STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL CIRCUIT
SEÑOR WRAPS, INC., PLAINTIFF, vs. E. KWANG KIM, as trustee of the E. Kwang Kim Revocable Trust dated January 5, 2007, and E. KWANG KIM, DEFENDANTS.	CASE NO.: 2013-CP-23-00179

ORDER

THIS MATTER came before the Court for non-jury trial on June 12, 2014. Present and representing the Plaintiff were Robert C. Wilson, Jr., Esq. and Constantine S. Christophillis, Esq. Defendants were represented by Kurt M. Rozelsky, Esq., and Joseph W. Rohe, Esq. Upon review of the testimony and exhibits presented at trial, the Court hereby finds for the Defendants as follows:

PROCEDURAL HISTORY OF THE CASE

This matter derives from a dispute concerning an option to purchase real property located at 10 S. Main Street, Greenville, South Carolina. On January 11, 2013, Plaintiff filed a Summons and Complaint, along with a *Lis Pendens*, alleging equitable causes of action for declaratory judgment and specific performance. Defendants were served and timely filed an Answer and Counterclaim asserting various affirmative defenses and counterclaimed for declaratory judgment and for recovery of attorneys' fees to the extent permitted under a pre-existing lease.

FINDINGS OF FACT

Defendants and Cantinflas, Inc.[1] entered into a Lease Agreement dated March 30, 2001 (the "Lease").[2] The Lease defines the leasehold estate as "the premises located at 10 South Main Street, Greenville, South Carolina...being the main floor only of said building." In April of 2007, Defendants and Plaintiff entered into a certain Modification and Extension of Lease Agreement (the "Lease Extension") to extend the term of the Lease until midnight on April 13, 2013. The leasehold premises under the Lease Extension are defined by reference to the original Lease; thus, the Lease Extension did nothing to alter, amend or expand the leasehold area beyond the first floor at 10 S. Main Street. Contemporaneous with the Lease Extension, the parties entered into an Option to Purchase Real Property and Right of First Refusal dated April 14, 2007 (the "Option"). (See Pl.'s Ex. 1.) It is the Option that is the subject of dispute in the present action.

The Lease Extension and Option were negotiated between the parties and their respective attorneys, Marion M. Goodyear, Esq. ("Goodyear") representing Plaintiff and William B. Swent, Esq. ("Swent") representing Defendants, in the months leading up to April 2007. However, prior to the attorneys' involvement, a number of negotiations occurred directly between the parties, which are evidenced by e-mails and other correspondence by and between the same. In July 2006, Plaintiff's principal Ruben Montalvo ("Montalvo") dispatched a letter to Defendant E. Kwang Kim ("Kim") requesting certain modifications to the Lease. In response thereto, Kim's son-in-law, John Hwang ("Hwang") drafted and sent, at the request of Kim, correspondence to Montalvo dated September 19, 2006 stating, *inter alia*, that Defendants would offer Plaintiff the

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[1] On or about January 2, 2004 Cantinflas, Inc. amended its Articles of Incorporation with the South Carolina Secretary of State to change its legal name to Senor Wraps, Inc. Accordingly, Plaintiff is the uncontested successor in interest to Cantinflas, Inc. as to all contract rights in dispute.

[2] It is the Lease that contains a provision for the award of attorneys' fees; however, no similar provision is contained in the Option that is the subject of this action.

right to purchase the property currently leased along with the second floor directly above. (See Pl.'s Ex. 3.) Hwang testified that, at the time the letter was sent, he had never visited the property and was not familiar with its floor plan, particularly as it related to the separation of 10 and 12 S. Main Street and access between the first and second floors of the building. It is undisputed that 10 and 12 S. Main Street are located in single, two-story building; however, the second floor of the building is only accessible from 12 S. Main Street and there is no means of ingress or egress from 10 S. Main Street to the floor above. Montalvo testified that the building was constructed in such a manner that the leasehold space he occupied at 10 S. Main Street was physically separated from the remainder of the building—including the entire upstairs of the building.

