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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOCELYN NEWMAN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2024-001994
CIVIL ACTION NO. 2019-CP-21-40-06914

Opinion No. 6070 (S.C. Ct. App. filed July 10, 2024)

Spring Valley Interests, LLC,

PETITIONER,

versus

The Best for Last, LLC,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

I. The Court of Appeals erred in failing to hold that the non-donative Purchase Option is enforceable and not subject to any rule against perpetuities under the express language of the South Carolina Uniform Statutory Rule Against Perpetuities.

In its Return, The Best for Last, LLC ("Best") perpetuates the erroneous conclusion of the Trial Court and the Court of Appeals that nondonative transfers are exempt from the statutory scheme created by the General Assembly in South Carolina's Uniform Statutory Rule Against Perpetuities ("SCUSRAP"), S.C. CODE ANN. §§ 27-6-10 *et al.* As thoroughly explained in the Petition of Spring Valley Interests, LLC ("Spring Valley"), nondonative transfers are not exempt from Chapter 6 of Title 27 of the South Carolina Code which embodies the SCUSRAP. Instead, nondonative transfers are only exempt from the vesting requirements set forth in Section 27-6-20. See S.C. CODE ANN. § 27-6-50(1) ("Section 27-6-20 [which sets forth vesting requirements] does not apply to: (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer . . . .").

The plain language used by the General Assembly could not be any clearer that nondonative transfers are not subject to any time vesting requirements and remain valid under the provisions of the SCUSRAP despite the lack of any vesting requirement. Further, the General Assembly used explicit language evincing its intent that the common law would no longer exist as to the rule against perpetituties and would instead be replaced by Chapter 6 of Title 27 of the South Carolina Code. See S.C. CODE ANN. § 27-6-80 ("This chapter supersedes the common law rule against perpetuities.").

Under the language used by the General Assembly, there is only one interpretation: (1) the SCUSRAP has superseded the common law rule against perpetuities such that the common law no

longer exists and validity of property interests are now determined by Chapter 6 of Title 27 of the South Carolina Code; (2) Section 27-6-20 sets forth the vesting requirements; and (3) Section 27-6-50 provides that there are seven categories of interests, including nondonative transfers, which remain valid without regard to the vesting requirements of Section 27-6-20.

The Court of Appeals erred in not giving effect to the unambiguous text of the SCUSRAP. Instead of effectuating the intent of the General Assembly, the Court of Appeals overstepped its role and defeated the express intent of the General Assembly. The Purchase Option at issue in this case is valid under the provisions of the SCUSRAP in accord with the intent of the General Assembly.

Spring Valley agrees with Best that this Court need not go beyond the plain language of the SCUSRAP to reach the above conclusion. Spring Valley merely pointed this Court to case law from other jurisdictions and to the commentary by the National Conference of Commissioners on Uniform State Laws to show that other courts and the drafters of the Uniform Statutory Rule Against Perpetuities have interpreted similar plain language in the manner as urged by Spring

Valley.[1] Spring Valley therefore respectfully asks this Court to give effect to the unambiguous language of the SCUSRAP to find the Purchase Option valid and enforceable.

II. In the alternative, if the common law rule against perpetuities applies to the Purchase Option, an implied term that the Purchase Option would be exercised within a reasonable amount of time operates to prevent the Purchase Option from violating the common law rule against perpetuities.

Spring Valley continues to maintain that the common law rule against perpetuities does not

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[1] Furthermore, the SCUSRAP specifically instructs that "[t]his chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." S.C. CODE ANN. § 27-6-70.

Best itself cites to a North Carolina Court of Appeals' opinion, New Bar Partnership v. Martin, 729 S.E.2d 675 (N.C. Ct. App. 2012), in urging this Court to accept its interpretation of the SCUSRAP. The opinion in New Bar suffers from the same fundamental error and belief that nondonative transfers are exempt from the entire statutory scheme and not merely the particular section regarding vesting requirements. Indeed, the parties in New Bar appeared to both agree and acknowledge that North Carolina's statutory scheme did not apply to nondonative transfers. Id. at 683 ("*As all parties acknowledge*, section 41-18 makes clear that the USRAP does not apply to nonvested property rights arising from nondonative transfers . . . .") (emphasis added). Spring Valley does not agree that nondonative transfers are exempt from the entire statutory scheme created by the General Assembly in the SCUSRAP.

