

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Mark B. Mitchell and Celine C. Mitchell
Plaintiff,

vs

Ronald Joseph Albertelli and Mary Frances
Snelling, Trustees of the Mary Frances Snelling
Living Trust, Donnita C. Harmon and Jimmie
Phillip Harmon,
Defendant(s).

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CASE NO.: 2020-CP-02-01173

ORDER

RECEIVED

Feb 25 2022

SC Court of Appeals

PROCEDURE

1. The summons and complaint were filed on June 18, 2020. The complaint alleged causes of action for specific performance, quiet title claim, and breach of contract.
2. The Harmon defendants filed an answer and counterclaim on July 2, 2020. In addition to a general denial, these defendants filed counterclaims for an injunction and abuse of process.
3. The Albertelli and Snelling defendants filed an answer on July 20, 2020. In addition to the general denial, these defendants asserted the affirmative defenses of the statute of frauds, unclean hands, and the failure to mitigate damages.
4. The order of reference was filed on June 30, 2021.
5. The hearing was held on November 8, 2021. The plaintiff was represented by W. Grady Johnson. The Harmon defendants were represented by John Harte. The Albertelli and Snelling defendants were represented by Brad Brodie.

PRE-TRIAL MATTERS

Exhibits

The parties stipulated to the following exhibits:

1. The contract between the plaintiffs and defendants Albertelli and Snelling, with a stipulated date of May 6, 2020 is Exhibit 1.
2. The agreement to buy and sell real estate between Jimmie Philip Harmon and defendants Albertelli and Snelling is Exhibit 2.
3. The addendum to the contract marked as Exhibit 2 is Exhibit 3.
4. The general warranty deed from defendants Albertelli and Snelling to the Harmon defendants for Tract 3-A is Exhibit 4
5. The plat is Exhibit 5.
6. Defendants Exhibit 1 is an email from Ron Albertelli to Mark Mitchell

Pleadings

The parties stipulated to the following:

1. The plaintiff is not seeking any damages as to defendants Albertelli and Snelling. Defendants, Albertelli and Snelling are not claiming any damages against the Mitchells.
2. Plaintiffs are not pursuing any causes of action for damages against the Harmon defendants.
3. The plaintiff's claims for quiet title and specific performance remain for the trial. The tortuous interference with contract was withdrawn without prejudice.

4. The Harmon defendants withdrew the cause of action for abuse of process without prejudice.
5. The Harmon defendants continue to raise the issue of standing as it relates to the plaintiffs.

STATEMENT OF FACTS

The plaintiffs entered into a Contract of Sale to purchase property described as 555 Kimball Pond Road, Aiken, S.C. with Aiken County Tax Parcel Number 091-16-01-003. Ronald J. Albertelli and Mary F. Snelling signed as the sellers and Mark B. Mitchell and Celine C. Mitchell signed as the Buyers.

Jimmie Phillip Harmon had previously entered an Agreement to purchase property located at 555 Kimball Pond Rd./Tract 3-A, Eula Lamar Estates. On page 7, at the end of paragraph 28, the following language appears: “311-Due Diligence/509-VA Addendum/Pre-approval letter/Old Republic Home Protection Application-Map of Property Line to be agreed on, and first right of refusal of property adjoining outside of immediate family. Paragraph 28 is titled as, “ATTACHMENTS, OTHER CONTINGENCIES, TERMS, AND OR STIPULATIONS:”

Mr. Harmon’s wife, Donnita Harmon is listed as the buyer’s agent and is not listed as a buyer on the contract. She inserted the language for the first right of refusal. Her deposition was entered as an exhibit. She admits the language for the first right of refusal does not contain any purchase price for the benefit. The only consideration is the purchase price of \$435,000.00. The only description of the property is the term “adjoining property”. She believes this is sufficient since the Snelling Trust only had ownership interest in the adjoining Tract 3-B.

She admits the language does not say the adjoining Tract-3A. She also testified the first right of refusal would last until one of the parties dies but admits that language is not stated in the first right of refusal. She agrees the language does not describe a mechanism to determine the price if the first right of refusal is exercised.

The parties introduced the undated contract signed between the plaintiffs, as the purchaser, and the defendants Albertelli and Snelling, as the sellers. Mark Mitchell testified the plaintiffs were ready, willing, and able to perform under the terms of the agreement.