Montalvo responded to Hwang's correspondence on September 22, 2006, stating that "[w]e accept to purchase the property that we currently occupy in April 2010." (See Defs.' Ex. 4.) It was undisputed among the parties that Plaintiff never occupied anything more than the ground floor at 10 S. Main Street. At the same time Defendants and Plaintiff were negotiating the terms of the Lease Extension and Option, Defendants were also engaged in attempts to lease or potentially sell the 12 S. Main Street property, including the floor space above Plaintiff's leasehold. Although unprompted, on January 18, 2007, Montalvo sent an e-mail purportedly summarizing that the parties had "[a]gree[d] on a purchase option for the space we occupy and its upstairs." (See Defs.' Ex. 3.) Notwithstanding, Defendants denied that any agreement had been reached at this point in negotiations. In support of the same, Hwang responded to Montalvo on January 20, 2007, with an offer to permit Plaintiff to purchase "the space occupied by the leasee [*sic*]" and further noted that any terms would not be binding until such time as an addendum to the Lease was executed by the parties. (See Defs.' Exs. 3, 5.) On January 24,

Montalvo responded, stating that Plaintiff was "thankful to have the opportunity that Ms. Kim grants us to purchase our part of the building in 2010." (See Defs.' Ex. 3.) However, on January 29, 2007, Montalvo dispatched a letter directly to Kim offering $660,000 to purchase the "first and second floors." (See Defs.' Ex. 6.) From the testimony and evidence presented at trial, it is clear that no agreement between the parties had been reached at this time.

In late January 2007, Goodyear was retained or otherwise became involved in representing Plaintiff in negotiations and was provided copies of a number of the e-mails above-referenced along with a proposed addendum to the Lease drafted by Montalvo. (See Defs.' Ex. 3.) Several versions of this addendum were submitted to Defendants for execution, but none were signed. In March 2007, Swent took over negotiations on behalf of Defendants and in April 2007 the Lease Extension and Option were executed by the parties. Swent testified that it was never the intention of Defendants to grant an option encompassing the floor above Plaintiff's leasehold. This was further supported by the testimony of Hwang, as well as Kim's daughter, Sarah Kim, who assisted Kim in negotiations due to Kim's language barriers. Goodyear did not testify as to intent, but rather identified the two-dimensional drawing that is attached as an exhibit to the Option as supporting Plaintiff's averment that the Option should extend to both the leasehold space and the property located thereabove. However, Swent communicated to Goodyear the impossibility of granting Plaintiff any additional property rights beyond the leasehold due to an anticipated purchase option for the entirety (upstairs and downstairs) of 12 S. Main Street. (See Pl.'s Ex. 2). Manaf Mazoni, the eventual lessee of 12 S. Main Street, testified that his purchase option extended to the entirety of 12 S. Main Street, to include the floor space located above Plaintiff's leasehold.

Plaintiff testified it was his intention to purchase and has asserted a right to purchase not only the leased property at 10 S. Main Street, but also the property above 10 S. Main Street, based upon preamble language and a two-dimensional drawing that is attached to the Option. The Option, however, contains more than just this cursory language and building footprint depiction.[3] The property that is made subject to the Option is consistently identified therein as the very same property under lease to Plaintiff; for example,

> "It is acknowledged and agreed that Grantor presently leases the Property to the Grantee..."

(Pl.'s Ex. 1, Supp. Contract Provision, Para. B.)

> "Grantor hereby grants to Grantee an irrevocable option...through and until the Grantee's lease of the Property...expires."

(Pl.'s Ex. 1, Para. 1.)

> "It is acknowledged and agreed that the Property is situated upon a larger tract of land...[and] exists as rental space within a larger building..."

(Pl.'s Ex. 1, Para. 3.)

> "In light of the existing lease from Grantor to Grantee and the maintenance obligations that are anticipated to exist up until the exercise of the Option, the Property shall be conveyed AS IS..."

(Pl.'s Ex. 1, Para. 7.)

> In order that Grantee may consummate its Option to purchase the Property, said Property will need to be severed from the Master Parcel--by subjecting the Master Parcel to the condominium form of ownership (or by some other form of subdivision acceptable to both

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[3] Under South Carolina law, any inconsistency between a general clause and a specific clause must be resolved in favor of the specific. Richland-Lexington Airport Dist. v. American Airlines, Inc., 306 F.Supp.2d 548 (D.S.C. 2002). As a general rule of property law and conveyancing, "if a general description is followed by a clause summing up the intention of the parties as to the premises conveyed, such clause has a controlling effect on all prior phrases used in the description." Lake View Acres Dev. Co. v. Tindal, 306 S.C. 447, 480, 412 S.E.2d 457, 459 (Ct. App. 1991).

> Grantor and Grantee). Grantee covenants and agrees to bear the cost of such severance including, but not limited to all capital expenditures necessary to accomplish physical severance and building code compliance, legal fees and the costs of plot plans, floor plans, survey and architectural renderings necessary to subject the Master Parcel to the condominium form of ownership. The condominium master deed shall be prepared by an attorney approved by Grantor, and the master deed itself shall be subject to complete review and approval of Grantor. In the event the Grantee fails to deliver a draft master deed (in recordable form with all exhibits attached) and all other documents or construction contracts reasonably necessary to accomplish severance within forty-five (45) days following Option exercise, the Option shall automatically be terminated and of no further force or effect.

