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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.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

ISSUE I: The Trial Court's Improperly Granted Summary Judgment Because It Applied The Common Law Rule Against Perpetuities That Had Been Superseded By The Statutory Rule.

After devoting a long essay on how the Option to Purchase would be void under the Common Law, in Section I (b) (ii) of its Brief, the Respondent takes up the threshold issue of whether the USRAP replaced the Common Law Rule Against Perpetuities after its enactment so that the only rule against perpetuities in effect in South Carolina is the USRAP.

The Respondent's brief gives scant attention to what is the main issue in this case.

The Respondent's starting point on this issue acknowledges that the Legislature's use of the word supersedes is equivalent to mean "to annual," "make void," or "repeal by taking the place of" *citing* Black's Law Dictionary 1479 (8th ed. 2004). This is exactly what the Legislature meant to do by enacting the SCUSRAP. It made void and repealed the common law rule by having the statutory rule take its place. This is exactly the language

one would use in connection with enacting legislation to replace an existing common law rule.

The Respondent tries to limit the effect of the voiding and replacement effect of the USRAP by suggesting that the voiding and replacement of the common law was partial, not complete. However, the Respondent failed to identify any language in the statute that limited its superseding effect. It is illogical to recognize that the General Assembly's use of the word supersedes means to replace and void by taking the place of and yet try to insert limits on that effect without any language to support that limitation.

Of course, that is what the Trial Court did as well following *New Bar Partnership v Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012).

The Respondent's Brief suggests that Courts in other jurisdictions have likewise expressly declined to read the USRAP as replacing the common law rule based on the nondonative exclusion from the statute. But, as explained below, the Appellee actually cites no case law in support of this bold assertion other than *New Bar*.

In addition to *New Bar*, the Respondent's Brief cited two cases in support of this statement. One case was *Khwaja v Khan,* 239 N.C. App. 87, 90, 767 S.E.2d 901, 903 (2015) which applied the rule stated in New Bar to another commercial lease. Specifically, the Court in *Khwaja* held that it was compelled to rule based on the ruling in *New Bar*.

The fact that *Khwaja* followed that *New Bar* holding was not necessarily an endorsement of the latter's logic. The reason is simple. Under North Carolina laws of jurisprudence, one panel of the Court of Appeals may not overrule another panel of the Court of Appeals. *O'Connor v. Zelinske*, 668 S.E.2d 615, 193 N.C. App. 683 (N.C. App.

2008) (Court of Appeals applied rule even after noting its disfavor and that of other panels with holding it upheld)."…one panel of this Court is bound by the prior decision of another panel addressing the same issue, although in a different case, absent modification by our Supreme Court,..." *State v. Adams*, 513 S.E.2d 588, 621, 132 N.C. App. 819 (N.C. App. 1999).

So, the fact that the Court of Appeals panel in *Khwaja* applied the *New Bar* holding as it was compelled to do, does not mean that it necessarily agreed with the reasoning of that court.

However, we do know that Justice Bryant, did have reservations concerning the *New Bar* holding because he expressed those concerns in his concurring opinion in *Khwaja* stating:

> I also write separately to express my concern that we should proceed with caution in applying the common law RAP to non-donative transfers, commonly known as commercial leases. When our legislature specifically excluded these types of commercial transactions from the statutory RAP, it reflected an intent that the common law rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements. Clearly, the legislature was making a distinction between donative transfers and commercial transactions. However, as noted in New Bar P'ship , "a preemptive right or a right of first refusal to be valid must not extend beyond the period of the common law RAP". New Bar P'ship, 221 N.C.App. at 313, 729 S.E.2d at 684 (citation omitted) (holding the right of first refusal violated the common law RAP and, thus, was void). Because the lease in the instant case contained a section that made the preemptive rights under the lease "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties[,]" it went beyond the period of the common law RAP, and therefore, based on our case law, is void and unenforceable.
>
> Because the instant case cannot be distinguished from New Bar, I concur in the result reached by the majority.

Khwaja, 239 N.C.App. at, 93, 767 S.E.2d at 905. (Citations and internal quotations omitted.)

The Appellee also cited the case of *Malad, Inc. v Miller*, 219 Ariz. 368, 373, 199 P.3d 623, 628 (Ct. App. 2008) in support of its position that other states have held that the common law survives the enactment of the USRAP. *Citing Malad* to support this position is misleading. The reason being is that Arizona adopted a unique version of the USRAP that is very different from the USRAP adopted by South Carolina. The significant difference for the analysis of this case is that the Arizona statutory scheme applicable to the rule against perpetuities does not purport to supersede the common law. Instead, the Arizona statutory scheme expressly states that the common law applies in addition to the statutory scheme.

Arizona has two statutes relating to the rule against perpetuities. One is the statute that the *Malad* court referenced in its opinion as the Arizona version of the Uniform Statutory Rule Against Perpetuities, A.R.S. §§ 14-2901 through -2907 (2005).