Mr. Albertelli advised the plaintiffs he would speak with the Harmons to see if they were interested in purchasing the property. Jimmie Philip Harmon had signed an Agreement to Sell Real Estate for Mr. Harmon to purchase property located at 555 Kimball Pond Rd./Tract 3-A Eula Lamar Estates. The plaintiff's contract to purchase the property had already been executed before the Harmons advised Mr. Albertelli they wished to purchase the property.

On cross-examination, Mr. Mitchell admitted Plaintiff Exhibit 1 was not dated. The contract (Exhibit 1) contained an address of 555 Kendall Pond Road, Aiken, South Carolina and tax parcel number 091-16-01-003. He did not verify if that was the address of the property he wished to purchase but it was identified a Tract 3-B. Albertelli and Snelling were shown as owners on Exhibit 5 for Tracts 3-A and 3-B. He also agreed that when the document (Exhibit 1) was executed on May 6, 2020, Mr. Albertelli told him he believed he had given the Harmons a right of first refusal. The Harmon defendants also published Defendants Exhibit 1, an email from Mr. Albertelli that provided certain conditions that were needed to sell the property to the

Mitchells. On the list was, “a separate release must be written up for the neighbors to sign to release the right of first refusal that they have.” Mr. Albertelli later advised Mr. Mitchell he had decided it was better for him to sell the property to the Harmons.

Celine C. Mitchell is married to Mark Mitchell. She testified Mr. Albertelli told them he wanted to check with the Harmons to verify if they wanted to purchase the property. He gave them seven days to decide. After seven days, he advised the Mitchells that Mr. and Mrs. Harmon said they did not want the property.

The Mitchells proceeded to have perk tests done. She understood that Mr. Harmon was going to sign a document at the closing attorney’s office to document their waiver of the first right of refusal. That information was provided by Mr. Harmon. On May 24 or 25, Mr. Albertelli called the Mitchells and told them Donnita Harmon had decided to purchase the property. The Mitchells received a document identified as addendum to their agreement. The purpose was to void their contract with Mr. Albertelli & Ms. Snelling. The Mitchells refused to sign the addendum. Mrs. Mitchell never saw a document signed by the Harmons that would waive the right of first refusal. Her conversations were with Mr. Albertelli.

Ronald Albertelli testified the plaintiffs originally contacted him by telephone to inquire about Tract 3-B which was posted for sale by Mr. Albertelli and Ms. Snelling. When meeting with Mr. Mitchell on the property, Mr. Albertelli informed Mr. Mitchell the Harmons had a first right of refusal and he would need to speak with them before any other negotiations. He received an offer from the plaintiffs and spoke with Donnita Harmon to let her know about the offer.

Donnita Harmon told him they would not be able to purchase the property and Mr. Albertelli was free to move forward with the Mitchells. He then contacted the plaintiffs and advised them of the Harmon's verbal response. He testified that "as long as that ends up in writing, I had no problem with proceeding with the sale of the property." The contract, marked as Exhibit 1, between himself, Ms. Snelling and the plaintiffs was then prepared and signed.

A perk test was scheduled on the property. As part of that process, the location of the home was staked out. After that, Mr. Albertelli was contacted by Jim and Donnita Harmon about purchasing the property. He told them about the contract with the plaintiffs. Mr. Albertelli then advised Mr. Mitchell that there was a problem that needed to be resolved.

Donnita Harmon provided him with a document to activate their first right of refusal and to purchase the property. He signed the document by digital signature. He did not know why his initials or signature appeared to be whited out.

The contract when Mr. Harmon purchased Tract 3-A stated, "And first right of refusal of property adjoining outside of immediate family." Mr. Albertelli did not prepare the document. There is no other document providing a first right of refusal. That language does not list the sales price for Tract 3-B. He admitted the document does not state how long the first right of refusal was going to last or identify the property by a tax map number or as Tract 3-B.

The Harmon contract to purchase Tract 3-A listed the purchase price as \$435,000.00. The contract does not provide any specific amount being paid for the first right of refusal. The deed transferring Tract 3-A (Joint Exhibit 4) lists

\$435,000.00 as the consideration. Donnita Harmon is not a party to the Tract 3-A contract. The agreement was between Albertelli, Snelling and Jimmie Philip Harmon (Exhibit 2).

