THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS

S. JACKSON KIMBALL, SPECIAL COURT JUDGE

CASE NO. 2016-002176

Edward R. Kelly and Deirdre O. Kelly,
Appellants

v.

Allen S. McCombs and Benjamin James Russell,
Respondents

INITIAL BRIEF OF RESPONDENTS
Allen S. McCombs and Benjamin James Russell

Beth Ramsey Faulkner
Attorney for Respondents Allen S. McCombs and Benjamin James Russell
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700

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STATEMENT OF THE CASE

Appellants filed their Complaint on March 21, 2016 asserting claims for specific performance and rescission, equitable relief/constructive trust and breach of contract relating to a first right of refusal in a deed. Respondents timely answered and asserted defenses. Respondent Russell filed a Motion to Dismiss or for Summary Judgment on August 17, 2016, and Respondent McCombs filed a Motion to Dismiss or for Summary Judgment on August 26, 2016. A hearing on the motions was held on September 7, 2016. No testimony was taken at the hearing. On September 28, 2016, the Special Circuit Court Judge signed an Order for Summary Judgment (the "Order") granting summary judgment to the Respondents. The Order was filed on September 30, 2016. The Notice of Appeal was served on October 21, 2016. Counsel for Appellants ordered the transcript.

This case involves a 37-acre tract of real estate ("Property") located in York County, South Carolina. [Deed]. The Appellants allege there was some Contract of Purchase and Sale ("Contract") between Henry McCombs and Appellants regarding the 37-acre tract or real estate. [Kelly Aff. ¶ 3; Exhibit A]. However, this Contract is irrelevant to this action, as any agreement between Appellants and Henry McCombs was merged into and is evidenced by the publicly recorded deed, in which Appellants conveyed the Property to Henry McCombs by deed recorded on March 22, 1996 (the "Deed"). [Deed]. The description of the property conveyed includes (1) a legal description of the property by reference to a plat book; (2) a restriction on mobile homes on the property:

> The above described property is also subject to the restriction that neither the ***grantee nor any of his successors or assigns or heirs*** will place more than one mobile home on the above described property for a period of 45 years, that being from August 29,

> 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved.

and; (3) the following first right of refusal:

> The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or partial of the same.

[Deed].

On April 11, 2012, Henry McCombs conveyed his interest in the Property by Quitclaim Deed to his son, Respondent Allen S. McCombs, for "$5 and love and affection." [Quitclaim Deed]. The Appellants were on constructive notice of the transfer by virtue of the recordation of the Quitclaim Deed on April 11, 2012 in the public record in the Office of the Clerk of Court in York County, South Carolina. [Quitclaim Deed].

Henry McCombs died in June 2015. [Kelly Aff. ¶ 7].

On November 20, 2015, Respondent Allen S. McCombs conveyed the Property to Respondent Benjamin James Russell for $125,000. [Deed of 11/20/2015]. The Appellants were not provided notice of the transfer prior to the transfer.

ARGUMENTS

I. THE LOWER COURT DID NOT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL INVALID FOR NOT EXPRESSLY STATING THE NOTICE AND TIMING PROVISIONS. THE FIRST RIGHT OF REFUSAL WAS TOO VAGUE AND INDEFINITE AND THUS IS VIOLATIVE OF PUBLIC POLICY.

A first right of refusal is a pre-emptive right, and it is a contingent nonvested interest because the grantee or the grantee's heir has the right to decide to sell the property, and thus, may never decide to do so. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2 384, 385 (Ct. App. 1997). A first right of refusal is an interest predicated on an event which is not certain to occur. *Id.* As a pre-emptive right, a first right of refusal is subject to the rule against restraint of alienation of interest in land. 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002). Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right. Restatement (Third) of Prop.: Servitude § 3.4 cmt. (f) (2000). In this instant case, the procedures for exercising the right are omitted. The first right of refusal in the instant case "contains no specification for giving notice of a third party's offer to purchase, no specification of time after notice within which the [first right of refusal] must be exercised by [Appellants], no specification of the time within which [Appellants] must pay the consideration for repurchase, or any other terms by which the reasonableness of the servitude imposed by the [first right of refusal] may be assessed. Nor are any such procedures otherwise specified in the deed to Henry [McCombs]." [Order at p.4]. The first right of refusal contains no specification of how price or value are to be determined, and it contains no specification as to how long either party, if notice if given, has to reject or accept the right of refusal or any determination of the timing of the closing.

A first right of refusal should be strictly construed in South Carolina. South Carolina has long disfavored subsequent clauses in deeds that purport to cut down a fee simple estate contained in the granting clause. See *Sanford v. Sanford*, 106 S.C. 304, 306, 91 S.E. 294, 295 (1917); *Douglas v. Medical Investors, Inc.* 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971); *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968); *Batesburg—Leesville School Dist. No. 3 v. Tarrant*, 293 S.C. 442, 444, 361 S.E.2d 343, 345 (Ct. App. 1987).

One of the commonly acknowledged attributes of fee simple ownership in South Carolina is the ability to freely convey it without any restrictions. Any restraint on alienation, including a first right of refusal, not specific in all elements including legitimacy of purpose, price and detailed procedures for exercising the right, runs counter to this commonly acknowledged attribute. Without detailed procedures for exercising the right, the first right of refusal in the instant case is an unreasonable restraint on the alienability of the property and it therefore violates the public policy of South Carolina, and is thus unenforceable. *McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142, 143 (1912); *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct.App. 1984).