There are significant differences between the Arizona USRAP and the version of the Act adopted by South Carolina. For example, the "wait and see" provision is 500 years under the Arizona Statute. A.R.S. § 14-2901 (B) (2), (E).

The difference between the SCSRAP and the Arizona statutes most significant to the analysis in the case at hand is found in the section on the statutory rule's effect on the common law rule. The Arizona SRAP section entitled "Rule against perpetuities: supersession" reads as follows: "This article applies notwithstanding common law rules against perpetuities or section 33-261." A.R.S. § 14-2906

Obviously, the Arizona statute does not say that the statutory rule supersedes the common law.

Moreover, A.R.S. § 33-261, the statute referred to in 14-2906, specifically provides that "The common law rule known as the rule against perpetuities shall hereafter be applicable to all property of every kind and nature and estates and other interests therein, whether personal, real or mixed, legal or equitable by way of trust or otherwise." A.R.S. § 33-261 Rule against perpetuities (Arizona Revised Statutes (2022 Edition))

The Arizona SRAP, read in conjunction with A.R.S. § 33-261 clearly set forth a scheme where both the statutory rule and the common law rule exists after the enactment of the statutory rule.

So, a case like *Malad* applying the Arizona version of the USRAP can not be legitimately cited in support of an argument that Section 27-6-80 of the SCUSRAP failed to replace the common law rule. Equating the two statutory schemes is like equating apples to oranges. The South Carolina statute says the statutory rule supersedes the common law. The Arizona statute does not contain any language regarding superseding effect and cites to the Arizona statutory adaptation of the common law.

So, as stated in the Appellant's Brief, there really is only one court decision, *New Bar*, that has addressed in detail the issue before the Court: and that issue is did the common law rule against perpetuities survive the enactment of Section 27-6-80 of the SCUSRAP which states that the statutory rule supersedes the common law. And, at least one Justice of the North Carolina Court of Appeals has expressed concern for the reasoning of *New Bar*. Thus, there is no case law from other jurisdictions to support the Trial Court's

ruling in the case at hand other than *New Bar*. As stated in the Appellant's Brief, the Trial Court appears to have adopted the logic of *New Bar* in granting summary judgment in this case. This Court is not bound to follow *New Bar* and should freely reject the reasoning of the same if it finds such reasoning insufficient.

ISSUE II: The Appellant Preserved For Appeal Its Argument That The Purchase Option Contains An Implied Term That It Would Be Exercised Within A Reasonable Time.

The Respondent has asserted as its Issue II that the Appellant did not preserve its argument that in the event the common law rule against perpetuities did survive the enactment of the USRAP, the common law rule would not void the Purchase Option because it contained an implied covenant that the option would be exercised in a reasonable time.

"There are four basic requirements to preserving issues at trial for appellate review. 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." *Scdot v. First Carolina Corp. of S.C.*, 641 S.E.2d 903, 372 S.C. 295 (S.C. 2007).

Scdot v. First Carolina Corp gives insight into the sufficiency of the Appellant's preservation of the issue of the implied reasonable time element in the option. On appeal, the *SCDOT* argued that the use of a special verdict form by the trial court was unduly suggestive or misleading as to the appraisal method to be used by the jury in calculating just compensation. At trial, when the trial court proposed the use of a special verdict form the Department objected to the verdict form by stating that "it emphasizes damages by its

bifurcated nature and the Department doesn't believe that the landowner has proven its damages to the standards required by the law in this case." The court overruled *SCDOT's* objection.

On appeal the Department argued that although it did not use those exact words, it nonetheless objected to the use of the special verdict form on the basis that it emphasized the appraisal method advocated by First Carolina.

The Supreme Court held that although *SCDOT* did not phrase its objection in the exact terms used in the issues on appeal, *SCDOT's* objection on the basis that the verdict form "emphasizes damages by its bifurcated nature" provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue.

Scdot v. First Carolina Corp. of S.C., 641 S.E.2d at 907.

This ruling is consistent with the general rule that "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. " *Walterboro Cmty. Hosp. Inc. D/B/A Colleton Med. Ctr. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (S.C. App. 2011), *see* Jean Hoefer Toal, et al., Appellate Practice in South Carolina 58 (2d ed. 2002).

Comparing *Scdot v. First Carolina Corp* to the case at hand supports the finding that the Appellant preserved for appeal the issue of whether the option contained an implied condition that it be exercised in a reasonable time that would avoid the application of the common law rule against perpetuities. In the arguments to the Court at the hearing on the Respondent's Motion for Partial Summary Judgment, counsel stated to the Court that:

> And you know, one think too, I, I talked about the, you know, the rules for commercial transactions are different. One of the differences of the, one of the differences of the –including these estate kind of, kind of transfers that a commercial transfer – courts, including courts in South Carolina where no date is stated in a commercial transfer for something to be accomplished, courts routinely apply a reasonable date. And so that in and of itself is a kind of illustration of why commercial cases were excluded, but that would apply in this case.

(R. p. 114).

So, while counsel's argument before the trial court on the implied reasonable time issue may have been inartful, it was sufficient to put the Trial Court on notice of the argument that the implied reasonable time provision would prevent the application of the common law rule to void the Purchase Option.