On cross-examination, Mr. Albertelli testified the \$435,000.00 was consideration for the entire contract, including the first right of refusal. In regards to the language, “adjoining property”, Mr. Albertelli and Ms. Snelling only owned Tracts A and B. He believes it is clear that the adjoining property could only be Tract 3-B.

Mr. Albertelli never received a written waiver of the right of first refusal. The conversations about the offer made by the plaintiff and the first right of refusal was with Donnita Harmon. He relied on the statements from Donnita to advise the Mitchells that the Harmons were not interested in purchasing Tract 3-B. He believes he still needed the waiver of the first right of refusal to be in writing.

Jimmie Philip Harmon is a defendant in this matter. He believes the deed conveying Tract 3-A should have contained language for a first right of refusal. It is in the sales contract. In reviewing the sales contract, Mr. Harmon believes the language “outside of immediate family”, was in reference to the Albertelli children but agrees that specific reference is not in the sales contract. There is no time frame or mechanism to determine the sales price, expiration date, or description of real estate (other than the word adjoining).

Mr. Harmon, individually, is listed as the buyer in the sales contract. The deed of conveyance for Tract 3-A listed both Jimmie Philip Harmon and Donnita Harmon. Mr. Harmon testified that when his wife initially advised Mr. Albertelli that they need

to check on financing before they could decide to purchase Tract 3-B, she was speaking on his behalf. They were not aware that, based on that conversation, Mr. Albertelli would enter a contract with the Mitchells. He does not believe he waived his right under the contract for the right of first refusal. He did not authorize his wife to waive the right of first refusal. The only adjoining property owned by Mr. Albertelli and Ms. Snelling was Tract 3-B. He believes the purchase price was for the entire benefit of the contract, including the first right of refusal.

On cross-examination, Mr. Harmon admitted the contract of sale does not require a written waiver of the first right of refusal and does not have a time limit. Mr. Albertelli and Donnita Harmon had the original discussion about the first right of refusal in March or April. The contract with the Mitchells was not signed until May 6.

Mary Snelling and her father purchased the property now referred to as Tract 3-A and Tract 3-B. She built a home on Tract 3-B and her father farmed Tract 3-A. She obtained title to the property through her parents' estate. Due to her personal feelings about the property, she gave her husband authority to negotiate the sale of the property. She was aware of the language referred to as the first right of refusal in the sales contract. She did not draft the language but did believe it provided the Harmons the right to have an opportunity to purchase the property. In this matter, Mr. Albertelli told her the Harmons were not going to purchase Tract 3-B due to financial matters. She signed the contract with the Mitchells on May 6, 2020. Any conversation about the first right of refusal was through her husband.

At the conclusion of the testimony, the plaintiffs renewed their motion for a directed verdict. The Harmon defendants also renewed their motion for a directed verdict. The court denied the motions.

CONCLUSIONS OF LAW

This Court has subject matter jurisdiction over this proceeding and personal jurisdiction over the parties. Venue of this action is proper in Aiken County and this court and all persons entitled to be served and/or provided notice of these proceedings have been served and/or provided such notice or have otherwise appeared in this action.

The plaintiffs maintain a cause of action to quiet the title to the property. The purpose of the quiet title action is to remove any cloud on title to the property. S.C. Code Ann. 15-67-10 et. seq., In re *Sand Castle South Timeshare Owners Association, Inc.* (Bkrcty. D.S.C. 2020).

A first right of refusal is a pre-emptive right. *Webb v. Reams*, 326 S.C. 444, 485 S.E.2d 385 (Ct. App. 1997). Courts examine several factors to determine if the contract provides a first right of refusal. These factors include: “(1) the purpose or purposes for which the restraint is imposed; (2) the duration of the restraint: and (3) the method of determining the price to be paid.” 6 Am. Jur.2d Perpetuities, etc. § 109(2002). “A right of first refusal...is not a restraint on alienation, as long as both the price that the designated person must pay, and the time allowed for the exercise of the right of first refusal are reasonable. *Id.*”

The language in the contract between Mr. Harmon and the sellers does not contain a price or a mechanism to determine the price. Harmon believes it is simply a

higher offer than any offer received by Mr. Albertelli and Ms. Snelling. It may not be unusual for no specific price to be listed since the competing offer is unknown, but this clause does not provide any mechanism to determine the price. The mechanism would not require a specific figure. The language uses the phrase “adjoining property” but does not list the property by an address, tax parcel number or list it as Tract 3-B. Mr. Harmon argues that the language is not needed since Albertelli/Snelling only owned Tract 3-B, shown on the admitted plat. Without referencing the property in some manner, or reference the plat, the proposed language does not describe the property.

