THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002176

Edward R. Kelly and Deirdre O. Kelly..... Appellants

v.

Allen S. McCombs and Benjamin James Russell.....Respondents

FINAL BRIEF OF APPELLANTS

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INTRODUCTION

Appellants bargained for and paid consideration for a first right of refusal in a deed. Inexplicably, although Respondent Allen McCombs had actual knowledge of the first right of refusal, and would have received the exact same sale price and terms if he notified Appellants of an offer on the property, he sold the property without notifying Appellants. The buyer, Respondent Benjamin Russell, also had actual knowledge of the first right of refusal, but he elected to proceed with his purchase with knowledge that the Appellants were not given their right. Appellants promptly filed this lawsuit when they became aware of the violation, but instead of giving effect to the clear intent of the parties to the deed in issue, the lower court stretched logic and law to hold that the first right of refusal was (i) unenforceable, and (ii) enforceable only against the grantee of the deed in issue. The holdings are clearly incorrect, and Appellants are entitled to specific performance.

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 timely ordered the transcript, which was received on November 14, 2016.

UNDISPUTED FACTS

All of the facts are undisputed. Only two affidavits were filed relating to the motions for summary judgment: (1) by Appellant Edward R. Kelly (R.pp.068-072), and (2) by Respondent Benjamin J. Russell. However, the affidavit of Russell merely states his legal contentions and does not include any factual allegations that dispute the sworn testimony of Kelly. (R.pp.079-081).

This case involves a 37-acre tract of real estate ("Property") located in York County, South Carolina. R.pp.068 ¶3) Henry L. McCombs ("Henry") wanted to purchase part of a 100+ acre-tract of property next to his property, but the seller would not divide it and Henry could not afford the purchase price. (R.p.069 ¶3(a)). Appellants financed the

purchase of the entire tract, and in a series of transactions, sold a portion back to Henry, including the tract in issue in this case. (R.p.069 ¶3(a)). The parties entered into a Contract of Purchase and Sale ("Contract") relating to the sale of the 37-acre tract to Henry. (R.p.068 ¶3; R.pp.073-076). The Contract included a first right of refusal in favor of the Appellants. (R.pp.073-076). The parties extensively discussed the provision and agreed that it would allow the Appellants to match any offer that Henry or his heirs would receive on the Property. (R.pp.068-069 ¶3). The right was very important to the Appellants and was an important factor in their determination to go forward with the transaction, and in the consideration they were willing to accept for the transaction. (R.pp.069-070 ¶3(a-c)).

Based on all of the consideration, including the right, Appellants conveyed the property to Henry by deed, which was recorded on March 22, 1996 (the "Deed") (R.pp.070-071 ¶5). The description of the property conveyed includes a legal description of the property by reference to a plat book, a restriction on mobile homes on the property (not involved in this case), and the following reservation:

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

(the "FROR") [1] (R.p.082). The habendum clause then provides: "TO HAVE AND TO HOLD, all and singular the said premises above-mentioned, unto Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever." (R.p.083).

[1] Although the FROR provision does not include a termination date for the right, the provision does not violate the rule against perpetuities because of S.C. Code §27-6-20(A)(2) and §27-6-50. The issue was argued below, and the lower court's ruling on that issue was not appealed (and is correct).

After the deed was executed and recorded, on at least two occasions, Henry informed the Appellants, pursuant to the FROR, that he had received (or might receive) an offer to purchase the Property and asked if they would be interested to match the price and terms of the offer. (R.p.071 ¶6). Appellants requested a copy of the offer on both occasions and expressed their interest to exercise their right to purchase the Property subject to their review of the offer. (R.p.071 ¶6; R.pp.077-078). Henry did not provide either offer, and no sale of the Property occurred pursuant to those purported offers. (R.p.071 ¶6).

On April 11, 2012, Henry conveyed his interest in the Property by Quitclaim Deed to his son, Respondent Allen S. McCombs, for "$5 and love and affection." (R.pp.084-085). The Quitclaim Deed includes a derivation statement that refers to the Deed to Henry, and specifically includes: "HOWEVER, subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any."

The Appellants were not informed of the transfer and were not aware that it occurred until early 2016. R.p.071 ¶7). Henry died in June 2015. (R.p.071 ¶7).