II. THE LOWER COURT DID NOT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL WAS ENFORCEABLE ONLY AGAINST HENRY MCCOMBS AND THUS INVALID BECAUSE IT WAS ASSIGNED.

"The [first right of refusal] as contained in the deed to Henry [McCombs] states: 'the grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same.' On its face, the [first right of refusal] contains no language making it binding on the heirs or assigns of Henry [McCombs]. This is in

contrast to a previous provision of the deed placing a restriction on the property pertaining to mobile homes. That provision states:

> The above described property is also subject to the restriction that neither the ***grantee nor any of his successors or assigns or heirs*** will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved. (Emphasis added.)

This restriction is clearly made binding on the successors in title to Henry [McCombs] for a definite period. No such intent is expressed, or can be reasonably inferred, from the language of the [first right of refusal]. Thus, upon Henry [McCombs'] conveyance of the property, or upon his death, the [first right of refusal] would expire, and have no effect going forward.

After Henry [McCombs] conveyed the subject property to Allen in 2012, some sixteen years after he received title, the [first right of refusal] was no longer binding. Even if it is assumed that the donative transfer to Allen [McCombs] would not operate to extinguish the [first right of refusal]...Henry [McCombs'] death would. His heirs would not be bound by its provisions, as the language of the [first right of refusal] simply did not contain any such provision or language." [Order at p.4].

As for the reasons stated above, a first right of refusal is a restraint on alienability of interest in land, and restrictions on alienability should be strictly construed. While it is true that in the habendum clause, the Deed states that the "premises above-mentioned" are conveyed to Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever," this language addresses the fee simple interest of Henry McCombs but should not be interpreted to

extend to any restraint on the fee simple interest set forth in the deed, such as the first right of refusal. [Deed, p.2]. Strictly construed, the first right of refusal ended with Henry McCombs, and his assignment of the land extinguished the first right of refusal. Therefore, upon the assignment of the interest in land by Henry McCombs, the first right of refusal extinguished.

Thus, the first right of refusal was only enforceable between Henry McCombs and the Appellants.

III. THE LOWER COURT CORRECTLY HELD THAT A FIRST RIGHT OF REFUSAL EXPIRED ON HENRY McCOMB'S DEATH.

As for the reasons stated above, a first right of refusal is a restraint on alienability of interest in land, and restrictions on alienability should be strictly construed. Again, while it is true that in the habendum clause, the Deed states that the "premises above-mentioned" are conveyed to Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever," this language addresses the fee simple interest of Henry McCombs but should not be interpreted to extend to any restraint on the fee simple interest set forth in the deed, such as the first right of refusal. Strictly construed, the first right of refusal ended upon the death of Henry McCombs, and is not enforceable against respondents.

CONCLUSION

"The right of first refusal in this case constitutes an unreasonable limitation upon the power of alienation, and it is therefore violative of the applicable case law and public policy of this state, and is unenforceable. *See McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142, 143 (1912); *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct.App. 1984). Further, the right of first refusal was binding only as between [Appellants] and Henry McCombs, as it contained no language making it binding on Henry [McCombs'] heirs and assigns." [Order p.5]. South Carolina Supreme Court precedent does not imply reasonable time and notice requirements into first rights of refusal but rather, strictly construes them. Based on the reasons set forth above, the lower court's holdings should be affirmed.

Respectfully submitted,

Beth Ramsey Faulkner
Attorney for Respondents
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700

York, South Carolina
January 13, 2017

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S. JACKSON KIMBALL, SPECIAL COURT JUDGE

CASE NO. 2016-002176

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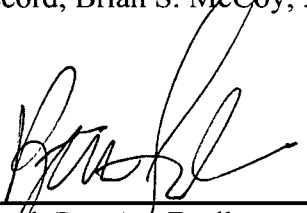
PROOF OF SERVICE

I certify that I have served the Respondents' Brief and Designation of Matter to be included in Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid on January 13, 2017 addressed to the attorney of record, Brian S. McCoy, 378 East Main Street, Rock Hill, SC 29730.



Beth Ramsey Faulkner
Attorney for Respondents
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700

York, South Carolina
January 13, 2017

Telephone
(803) 818-5700

Facsimile
(803) 818-5701

Faulkner Law Firm LLC

616 E. Liberty Street
P.O. Box 1030
York, SC 29745

January 13, 2017

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

RE: *Edward R. Kelly and Deirdre O. Kelly v. Allen S. McCombs and Benjamin James Russell*
Case No.: 2016-002176

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondents' Brief, Designation of Matter to be Included in Record on Appeal, and Proof of Service in the above referenced matter. Please file these documents with your office and return the copies to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am also serving the Appellants' counsel.

If you have any questions concerning this matter, please do not hesitate to contact me at (803) 818-5700.

With kind regards, I am

Yours very truly,

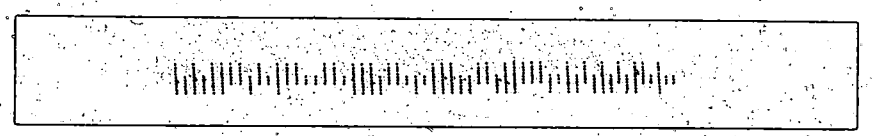
Beth Ramsey Faulkner
Attorney

BRF/tsh

Enc.: As Noted.

cc: Brian S. McCoy, Esq.
Allen McCombs
Benjamin Russell

Faulkner Law Firm, LLC
BETH RAMSEY FAULKNER
Attorney & Counselor at Law
P.O. Box 1030
York, South Carolina 29745



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