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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,

v.

CJN, LLC, Respondent.

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Pursuant to Rules 219(a), 221(a) and 240, SCACR, Appellant Crescent Homes SC, LLC ("Crescent") petitions this Court for partial rehearing *en banc* of Opinion No. 6093 issued on November 20, 2024 (the "Opinion")[1], which affirmed the Master-in-Equity's determination that the Right of First Refusal (the "ROFR") set forth in the Agreement for Purchase and Sale of Developed Lots between Crescent and Respondent CJN, LLC (the "Agreement") was unenforceable. Although the case presented at trial should have been dismissed for lack of a justiciable controversy, the master erroneously ruled on the enforceability of the right of first refusal provision in the Agreement and issued a declaration that the ROFR, which the parties had negotiated and intended to be binding, was an unreasonable restraint on the alienation of property and therefore, unenforceable. (R. pp. 9 – 18.)

BACKGROUND

It is undisputed that no offers to purchase the property were "pending" at the time of trial. In concluding that a justiciable controversy existed at the time of trial, the master relied upon two prior offers, the Clark Offer and the Opus Offer, that had been withdrawn and were not "pending." The Clark Offer to purchase the Phase 2 Property as a like-kind exchange was withdrawn because the closing could not occur in the legally required time to due to the filing of the lis pendens. Crescent filed the lis pendens for the purpose of placing potential purchasers on notice of Crescent's ROFR and to address CJN's ongoing breaches or defaults of the Agreement set forth in the notices of default. (R. pp. 622 – 634.) Pursuant to the ROFR provision, the granting of the ROFR was to occur "[a]t the Initial Closing." (R. p. 107.) The breaches and defaults on the part of

[1] *See Crescent Homes SC, LLC v. CJN, LLC*, No. 2022-000897, 2024 WL 4831180 (S.C. Ct. App. Nov. 20, 2024).

CJN needed to be resolved in order to complete the Initial Closing. (R. p. 291.) Because the Initial Closing had not occurred, CJN was unable to accept offers to sell the Phase 2 Property and, as a result, the ROFR was not capable of being validly exercised. (R. pp. 620 – 623.)

Thereafter, CJN filed the second lawsuit seeking a declaratory judgment as to the validity of the ROFR. (R. pp. 132 – 191.) While CJN's declaratory judgment action was pending, CJN tendered a copy of the Opus Offer to purchase the property in the amount of $1.25 million. (R. pp. 560 – 570.) By letter to counsel for CJN, Crescent presented a response to the Opus Offer, which Crescent determined was illegitimate and not tendered in good faith for several reasons, including, but not limited to, the amount of purported offer, the commercially unreasonable terms, the lack of due diligence, and the personal and professional relationship between the parties. (R. pp. 571 – 573.) As a result of the purported Opus Offer, Crescent filed a new lis pendens. The Opus Offer was subsequently withdrawn. (R. p. 12.)

Following the lower court's denial of Crescent's Motion to Alter or Amend, Crescent appealed to this Court for a reversal of the master's Order due to the master's error in finding a justiciable controversy existed in the absence of a pending offer or pending sale, along with additional issues on appeal presented. (R. pp. 19 – 20, pp. 295 – 300.) The Court concluded that: (i) this matter is ripe for review and a justiciable controversy exists; (ii) the master did not err in concluding that the ROFR was an unreasonable restraint on the alienation of property and thus unenforceable; and (iii) that the master did not err in not considering evidence outside of the ROFR. The Court's decision that a justiciable controversy exists here misapprehends the binding precedent establishing that a pending offer or pending sale is required for a right of first refusal to be justiciable. *See Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp*., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (holding that,"[a]bsent 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 Opinion acknowledges that no offer or sale was pending at the time of trial. Nevertheless, the Court concluded that this matter presented a justiciable controversy. In reaching this conclusion, the Court opined that the holding in *Peoples Federal* should be interpreted to mean that once a bona fide offer has been made, the matter is ripe for determination regardless of whether the offer is currently pending or has been withdrawn.

Based on the Opinion's departure from the holding in *Peoples Federal*, Crescent respectfully requests a rehearing *en banc* on the issue of whether the master erred by declaring the ROFR unenforceable in the absence of a pending offer required to present a justiciable controversy. Consideration by the full Court is necessary to ascertain the Court's decision to affirm the master's Order based on the Court's interpretation of the supreme court's holding in Peoples Federal in a manner that contravenes controlling precedent.

STANDARD FOR REHEARING

Rule 221(a), SCACR, provides that a party who believes the Court overlooked or misapprehended points of law or fact is authorized to petition the Court for rehearing. *Id*. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. "The purpose of such a petition is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co*., 168 S.C. 163, 167 S.E. 234, 238 (1933).