Interestingly, the North Carolina Supreme Court had a different observation of the effect of North Carolina's Statutory Rule Against Perpetuities. While the contract it was reviewing predated the statute, the North Carolina Supreme Court nevertheless noted the following as to its state's USRAP:

> [T]he General Assembly has seen fit to exclude certain kinds of transactions from the statutory rule's application, including most nonvested property interests arising out of "nondonative transfers." N.C.G.S. § 41–18(1) (1999); *see also* Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L.Rev. 1783, 1799–1800 (1996) [hereinafter Link & Licata] (discussing the effects of N.C.G.S. § 41–18(1)). The exclusion of most nondonative transfers, i.e., commercial-type transactions, from the rule is contrary to the common law, but reflects a decision by the General Assembly that the rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements." N.C.G.S. § 41–18 official commentary; *cf.* Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L.Rev. 727, 804–17 (1979) (discussing the application of the common-law rule to commercial interests in North Carolina and concluding that it is better not to apply the rule in such cases).

Rich, Rich & Nance v. Carolina Constr. Corp., 558 S.E.2d 77, 79-80 (N.C. 2002).

void the Purchase Option as set forth above in Section I. hereof, but does submit to this Court in the alternative that an implied period of reasonable time for the duration of the option can be supplied to prevent the option from violating the common law rule against perpetuities. Best argues that imposing a reasonable time would be contrary to the common law rule against perpetuities, but the common law has long allowed a reasonable time to be implied for the exercise of an option. See King v. Oxford, 282 S.C. 307, 316, 318 S.E.2d 125, 130 (Ct. App. 1984) ("The failure of the parties to express a date certain by which the option to lease must be exercised is not fatal. Where the parties to an option contract do not specify a time for performance, a reasonable time will be implied."); see also Lindler v. Adcock, 250 S.C. 383, 386, 158 S.E.2d 192, 194 (1967) ("[T]he option must be exercised in a reasonable time if no time is specified.")[2].

III. Best is not entitled to summary judgment as a matter of law as to whether Spring Valley waived its right to exercise the Purchase Option where the issue of waiver presents a question of fact.

Neither the Trial Court nor the Court of Appeals issued any ruling on whether Spring Valley waived its right to exercise the Purchase Option. Further, whether or not a waiver has occurred in a given factual setting is a question of fact for the finder of fact. Bishop v. Benson, 297 S.C. 14, 18, 374 S.E.2d 517, 518 (Ct. App. 1988). The closing under the Purchase Option did not occur because not all details of the deal were finalized, including the responsibility for the payment

[2] Best points out that in Juliano & Sons Enters., Inc. v. Chevron, U.S.A., Inc., 593 A.2d 814, 817-18 (N.J. Super. Ct., App. Div. 1991), a case relied upon by Spring Valley, a right of first refusal could not be saved under New Jersey Law by implication of a reasonable time. But in Juliano & Sons Enters., Inc., the court did find that the right of first refusal, a nondonative commercial transaction, was not subject to the common law rule against perpetuities and was valid under the Uniform Statutory Rule Against Perpetuities. There, as here, it was not even necessary to reach the issue of an implied reasonable time because the transaction was clearly valid under the statutory scheme.

of attorneys' fees. [R.pp. 70-72.] At a minimum, genuine issues of material fact exist which preclude the grant of summary judgment for Best. Spring Valley requests this Court to find the Purchase Option enforceable for the reasons set forth herein and remand for further proceedings on Spring Valley's claim for specific performance or, in the alternative, actual damages.

CONCLUSION

For the reasons set forth herein and in its Petition, Petitioner Spring Valley respectfully requests that the Court grant its Petition for Writ of Certiorari, reverse the Court of Appeals' Opinion and the Trial Court's grant of summary judgment to Best, hold that the Purchase Option is enforceable for the reasons set forth herein, and remand to the Trial Court for further proceedings.

Respectfully submitted,

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