On November 20, 2015, Respondent Allen S. McCombs conveyed the Property to Respondent Benjamin James Russell for $125,000. (R.pp.088-089). The Appellants were not provided notice pursuant to the FROR, and were not aware of the transaction until early 2016. (R.p.072 ¶9). No evidence was submitted by Respondents that notifying Appellants was a problem. Appellants would have exercised the FROR and would have promptly purchased the Property at the sale price. (R.p.072 ¶10). Both Allen S. McCombs and Russell had actual knowledge and record knowledge of the FROR, but

failed to comply with the requirements thereof, and proceeded with such knowledge. (R.pp.174-148 No.8; R.p.154 No.5, p.155 No.8).

Promptly after learning of the sale to Russell in violation of the FROR, the Appellants filed this lawsuit to enforce their rights. (R.pp.006-011).

STANDARD OF REVIEW

"When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders Firstsource-Southeast Grp.*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct.App.2015). When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP. Specific performance and rescission are equitable remedies. In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544(Ct.App.1999).

ARGUMENT

I. SOUTH CAROLINA COURTS IMPLY REASONABLE NOTICE AND TIMING TERMS WHEN NOT SPECIFIED IN AN AGREEMENT. BY NOT SPECIFYING NOTICE AND TIMING PROCEDURES IN A FIRST RIGHT OF REFUSAL, THE PARTIES AGREED TO BE BOUND BY REASONABLE NOTICE AND REASONABLE TIMING PROVISIONS. THE LOWER COURT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL INVALID FOR NOT EXPRESSLY STATING THE NOTICE AND TIMING PROCEDURES.

The lower court acknowledged that a first right of refusal "is enforceable so long as both the price term, and the time within which the right may be exercised are reasonable." (R.p.003) (citing 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002)). It held that the price term of the FROR here was reasonable because by "reasonable inference" the price to be paid "would be the same as the sale price contained in the offer from a potential third party purchaser." (R.pp.003-004). However, the lower court held that the FROR was unenforceable because "the procedures for exercising the [FROR] are not specifically stated in the grant itself." (R.p.004).

The Order lists the following as purported deficiencies: "[The FROR] contains [(1)] no specification for giving notice of a third party's offer to purchase; [(2)] no specification of time after notice within which the FROR must be exercised by Plaintiffs, [and (3)] no specification of the time within which Plaintiffs must pay the consideration for repurchase." *Id.* However, these purported deficiencies are easily cured by implying reasonable time and notice terms, which the courts routinely do to effectuate the intent of the parties. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Maybank v. BB&T Corp.*, app. case no. 2014-002638, at 25 (S.C. 2016); *Schulmeyer v. State Farm Fire and Cas.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (same).

A. South Carolina Courts Routinely Imply Reasonable Terms

South Carolina courts have consistently enforced the intent of the parties to a contract by implying reasonable time and notice terms.[2] *See Cloniger v. Cloniger*, 261

[2] In fact, the lower court here acknowledged this law of implying reasonable or standard terms by holding that the implied price term was reasonable, based on the nature of a FROR and the implied terms therein.

S.C. 603, 193 S.E.2d 647, 651 (1973) (a reasonable time for performance is implied when the time for performance is not stated in an agreement to repurchase property.); *Martin v. Boon,* 116 S.C. 97, 107 S.E. 320, 323 (1921) ("payment will be presumed to be due within a reasonable time or on demand" when not specified); *Carolina Cable Network v. Alert Cable*, 316 S.C. 98, 447 S.E.2d 199 (1994) (implying "reasonable notice" may be given to terminate when the contract lacks a duration term); *South Carolina Elec. & Gas Co. v. Hartough,* 375 S.C. 541, 654 S.E.2d 87, 90 (Ct.App.2007)("if the parties to an option agreement fail to specify a time for performance, a reasonable time will be implied").

