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 REPLY OF APPELLANTS

McCOY LAW FIRM. LLC

Brian S. McCoy, Esq. (SC Bar #2155)
Danielle Scimeca, Esq. (SC Bar # 102822)
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

There is no dispute that a first right of refusal is enforceable in South Carolina unless it imposes an unreasonable restraint on alienability of the property in issue. In this case, Respondents have completely failed to demonstrate that the FROR in issue here is unreasonable. In fact, the property owner here was always completely free to decide if, when, and at what price he might want to sell his property. The *de minimus* burden under these circumstances has universally been held to be enforceable. Respondents do not even challenge the clear South Carolina case law, including *Carroll v. Page*, 264 S.C. 345, 215 S.E.2d 203 (1975), that allows a court to impose a reasonable term under these circumstances.

Once it is determined that the FROR here is enforceable, it is clear that it applied to the sale of the property by Henry McCombs' son, Respondent Allen McCombs, to Respondent Russell. Appellants demonstrated that the FROR was assigned by Henry McCombs to his son, who expressly accepted the assignment in the Quitclaim Deed. Respondents did not address this critical fact. Nor did Respondents address the absurd and unfair results if the gift from father to son would invalidate the bargained-for FROR.

Finally, the Respondents did not even attempt to explain how the death of Henry McCombs could affect the FROR. Henry had no interest in the property at the time of his death.

Importantly, Respondents fail to address these points in their brief. Instead, Respondents simply restate the disproven statements of the lower court, and cite to inapplicable law.

ARGUMENT

I. RESPONDENTS FAILED TO DEMONSTRATE AN UNREASONABLE RESTRAINT ON ALIENATION

The lower court held, and all parties hereto agree, 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)). Certainly, some first rights of refusal can constitute an unreasonable restraint on alienation, if, for example, the price term is fixed and over time becomes below market value. This would inhibit the owner from selling the property. But Courts examine each case individually to determine whether alienability is unreasonably restrained. Whether a restraint is reasonable "depends upon its long-term effect on the improvement and marketability of property. Once that effect is determined, common sense should dictate whether it is reasonable or unreasonable." *Inglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980).

The FROR in this case does not contain any feature that would constitute an unreasonable restraint on alienation. The price term, as held by the lower court and not appealed by Respondents, provides for a matching of a bona fide offer.[1] (R.pp.003-004). The time to accept or reject the right to match the offer, and the time to close if accepted, are implied reasonable time periods under the circumstances. *See*, *Carroll v. Page*, 264 S.C. 345, 215 S.E. 2d 203 (1975); Appellants' Initial Br. pp. 7-9. Respondents did not contest this well-settled South Carolina law.

[1] A right of first refusal is defined as a "potential buyer's contractual right to meet the terms of a third party's offer." *Black's Law Dictionary* at 1439 (9th ed. 2009).

An examination of the FROR in this case, with the implied reasonable terms under South Carolina law, reveals at most only *de minimus* restraint on alienation. "Restraint on Alienation" is defined as "[a] provision in an instrument of conveyance which prohibits the grantee from selling or transferring the property which is the subject of the conveyance." *Black's Law Dictionary* at 1181-81 (5th ed. 1979). Here, McCombs was always totally free to convey or not convey, and was free to get any price he could if he decided to sell. Appellants were required to exercise or decline the right within a reasonable time, and to close within a reasonable time if accepted. Therefore, any restraint by this FROR was negligible – simply to notify the Appellants. Upon such notification, the transaction would proceed exactly the same as if there were no FROR, except that the name on the deed would be different if the Appellants elected to exercise the right.

Under these circumstances, the FROR is simply not an unreasonable restraint on alienation. *See, e.g.*, *Bortolotti v. Hayden*, 866 N.E.2d 882 (Mass. 2007) (because Hayden only had the right to match the terms of a bona fide offer on the property and had no additional power, the right of first refusal contained in the deed did not prohibit the free alienation of the property); *Shiver v. Benton*, 304 S.E.2d 903 (Ga. 1983) (a right of first refusal is not an unlawful restraint on alienation when it is conditioned on meeting the terms of the offer of a third party); J.A. Bryant, Jr., Annotation, *Pre-Emptive Rights to Realty as Violation of Rule Against Perpetuities of Rule Concerning Restraints on Alienation*, 40 A.L.R. 3d 920 (1971) (a standard right-of-first-refusal provision, which merely gives the holder of the right the power to match a bona fide offer, does not prohibit the free alienation of property).

Respondents contend that the FROR should be strictly construed because it purports to cut down a fee simple estate. [Respondents' Br. at p. 8]. First, under any level of scrutiny, the FROR here, with *de minimus* effect on alienability, would not be considered an unreasonable restraint. Moreover, this contention is a non-starter because the premise is false. In the Deed, the granting clause conveyed "to Henry L. McCombs, his heirs and assigns forever ***the following described property*** . . ." (R.p.082 emphasis added). The legal description that follows includes the FROR language, as all parties agree.[2] Thus, the property conveyed, by definition, included the reservation of the FROR, and the interest conveyed expressly included the FROR. Finally, under 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." Here, the Deed in issue clearly provides that the FROR is reserved to the grantors (Appellants).

II. THE GIFT FROM FATHER TO SON DID NOT AFFECT THE FROR

Respondents do not address or contest the common-sense conclusion in Appellants' Brief that the gift from Henry L. McCombs to his son Allen McCombs did not invoke or affect the FROR[3]. It would be an absurd result if (1) the bargained-for FROR could be immediately negated by giving the property to his son, or (2) interpreting the "$5 love and affection" consideration from father to son to invoke the FROR and allow the Appellants to match the $5 consideration. *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

[2] See, Respondent's Br. at 5-6 ("The description of the property conveyed includes . . . the following first right of refusal"); Appellants' Br. at p. 4 ("The description of the property conveyed includes . . . the following reservation").

reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results").

In addition, in the Quitclaim Deed, the son Allen expressly accepted the property "subject to any Restrictions . . . Rights now of record . . ." Accordingly, the FROR was effective and binding when Respondent Allen sold the property to Respondent Russell. Respondents' again failed to address this decisive fact.

III. HENRY McCOMBS OWNED NO INTEREST IN THE PROPERTY AT THE TIME OF HIS DEATH

Again, the Respondents failed to address Appellants' decisive argument that Henry's death was irrelevant because he had conveyed his interest in the property before his death. Therefore, Henry's death cannot be relevant to whether or not the FROR provision uses the word "heirs." In any event, the Deed in issue actually uses the "heirs and assigns" language, so the entire premise is false. The Deed provides that the "premises above-mentioned," which includes the FROR provision, are conveyed to "Henry L. McCombs, his heirs . . . successors and assigns forever." (R.p.083).

CONCLUSION

The Respondents failed to address each of the Appellants' arguments demonstrating the errors of the lower court's Order. For the reasons set forth in Appellants' Initial Brief, the ruling of the lower court should be reversed.

[3] Respondents restate the fact that the restriction in the Deed relating to mobile homes includes language making it binding on McCombs' heirs and assigns. This fact is not relevant to the issues in this case.

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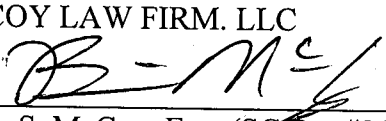

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CERTIFICATE OF COUNSEL

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

March 22, 2017

McCOY LAW FIRM. LLC

Brian S. McCoy, Esq. (SC Bar #2155)
Danielle Scimeca, Esq. (SC Bar # 102822)
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Rock Hill, SC 29730
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