The Trial Court's granting of the Respondent's Motion for Partial Summary Judgment constituted a ruling on the argument regarding the implied reasonable time provision prevented the application of the common law to void the Option to Purchase.

ISSUE III: Even With The Arguments Advanced By The Respondent, At Best There Exists An Issue Of Fact Exist As To The Alternative Ground For Summary Judgment And Therefore Summary Judgment Would Not Be Appropriate Based On This Ground.

The Respondent's Brief gives a long narrative as an alternative ground for its motion for partial summary judgment to support its claim that the Appellant waived its right to exercise the option. Under this narrative, the Respondent claims that the Appellant gave its notice to exercise the option and the parties engaged in negotiating a co-tenancy agreement that was a condition precedent to the exercise of the option. Then, as the Respondent's story goes, the Appellant failed to proceed with the agreed upon sale.

However, this narrative is contradicted by critical facts that the Respondent ignores.

The first fact that the Respondent ignores or glosses over is simply this. When the Appellant gave notice of its exercise of the Option to Purchase, the Respondent demanded that the Appellant receive a membership interest in TBFL instead of a 74.425% co-tenancy interest in the Property. (R. p. 250 Gavigan Deposition, P. 59, L. 10).

There was nothing in the option to purchase that said the exercise of the option would somehow be tied to eventually being converted to a membership interest as opposed to a co-tenancy interest. (R. p. 250 Gavigan, P. 59, l. 22 to P. 60, l. 3).

This demand was a breach of contract because there was nothing in the Loan Document, nor the Purchase Agreement that supported this demand.

As part of its narrative, the Respondent cites to Exhibit 5 from the Gavigan deposition. R. p. 412 Gavigan Exhibit 5 was in an email from Rob Bethea, the attorney for the Respondent, in which Bethea was citing reasons for the position that the Respondent was demanding that the Appellant receive a membership in TBFL instead of a 74.425% co-tenancy interest in the Property. But, these reasons were not supported by the language of the Purchase Option which clearly stated that the option was for a 74.425% co-tenancy interest in the Property.

This breach of contract is evidenced by the deposition testimony of Bethea wherein he admits that the Respondent would never be willing to convey the 74.425% co-tenancy interest to the Appellant. (R. p. 343 Bethea Deposition, P. 13, l. 5).

Moreover, this demand had significant financial implications for the Appellant and the Respondent. In response to the exercise of the option, The Best For Last demanded that the White Interest be made a member of The Best For Last for a simple reason: it was

better economically for the Respondent but to the Appellant's harm. (R. p. 251-252 Gavigan Deposition, P. 60, L. 25, - P. 62, l. 2). As Bethea testified, had the Appellant agreed to the Respondent's demand, it would have received a 74.425 percent of 50 percent interest instead of 74.425 percent of 1000 percent interest. (R. p. 349-352 Bethea Deposition, P. 19, l, 3 to P. 22, l. 13). And he acknowledged that this was the basis of the dispute between the parties. *Id*.

This demand for the ownership interest to be in the form of a reduced membership interest was the reason there was a dispute between the parties over the exercise of the option. (R. p. 250 Gavigan Deposition, P. 59, L. 10).

That lead to the effort to discuss conveying a 70 percent interest as a possible compromise of the Respondent's demand. (R. p. 252 Gavigan Deposition, P. 62, l. 3-l. 16). Ultimately, that compromise was not consummated because of the parties' disagreement over the attorneys' fee issue. (R. p. 253 Gavigan Deposition, P. 63, l. 8).

So, at best there is a disputed question of material fact on the issue of whether the Appellant waived its right to exercise the option. The Respondent's version of the case omits the facts relating to its demand that the Appellant receive a membership interest in the company instead of the co-tenancy interest in the Property. But, the evidence supports the Appellant's position that it never had a chance to consummate the option because the Respondent breached the contract, i.e., the Option by making the demand to substitute the interest in the company for the co-tenancy interest in the Property. At the summary judgment stage of litigation, 'the judge does not weigh conflicting evidence with respect to

a disputed material fact..." *L & W Wholesale, Inc. v. Gore*, 407 S.E.2d 658, 305 S.C. 250 (S.C. App. 1991).

Under the facts viewed in the light most favorable to the non-moving party, the Appellant's exercise of its option was met with a demand by the Respondent that rejected the option. This response was a breach of the contract. Therefore, under this evidence, the Appellant never had a chance to agree to terms of a purchase under its exercise of the option. A material fact exists as to the issue of whether the Appellant ever agreed to the terms flowing from the exercise of its Option to Purchase. Therefore, there is an issue of fact regarding whether the Appellant waived its right to Exercise the Option which precludes summary judgment on this issue.

CONCLUSION

For the reasons stated above and in the Appellant's Brief, the Appellant prays the Court to reverse the Trial Court's granting of partial summary judgment in favor of the Respondent.

Dated: January 18, 2023

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APPELLANT'S CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

Dated: January 18, 2023

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