(Pl.'s Ex. 1, Para. 3.) As noted above, neither party disputes that the leasehold is limited to the ground floor of 10 S. Main Street. Defendants' attorney, Swent, additionally testified that the two-dimensional drawing attached to the Option was never intended to be a precise description of the property to be subjected to the Option, but rather was excerpted from tax records to identify the property's general location.

CONCLUSIONS OF LAW

This Court finds that no agreement was reached between Plaintiff and Defendants as to the scope and terms of any purchase option prior to the execution of the Lease Extension and Option in April 2007. The correspondence and exchange of proposed terms occurring between July 2006 and the execution of the Option in April 2007 were simply that, proposals, and there was no meeting of the minds sufficient to support the formation of a contractual agreement prior to execution of the Option.

"The construction of a clear and unambiguous contract presents a question of law for the court." Ward v. West Oil Co., Inc., 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008); see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). When a contract is unambiguous on its face, the court must look only to the four

corners of the document. See Dixon v. Dixon, 362 S.C. 388, 396, 608 S.E.2d 849, 852 (2005); see also C.A.N. Enters, Inc. v. S.C. Health & Human Svcs. Finance Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense."). It is particularly well-established that parol evidence may not be offered to vary or contradict the terms of an unambiguous written agreement. See e.g., Penton v. J.F. Cleckley & Co., 326 S.C. 275, 486 S.E.2d 742 (1997); Roach v. Williams, 109 S.C. 29, 95 S.E. 120 (1918)(involving land sale contract).

Defendants resist the suggestion that the Option is ambiguous. For the Court to give *any* weight or consideration to Plaintiff's contradicting averments, however, there must first be a finding that the Option is, in fact, ambiguous.[4] As set forth above, the intention that the Option be constrained to the leasehold space is repeatedly stressed in the plain language of the Option. Nevertheless, extrinsic evidence further confirms the intention of the parties was to subject "the main floor only" to the Option. The exchange of correspondence and e-mails demonstrates that the contemplated purchase would apply only to the space occupied by Plaintiff as lessee. Moreover, the testimony presented at trial declared a clear intention of the Defendants to convey purchase rights only as to the premises being leased to Plaintiff.

Additionally and in support of this construction of the Option, the Lease Extension and Option were executed simultaneously by the parties. "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will

[4] An unambiguous contract is one capable of being understood in more ways than just one, or an agreement unclear in meaning because it expresses its purpose in an indefinite manner." Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977).

consider and construe the instruments together." Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). "Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." Id. at 88-89, 232 S.E.2d at 24. The Lease Extension operated to extend the leasehold estate and expressly referenced the original Lease to define and provide the description of the leasehold. In particular, leasehold is defined as "the premises located at 10 South Main Street, Greenville, South Carolina...*being the main floor only of said building*." [emphasis added.] When the Option and the Lease Extension are read as a whole, it is further confirmed that the Plaintiff's real property entitlements pertain to "the main floor only" of 10 S. Main Street.

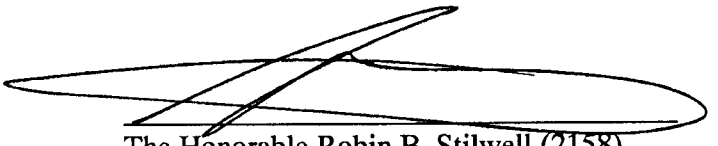
Based upon the foregoing and upon the evidence presented by the parties at trial, the unavoidable conclusion from a reading of the entirety of the Option is that it conveys a right to purchase only the first floor/leasehold space at 10 S. Main Street. Moreover, this conclusion is supported by the testimony of the parties and the correspondence by and between the parties and their respective counsel during negotiations leading up to execution of the Lease Extension and Option.

THEREFORE, IT IS ORDERED that the Option shall apply only to the premises leased to and occupied by Plaintiff—that is, the ground floor at 10 S. Main Street.

FURTHER, IT IS ORDERED that Plaintiff shall have thirty (30) days from the date of execution of this Order to perfect exercise of the Option in accordance with the terms of the Option.

FURTHER, IT IS ORDERED that the *Lis Pendens* filed by Plaintiff is hereby discharged.

AND IT IS SO ORDERED!



The Honorable Robin B. Stilwell (2158)
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Dated: 28 July 15