In *Carroll v Page*, 264 S.C. 345, 215 S.E.2d 203, 205 (1975), the plaintiff brought an action against the defendant for specific performance of a first right of refusal to purchase real estate in a lease. *Id.* at 204. The lease agreement containing the first right of refusal stated "It is agreed that should the Lessor elect or should the Lessor decide to sell the whole property at any specific figure, he does hereby agree to give the Lessee the right to the buy the property at the figure so determined..." *Id.* at 350, 215 S.E. 2d at 205. Several years later the defendant landlord notified the plaintiff tenant that he decided to sell the property and gave the plaintiff an opportunity to match the terms. *Id.* The plaintiff requested a "few days to think it over." *Id.* Instead, the plaintiff attempted to purchase the property and enforce the right over a year after notification. *Id.* No time limit for acceptance of the offer was fixed in the right of refusal. *Id.* Significantly, the Court did not hold the provision unenforceable, and in fact enforced the implied reasonable time

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See, e.g., Old Port Cove Holdings v. Condo. Ass'n, 986 So.2d 1279, 1285 (Fla. 2008)(first right of refusal defined as "a right to elect to take specific property at the same price and on the same terms and conditions as those contained in a good faith offer").

provision by denying specific performance. *Id.* The lower court's ruling is contrary to this precedent.[3]

B. Reasonable Time and Notice Terms are Easily Implied to the FROR

Thus, each of the three purported deficiencies is easily satisfied by implying reasonable terms. Of course, the Appellants and Henry McCombs *could* have specified details for these procedures in the Deed. But by not specifically stating the procedures, Appellants agreed (1) to allow Henry McCombs or his assignees to provide notice by any reasonable means, (2) to exercise the FROR within a reasonable time after notice, and (3) to pay the consideration within a reasonable time after exercise of the FROR, or to match the timing in the offer (if one is stated). The undisputed facts demonstrate that none of these purported deficiencies was an actual issue in this case because Appellants were easy to locate, and would have promptly accepted and closed on the FROR if they had been given notice. (R.p.072 ¶11).

II. UNDER SOUTH CAROLINA LAW, COURTS SHOULD AVOID INTERPRETATIONS THAT LEAD TO ABSURD RESULTS, AND A CONTRACTURAL OBLIGATION CAN BE ASSIGNED UNLESS PROHIBITED. THE FIRST RIGHT OF REFUSAL DOES NOT PROHIBIT ASSIGNMENT, AND ALLEN McCOMBS EXPRESSLY ASSUMED IT IN A QUITCLAIM DEED. THE LOWER COURT ERRED BY HOLDING THE FIRST RIGHT OF REFUSAL ENFORCEABLE ONLY AGAINST HENRY McCOMBS AND INVALID BECAUSE IT WAS ASSIGNED.

Apparently as an alternative holding, the Court held: "I conclude that the FROR was enforceable only between Henry and Plaintiffs, and expired either upon Henry's conveyance to Allen, or Henry's death." [Order p.5]. The basis for the holding is the irrelevant fact that the Deed also includes a restriction above the FROR that states

[3] Based on the definitive case law set forth in this section, if the Restatement (Third) of Property, Servitude § 3.4 (R.p.003) requires detailed procedures to be stated and does not allow reasonable terms to be implied, then it contradicts with well-established South Carolina law and is not the law of South Carolina.

"neither the grantee nor any of his successors or assigns or heirs" will place more than one mobile home on the property for 45 years. (R.p.082). Because the FROR paragraph does not repeat the "successors or assigns or heirs" language in the provision itself, the lower court held that it therefore was binding only against Henry. (R.p.005). Plainly, this is wrong.

A. The Gift to Allen was an Assignment that Did Not Invoke the FROR

The transfer of the Property from Henry McCombs to his son Allen McCombs was a straightforward assignment by Quitclaim Deed. South Carolina has recognized that contracts are freely assignable unless expressly agreed otherwise. [4] *See Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 381, 532 S.E.2d 269, 279 (2000); *Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 454, 343 S.E.2d 446, 447(1986); Restatement (Second) Contracts §328 (1981). Here, in the Quitclaim Deed, Allen expressly agreed to the assignment of the FROR. The Quitclaim Deed states the property conveyed is:

> *subject to any Restrictions, Conditions, Covenants, Rights,* Rights of Way, and Easements now of record, if any. TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, GRANTEE'S heirs and assigns forever.

(R.p.085, emphasis added). The FROR was a restriction or covenant that was assigned to Allen by the Quitclaim Deed. The fact that the FROR provision itself does not expressly state "assigns" is not pertinent. The FROR does not prohibit assignment of the obligation, and it was expressly assigned.