The Court of Appeals has discretion as to whether to accept rehearing *en banc*. *See Williamson v. Middleton*, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009). Rule 219(a), SCACR lists certain grounds on which rehearing *en banc* may be granted. *Id*. Rehearing *en banc* may be

ordered when consideration by the full Court is necessary to secure or maintain uniformity of its decision. *Id*.

I. IN THE ABSENCE OF A "PENDING" OFFER, THE OPINION AFFIRMING THE MASTER'S ORDER DECLARING THE ROFR PROVISION UNENFORCEABLE CONTRAVENES CONTROLLING PRECEDENT

The Court's decision that this case presented a justiciable controversy, despite the fact no offers were "pending" at the time of trial, misapprehends our supreme court's explicit holding that a "pending" offer or "pending" sale is required for a right of first refusal to be justiciable. *Peoples Fed.,* 358 S.C. at 477, 596 S.E.2d at 60 (holding that "a case or controversy regarding the validity of a preemptive right does not accrue until the right has been asserted" and therefore, "[a]bsent a pending sale or offer for sale, or purchase or offer to purchase, or the presence of a third party challenging the right of first refusal, there is no justiciable controversy"). The record before this Court demonstrates that no bona fide offer to purchase the property was pending at trial. Both prior offers (Clark Offer and Opus Offer) were terminated and withdrawn by the offerors. Under South Carolina law, no justiciable controversy existed concerning the enforceability of the ROFR. *See Peoples Fed.,* 358 S.C. at 476–77, 596 S.E.2d at 60 ("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."). South Carolina courts "generally decline to pronounce a declaration in a suit wherein the rights of the plaintiff are contingent upon the happening of some event which cannot be forecast and which may never take place." *See Park v. Safeco Ins. Co. of Am*., 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968). The master's Order declaring the ROFR provision unenforceable was an error warranting reversal.

The master's Order provides, in relevant part, that the Order "is focused solely upon the issue of whether the right of first refusal is enforceable under South Carolina law." (R. p. 13.)

South Carolina law provides that, absent a "pending" offer to purchase, there is no justiciable controversy concerning the validity of a right of first refusal provision. *Peoples Fed.,* 358 S.C. at 477, 596 S.E.2d at 60. On this basis, Crescent has maintained and continues to interpret the holding in *Peoples Federal* to mean that a "pending" bona fide offer is required. The Court, however, found that Crescent's "interpretation is too narrow." As indicated in the Opinion, this Court "do[es] not read *Peoples Federal* as requiring an offer to currently be pending in order for a matter to be ripe." The Opinion cites two cases from Montana to support the Court's decision to reinterpret South Carolina's requirement of a "pending" offer.[2] The Court observed that, like *Peoples Federal*, it appeared that "no offer had ever been made at any point" in the decision by the Montana Supreme Court in *Hardy* and *Parker.* The Court determined that "[o]nce a bona fide offer has been made the matter is ripe."

Although the Opinion acknowledges the South Carolina Supreme Court's holding that the determination of whether a right of first refusal was enforceable was not ripe because no offer for purchase was "pending," the Court found that "the situation is different here" because CJN had previously received two offers. Notwithstanding the absence of a "pending" offer to purchase the property, the Court concluded that a justiciable controversy existed at the time of trial. The distinction drawn by the Court improperly expands the holding in *Peoples Federal* and misapprehends controlling precedent. The findings and conclusions in the Opinion indicate that this Court interprets the holding in *Peoples Federal* to provide that a justiciable controversy exists if an offer has ever been made at any point, even the offer expires or is withdrawn. While the

[2] The decision by the Montana Supreme Court in *Parker v. Weed* is cited once in *Peoples Federal* but does not appear in any other reported decision by a South Carolina court. *Id.*, 220 Mont. 49, 713 P.2d 535 (1986). The Opinion also cites to *Hardy v. Krutzfeldt*, which does not appear in any reported decision by a South Carolina court. *Id.*, 206 Mont. 521, 672 P.2d 274 (1983).

decision in *Peoples Federal* did not address whether the mere making of any offer at any point presents a justiciable controversy even where the offer is withdrawn and no longer pending, it specifically addressed and ruled on the issue presented in this appeal, *i.e.,* whether the trial court erred by ruling on the enforceability of a right of first refusal provision. Our supreme court addressed this issue and held that, "[b]ecause 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." *Peoples Fed.,* 358 S.C. at 477, 596 S.E.2d at 60. That is because "[a] declaratory judgment action must involve an actual, justiciable controversy," which is "distinguished from a contingent, hypothetical or abstract dispute." *Id*. As it stands, the findings and conclusions set forth in the Opinion would require modification of the holding in *Peoples Federal*.