Defendant Harmon believes the duration of the right of refusal would end at the death of one of the parties to the agreement. He is correct that there are no words of inheritance. Further, the language does not create a contingent future interest which may not vest, if at all, not later than twenty-one years after some life in being when the interest was created. *Turner v. Turner*, 260 S.C. 439, 196 S.E.2d 498 (1973).

In examining the first right of refusal, the court examine the language contained in the contract. The court is not looking outside of the agreement since the language is unambiguous and capable of only one reasonable interpretation when assessing the first right of refusal. The clause, as written, does not meet the factors described in, *Webb v. Reams*, 326 S.C. 444, 485 S.E.2d 385 (Ct. App. 1997). While the language in the clause does not violate the rule against perpetuities, is does not have a method of determining the price to be paid or a statement to describe the mechanism within the language of the contract and no description of the property.

STANDING

The Harmon defendants argue the plaintiffs lack standing to raise issues concerning the contract between the Harmon defendants and the Snelling Trust defendants. They believe the parties to that agreement understood the terms and there is no ambiguity as to the terms of the contract or the right of first refusal. The plaintiffs are not third-party beneficiaries and do not have standing to raise the issue of enforceability “Generally, third person not in privity of contract with contracting parties has no right to enforce contract.” *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997).

The plaintiff’s cause of action is a quiet title claim. In this cause, the plaintiffs seek to determine if Mr. Albertelli and Ms. Snelling can sell to the plaintiffs the property located at 555 Kimball Pond Road, Aiken, S.C. with tax parcel number 091-16-01-003. The statute is “designated to afford an easy and expeditious mode of quieting title to real estate. The statutory remedy is broader and more comprehensive than that formerly afforded by a court of equity. “44 Am. Jur., Quietening Title, Section 5, page 6; 51 C.J., Quietening Title, Sections 8 and 9, page 138 et seq., *Tolbert v. Greenwood Cotton Mill*, 213 S.C. 43, 48 S.E.2d 599 (1948).

This is not claim for breach of contract, it is an action to determine the status of the title and part of that is any interest the Harmons have in Tract 3-A. The court finds that the plaintiffs contract affords them standing in a quiet title claim.

SPECIFIC PERFORMANCE

The plaintiffs have requested an order for specific performance in reference to the contract for them to purchase the real estate located at 555 Kimball Pond Road,

Aiken, S.C. with tax parcel number 091-16-01-003. “In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.” *Campbell v. Carr*, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004).

Having resolved the title issue raised in this matter, the plaintiffs have established a written agreement signed by the seller to purchase tax parcel number 091-16-01-003. The parties moved forward to conduct the perk test and the payment of earnest money. The plaintiffs testified they have been and remain ready to perform under the terms of the agreement. The plaintiffs are entitled to an order from the court for specific performance of their contract with Ronald Albertelli and Mary Snelling.

CONCLUSION

1. In regard to the quiet title action, the court finds the proposed first right of refusal does not contain the necessary information to be a valid first right of refusal.
2. The plaintiff’s contract affords them standing in the quiet title claim.
3. The plaintiffs are entitled to specific performance of their contract with Ronald Albertelli and Mary Snelling.

IT IS SO ORDERED.

Aiken, South Carolina.

February __, 2022

M. Anderson Griffith
Master in Equity for Aiken County



Aiken Common Pleas

Case Caption: Mark B Mitchell , plaintiff, et al VS Ronald Joseph Albertelli ,
defendant, et al
Case Number: 2020CP0201173
Type: Master/Order/Other

AND IT IS SO ORDERED

s/M Anderson Griffith-3076