B. The Lower Court's Ruling Leads to Absurd Results

[4] There are exceptions not applicable here, such as a personal services contract for an opera singer.

Moreover, an interpretation that the gift by Henry to his son invalidated the FROR leads to absurd results. First, the transfer from Henry to his son Allen was for "$5 love and affection." Under the lower court's reasoning, the Appellants should have been given the opportunity to match this consideration. Instead, the Quitclaim Deed from Henry to his son Allen simply did not qualify as a "sale" under the FROR. Courts have consistently found that a transfer of property that amounts to a gift does not trigger a first right of refusal. *Mericle v. Wolf and Sacred Heart Hospital*, 386 Pa.Super. 82, 562 A.2d 364 (1989); *Bennette v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981); *Isaacson v. First Security Bank of Utah*, 95 Idaho 452, 511 P.2d 269 (1973). Second, under the lower court's reasoning, despite the fact that the Appellants negotiated and gave consideration for the FROR, Henry could have *immediately* circumvented the right simply by transferring the Property to his son. South Carolina courts will not engage in an interpretation leading to absurd results. *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957) ("It is the policy of the Court to give a reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results")[5].

III. BEFORE HIS DEATH, HENRY McCOMBS CONVEYED HIS INTEREST IN PROPERTY WITH A FIRST RIGHT OF REFUSAL TO HIS SON. THE LOWER COURT ERRED BY HOLDING THAT A FIRST RIGHT OF REFUSAL EXPIRED ON HENRY'S DEATH BECAUSE THE PROVISION ITSELF DID NOT INCLUDE THE TERM "HEIRS".

Finally, the lower court held that "even if it is assumed that the donative transfer to Allen would not operate to extinguish the FROR . . . Henry's death would." (R.p.004).

A. Henry Conveyed All of His Interest Before He Died

[5] Also, the entire premise of the lower court's ruling is incorrect because the Deed includes heirs and assigns language. See Argument section III.B. below.

The Order does not explain how Henry's death could possibly be relevant when he did not own an interest in the property at the time of his death. The presence or absence of the word "heirs" is irrelevant. *See Son v. Shealy*, 112 S.C. 312, 318, 99 S.E. 825 (1919) ("no one is an heir of the living"). Henry conveyed the property and assigned the FROR prior to his death. Thus, at the time of his death, Henry did not own the property, and his death is not pertinent to the analysis.

B. The Deed to Henry Includes Heirs and Assigns Language

In any event, the very premise of the lower court's holding is faulty. The plain language of the Deed it makes it binding upon the heirs and assigns of both parties. A review of the entire Deed reveals that the provision is expressly binding on Henry's heirs and assigns. *See First Carolinas Joint Stock Land Bank v. Deschamps*, 171 S.C. 466, 172 S.E. 2d 622, 624 (1934) ("the court will look to the entire deed to obtain the intention as to the meaning of the words used"); S.C. Code §27-5-130 (every deed "passes to the grantee the entire interest of the grantor in the property described in the deed, unless provided to the contrary in the deed").

In the Deed, the description of the property conveyed sets forth a plat book reference, describes the restriction on mobile homes, and describes the reservation of the FROR to Appellants. After the description, 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*." (R.p.083, emphasis added).

Thus, even though it is not necessary on these facts, the Deed actually contains the language making the FROR binding on heirs and assigns. It was not necessary for the

heirs and assigns language to be repeated in the FROR provision, and the fact that it was superfluously repeated in the mobile homes provision is irrelevant.

CONCLUSION

The lower court's holdings are incorrect for the reasons set forth above, and should be reversed. South Carolina Supreme Court precedent implies reasonable time and notice requirements into first right of refusal provisions such as the one in issue here. *Carroll v Page*, 215 S.E.2d at 205. The Property and the FROR were assigned to Allen McCombs, and he failed to give the required notice to the Appellants to exercise or decline their right to match it. Henry McCombs' death is irrelevant because he owned no interest in the Property at death. This Court should reverse and remand to the circuit court with instructions to order rescission and specific performance.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCAR.

March 22, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellants complies with the South Carolina Supreme Court Order dated August 13, 2007 regarding personal data identifiers. I have served a copy on counsel for Respondents this day.

March 23, 2017

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