASE OPTION AFTER EXERCISING THE OPTION, AGREEING TO THE TERMS OF PURCHASE, EXECUTING THE CLOSING DOCUMENTS, AND THEN FAILING TO PROCEED WITH THE AGREED UPON SALE.

Appellant's failure to close the Purchase Option and proceed with the purchase of an interest in the Property under the terms agreed to and after executing the Closing Documents constitutes a waiver of Appellant's right to enforce the option. Appellant describes this argument as a "clumsy sleight of hand to distort the fact that [TBFL] refused to honor its commitment to convey the property in response to Appellant's notice of exercise of the option." (Brief of Appellant, p. 31). While TBFL certainly takes issue with Appellant's characterization of TBFL's recitation of the facts as being deceitful, it will let the record speak for itself rather than respond in kind.

What the record will show is that upon learning that TBFL paid a $35,000 nonrefundable application fee for the Refinance, Appellant immediately exercised the Purchase Option. (R. p. 165, lines 9-17; R. p. 168, lines 2-21; R. pp. 372-373). In its brief, Appellant writes that the "consummation of the exercise of the option should have been fairly simple, Respondent would accept the Appellant's tender of the purchase price and deliver a deed to the Appellant." (Brief of Appellant, p. 31). However, the reality of the transaction was nowhere near as simplistic as Appellant would have this Court believe.

In reality, the parties had to consider the tax consequences of the transfer, how the transfer would work within the structure of the business they were operating, how expenses would be allocated, the distribution of the proceeds from the Refinance, and the fact that in order for Appellant to take a co-tenancy interest in the Property, there needed to be a "mutually acceptable co-tenancy agreement." (R. p. 355, line 10 – p. 357, line 4). Those were the types of details not provided for in

the Loan Agreement that still needed to be worked out following the exercise of the Purchase Option. As astute a businessman as Mr. White claims to be, Appellant cannot seriously contend that taking a possessory interest in an active commercial property while in the midst of a multimillion dollar refinance would be as simple as exchanging duffel bags of cash and signing a deed.

TBFL does not dispute that it had a different understanding than Appellant as to how the deal was to be structured, but what is not in dispute is that despite any initial differences, the parties reached an agreement as to the fundamental terms of the transaction following weeks of extensive negotiations. As of September 30, 2019, two days prior to the October 2, 2019 closing of the Refinance, both Appellant and TBFL had *signed* their respective counterparts of the Closing Documents. (R. p. 242, line 17 – p. 243, line 12). TBFL acceded to Appellant's final demand for $6,500 in attorney's fees in order to ensure the deal was finalized prior to the Refinance closing. At that moment, the parties had reached an agreement as to the fundamental terms by which Appellant would take an interest in the Property, and TBFL had expressed a clear intent and willingness to move forward and to take any action necessary to finalize the deal. (R. p. 241, lines 22-25). Appellant responded by attempting to unilaterally insert self-serving terms into the transaction, knowing that TBFL's two choices were to acquiesce or forfeit the Refinance application fee.

Appellant's action for specific performance of the Purchase Option rests in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). By exercising the option and then failing to close the agreement reached by the parties, Appellant has abandoned any right to demand specific performance of the Purchase Option. *See S. Silica Min. & Mfg. Co. v. Hoefer*, 215 S.C. 480, 496, 56 S.E.2d 321, 327 (1949) ("A right once abandoned may not be revived without the consent of both parties."); *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381

(1995). Accordingly, Appellant's forfeiture of his rights under the Purchase Option precludes Plaintiff's claim of specific performance. *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967) ("He who seeks equity must do equity."). Appellant is not entitled to a second bite at the apple.

CONCLUSION

For the foregoing reasons, the trial court's order granting TBFL's motion for summary judgment should be affirmed. In finding that the Purchase Option violated the common law rule against perpetuities, the trial court did not overlook or misapprehend any issues of fact or law and did not err in applying the summary judgment standard pursuant to Rule 56(c), SCRCP.

TBFL respectfully requests that this Court affirm the trial court's order on appeal.

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CERTIFICATE OF SERVICE

I certify that I have served **Respondent's Final Brief** on Appellant by sending a copy of said documents to Appellant's counsel via email on January 24, 2023, as follows:

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January 24, 2023.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914
Appellate Case No.: 2022-000813

Spring Valley Interests, LLC, ...Appellant,

v.

The Best For Last, LLC, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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