II. THE COURT'S OPINION VITIATES THE POLICY SUPPORTING THE "PENDING" OFFER REQUIREMENT

Crescent seeks an *en banc* review to resolve the Opinion's departure from binding precedent and the public policy interests served by the holding in *Peoples Federal*. The Court's decision to interpret South Carolina law as providing that a justiciable controversy exists once a bona fide offer has been made at any point, even if it is subsequently withdrawn and no longer pending at the time of trial, creates a policy issue. The requirement that an offer or sale be "pending" for a right of first refusal to be justiciable is not a technical issue; it is a matter of public policy. The requirement of a "pending" sale prevents a party from presenting a sham offer for the purpose of obtaining a declaratory judgment. In such a case, the party could claim to have received a bona fide offer without ever needing to prove the legitimacy of the offer in a declaratory judgment action. As it stands, the Opinion opens the door to allowing the trial court to render a

ruling affecting a right of first refusal provision based upon a contingent or hypothetical offer, not a "pending" offer.

Furthermore, the Opinion suggests a declaratory judgment claim is a viable avenue for obtaining an advisory opinion from the courts. *See Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951) (providing that a declaratory judgment should not deal with moot abstract matters or constitute a merely advisory opinion). The Court found that "CJN has shown hardship through losing the Clark and Opus Offers and the likelihood of facing similar obstacles as those it encountered with those offers if it receives an offer to purchase the Phase 2 Property in the future." The Opinion, if left uncorrected, endorses a finding that the mere making of an offer renders the matter ripe for determining hypothetical future harms. The issues presented by the Opinion's departure from established precedent merits the full Court's consideration.

Accordingly, this Petition for Rehearing *En Banc* should be granted to allowed rehearing on the issue of justiciability in the absence of pending offers, and Court's interpretation of the holding in *Peoples Federal*.

III. THE ISSUE OF THE IMPROPER RULING ON THE ROFR IN THE ABSENCE OF A JUSTICIABLE CONTROVERSY HAS BEEN PRESERVED FOR APPELLATE REVIEW

This Court found that Crescent's "arguments as to the validity of the offers are not preserved." The Opinion notes that the master declined to rule on the validity of the Clark Offer and Opus Offer because it found they were not dispositive of the enforceability of the ROFR. The Opinion further notes that Crescent motion to alter or amend the Order does not mention the validity of the offers. However, having ruled on the enforceability of the ROFR, the master had necessarily, albeit incorrectly, determined that a justiciable controversy existed that was ripe for review.

As the record reflects, the argument that the Opus Offer was illegitimate and not tendered in good faith was raised to the master and integral to the master's decision to proceed on the declaratory judgment claim. The master's Order notes, in relevant part, as follows:

> CJN asserted the following theories […] The Opus Offer was a bonified offer[.]
>
> […]
>
> CJN contends 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. Crescent contends this is not the case with respect to the Clark offer because the Initial Closing had not yet occurred at the time of that offer, and is not the case with respect to the Opus offer because Crescent disputes that the Opus offer was a bona fide offer.

(R. pp. 16 – 17.) Furthermore, Crescent requested in its Rule 59 motion that the master's Order be altered and amended to provide that "there is no justiciable controversy at this time concerning the enforceability of the right of first refusal such that declaratory judgment should be refused." (R. pp. 295 – 296.) Crescent has preserved the issue relating to the absence of a justiciable controversy. Because the master had already decided to undertake a determination as the enforceability of the ROFR, the issue should not be deemed unpreserved because the "validity" of the Opus Offer was not mentioned in the motion to alter or amend. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) (recognizing that a party need not engage in futile actions in order to preserve issues for appellate review).

Accordingly, rehearing *en banc* is warranted on the issue of whether the master erred in ruling on the ROFR.

IV. THE TWO-ISSUE RULE DOES NOT PRECLUDE CONSIDERATION BY THE FULL COURT

If rehearing is granted, the Court's decision to affirm the master's Order on the basis of the two-issue rule must also be reviewed because the master's ruling on the sole issue was flawed

from the outset. The master's Order "focused solely upon the issue of whether the right of first refusal is enforceable under South Carolina law." (R. p. 13.) The master's ruling on the sole issue of the enforceability of the ROFR was the result of an erroneous conclusion that a justiciable controversy existed. In certain circumstances, the two issue rule bears on whether an issue is preserved for appeal. However, the issues on appeal emanate from the master's ruling on one "limited issue." (R. p. 9.)

Accordingly, the two-issue rule should not be applied to the issues on appeal. *See, e.g., Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

CONCLUSION

For these reasons, Appellant Crescent Homes SC, LLC respectfully requests that this Court grant this Petition for Rehearing *En Banc* based on the misapprehension of law within the Opinion that a justiciable controversy exists in the absence of a pending offer.

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PROOF OF SERVICE

I certify on this date that **Appellant's Petition for Rehearing En Banc** was served on the Respondent's counsel of record pursuant to Rule 240, SCACR, at their primary e-mail addresses listed in the Attorney Information System (AIS) and by depositing a copy of the same with FedEx Overnight, properly addressed as follows:

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