

THE STATE OF SOUTH CAROLINA

In The Court Of Appeals

RECEIVED

SEP 23 2015

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2014-002201

Señor Wraps, Inc. Respondent,

v.

E. Kwang Kim, as trustee of the E. Kwang
Kim Revocable Trust dated January 5, 2007,
and E. Kwang Kim Appellants.

REPLY BRIEF OF APPELLANTS

William B. Swent (Bar No. 13519)
Kurt M. Rozelsky (Bar No. 6856)
Joseph W. Rohe (Bar No. 79313)
SMITH MOORE LEATHERWOOD, LLP
2 W. Washington Street, Suite 1100
Greenville, South Carolina 29601
(864) 751-7600
Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. RESPONDENT'S 2012 OPTION NOTIFICATION DID NOT TRIGGER A 2012 PROPERTY VALUATION BECAUSE SUCH NOTIFICATION CONSISTENTLY CHALLENGED THE SCOPE OF PROPERTY COVERED BY THE OPTION (THUS MAKING APPRAISAL A PRACTICAL IMPOSSIBILITY)	1
II. RESPONDENT MISCONSTRUES APPELLANTS' OBLIGATIONS UNDER THE OPTION	3
CONCLUSION	3

TABLE OF AUTHORITIES

	<u>Page No.</u>
<u>Conner v. Alvarez</u> , 285 S.C. 97, 328 S.E.2d 334 (1985).....	1, 2
<u>Ingram v. Kasey's Assocs.</u> , 340 S.C. 98, 531 S.E.2d 287 (2000).....	1

ARGUMENT

- I. RESPONDENT'S 2012 OPTION NOTIFICATION DID NOT TRIGGER A 2012 PROPERTY VALUATION BECAUSE SUCH NOTIFICATION CONSISTENTLY CHALLENGED THE SCOPE OF PROPERTY COVERED BY THE OPTION (THUS MAKING APPRAISAL A PRACTICAL IMPOSSIBILITY).

Respondent argues that “[s]ubsequent litigation over the scope of the Option does not somehow negate [Respondent’s] exercise of the Option on [November 30, 2012].” However, this argument fails to recognize the holding in Ingram v. Kasey’s Assocs., 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000), mandating exacting compliance with an option’s terms in order to effect an exercise. The plain language of the Option at hand granted Respondent an opportunity to purchase only the restaurant space being leased to Respondent, but Respondent continuously and improperly claimed the right to purchase additional property on the floor above the restaurant (in spite of inaccessibility and other physical obstacles to such a claim). Under the authority of *Ingram*, such an imperfect exercise is not valid.

Respondent erroneously argues that, “[w]here an option to purchase real property is exercised, the grantee is entitled to purchase the property at its appraised value as of the date of exercise.” (Respt.’s Initial Br. p. 8.) This is a false reading of the holding in Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334 (1985). In *Conner*, the South Carolina Supreme Court did not confront a dispute over the proper timing of appraisal. Rather, the issues in *Conner* related to application of rental payments towards an option price. See id. at 99. Disproving Respondent’s assertions relative to the *Conner* decision is as simple as recognizing the freedom of contract. Surely Respondent would not resist the proposition that parties to a bargain can stipulate whatever evaluation date they might choose. The

option language guiding the parties in *Conner* was summarized as follows: “[T]he house shall be re-appraised at the time the Lessee should decide to exercise his option to buy, and the Lessor shall offer the house to the Lessee for the appraised fair market value of the house at that time.” *Id.* at 99. By contrast, the Option at hand does not implicitly or explicitly link the date of option exercise to any subsequent appraisal. Instead, Respondent’s Option provides a mechanism for notice of intent to purchase followed by subdivision of the subject property through condominium and selection of an appraiser mutually acceptable to the parties. (See Pl.’s Ex. 1, generally.) It defies logic that Respondent would assert an appraisal date prior to the very existence of the thing that would be appraised.

Respondent also erroneously argues that Appellants’ counsel admitted at trial and in post-trial hearings that the Option was exercised on November 30, 2012. A close reading of the transcript to which Respondent cites contradicts this claim. Respondent quotes from page 37 of the Post-trial Transcript and concludes that “counsel for [Appellants] consistently argued that [Respondent] had exercised its option with the November 30, 2012 written notice.” Counsel’s actual statements from transcript are that “Mr. Montalvo *attempted* to exercise the option several years ago...” (Post-trial Tr. 37:20-25.) This statement is in line with Appellants’ consistent position—that Respondent’s Option exercise was made defective through attempts to improperly enlarge property to be purchased. The law should not allow Respondent to benefit from a retrospective 2012 valuation occasioned by Respondent’s over-reach.

II. RESPONDENT MISCONSTRUES APPELLANTS' OBLIGATIONS UNDER THE OPTION.

Only for the purposes of clarification, Appellants would point out that there was no obligation under the Option and Appellants had no "responsibility to designate an attorney to prepare the condominium master deed" as stated by Respondent at page 13 of Respondent's Initial Brief. Rather, the Option requires only that the master deed be prepared by an attorney approved by Appellants and states that the draft master deed was subject to review and approval of Appellants. Plain language in the Option provides that if Respondent "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." (See Pl.'s Ex. 1, ¶ 3.) Respondent did not deliver a draft master deed until December of 2014.

CONCLUSION

Based upon the foregoing and the arguments set forth in Appellants' Initial Brief, this honorable Court should reverse the trial court and declare that exercise of the Option was not perfected on November 30, 2012 and that a retrospective valuation is therefore improper.

[signature block on following page]

Respectfully submitted,

SMITH MOORE LEATHERWOOD, LLP



William B. Swent (Bar No. 13519)

Kurt M. Rozelsky (Bar No. 6856)

Joseph W. Rohe (Bar No. 79313)

2 W. Washington Street, Suite 1100

Greenville, South Carolina 29601

Telephone: (864) 751-7600

Facsimile: (864) 751-7800

Attorneys for Respondents-Appellants E.

Kwang Kim, as trustee of the E. Kwang Kim

Revocable Trust dated January 5, 2007, and

E. Kwang Kim

Greenville, South Carolina

Dated: 9/21/2015

Other Counsel of Record:

Constantine S. Christophillis, Esq.

201 Whitsett Street

Greenville, South Carolina 29601

Telephone: (864) 232-6565

James D. Galyean, Esq.

Nexsen Pruet, LLC

55 E. Camperdown Way, Suite 400

Greenville, South Carolina 29601

Telephone: (864) 370-2211

Attorneys for Respondent Señor

Wraps, Inc.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED

SEP 23 2015

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2014-002201

Señor Wraps, Inc. Respondent,

v.

E. Kwang Kim, as trustee of the E. Kwang
Kim Revocable Trust dated January 5, 2007,
and E. Kwang Kim Appellants.

PROOF OF SERVICE

The undersigned employee of the law offices of Smith Moore Leatherwood LLP, attorneys for Appellants, does hereby certify that service of the **Reply Brief of Appellants** was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Constantine S. Christophillis, Esq.
201 Whitsett Street
Greenville, South Carolina 29601

James D. Galyean, Esq.
Nexsen Pruet, LLC
55 E. Camperdown Way, Suite 400
Greenville, South Carolina 29601

This the 21st day of September, 2015.

Carol S Bell

Carol S. Bell
Legal Assistant/Secretary

September 21, 2015

RECEIVED

SEP 23 2015

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Senor Wraps, Inc. v. E. Kwang Kim, et al.*
Case No.: **2014-002201**
SML File No.: 09125129.000001

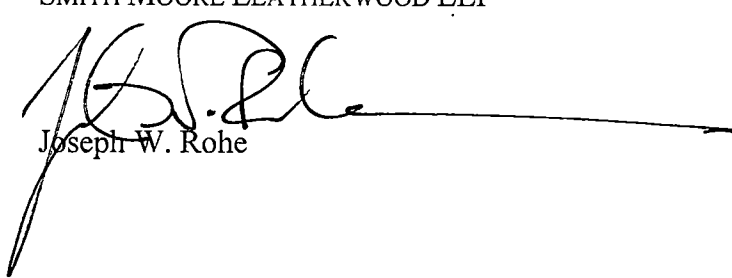
Dear Honorable Ms. Kitchings:

Enclosed herewith please find the original and one (1) copy of the Reply Brief of Appellants along with Proof of Service in the matter above-referenced. I would kindly ask that you return a filed copy in the self-addressed, stamped envelope enclosed.

Should you have any questions or concerns, please feel free to contact me at your convenience. With best wishes and kindest regards, I remain

Very truly yours,

SMITH MOORE LEATHERWOOD LLP


Joseph W. Rohe

JWR/csb

Enclosure(s)

cc: Constantine S. Christophillis, Esq.
James D. Galyean, Esq.

GREENVILLE 1410390.6

JWR-ae
**SMITH MOORE
LEATHERWOOD**
ATTORNEYS AT LAW

2 West Washington Street
Suite 1100
Greenville, SC 29601

NEOPOST

FIRST-CLASS

09/21/2015

US POSTAGE

\$001.8



ZIP 296
041L11255

RECEIVED

SEP 23 2015

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court of the
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

