IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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ROBERT KUTKOWSKI,
Petitioner/Plaintiff-Appellant/Plaintiff-Cross-Appellee,

vs.

PRINCEVILLE PRINCE GOLF COURSE, LLC, a Delaware Limited Liability Company, Respondent/Defendant-Appellee/Defendant-Cross-Appellant, and DOE CORPORATIONS 1-5, DOE LIMITED LIABILITY COMPANIES 1-5, DOE PARTNERSHIPS 1-5, DOE ENTITIES 1-5, JOHN DOES 1-5, and JANE DOES 1-5, Defendants.

SCWC-28826

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28826; CIV. NO. 05-1-0004)

MAY 14, 2013

OPINION BY RECKTENWALD, C.J.,
CONCURRING IN PART AND DISSENTING IN PART

I respectfully dissent. In my view, Robert Kutkowski's right of first refusal on the leased, half-acre parcel was not triggered by the sale of the undivided, 1,040-acre master parcel to Princeville Prince Golf Course, LLC (PPGC). I therefore respectfully disagree with the majority's determination that PPGC must offer to sell the property to Kutkowski.[1] Accordingly, I would affirm the judgment of the Intermediate Court of Appeals.

To briefly recount the facts, Kutkowski was a holdover tenant on a half-acre parcel of land, which was part of an undivided, 1,040-acre master parcel owned by Princeville Corporation. Kutkowski's license agreement with Princeville Corporation contained the following right of first refusal provision: "In the event Licensor [Princeville Corporation] decides to sell the premises, it shall be first offered to Licensee on terms and conditions provided by Licensor[.]" Princeville Corporation eventually sold the master parcel to PPGC and, pursuant to the terms of the sale, PPGC assumed Princeville Corporation's obligations under the license agreement. Kutkowski argues that his right of first refusal on the half-acre parcel was triggered by the sale of the master parcel to PPGC and,

[1] However, I concur in the majority's conclusion that the right of first refusal carried over into Kutkowski's holdover tenancy, and that performance of the right of first refusal is not legally impossible. Majority opinion at 9 n.5, 25-26.

accordingly, seeks specific performance of his right of first refusal or, alternatively, an injunction or rescission of the sale.

A majority of other jurisdictions have concluded, in similar circumstances, that a decision to sell a larger tract of land does not trigger a right of first refusal on a smaller, included parcel. See, e.g., Aden v. Estate of Hathaway, 427 P.2d 333, 334 (Colo. 1967) ("An attempt to sell the whole may not be taken as a manifestation of an intention or desire on the part of the owner to sell the smaller optioned part so as to give the optionee the right to purchase the same[.]") (citation omitted); see also Guaclides v. Kruse, 170 A.2d 488, 494 (N.J. Super. Ct. App. Div. 1961) ("We hold that an option of first refusal as to a portion only of a tract may be exercised only if the owner determines to sell that portion for a separate consideration; and the attempted sale of the whole tract for a single price is no indication of an intention or desire to sell the portion alone."). These holdings are founded on the principle that a right of first refusal does not ripen into an option to purchase the property[2] until "the condition precedent of the owner's

[2] A right of first refusal differs substantially from an option to purchase. 3 Eric Mills Holmes, Corbin on Contracts § 11.3 at 468 (Joseph M. Perillo, ed., rev. ed. 1996) (noting that rights of first refusal "are closely related to the purposes of option contracts and yet are very dissimilar in the legal relations of the parties who make them"). A right of first refusal is defined as "[a] potential buyer's contractual right to meet the terms of a third party's higher offer." Black's Law Dictionary 1439 (9th ed. 2009). In contrast, an option to purchase real property is defined as "[a] contract by (continued...)

intention to sell is met[.]" Chapman v. Mutual Life Ins. Co. of New York, 800 P.2d 1147, 1150 (Wyo. 1990). The requisite intent is not manifested where the owner intends to sell only the larger tract of land and has expressed no intention to sell the smaller parcel alone. Straley v. Osborne, 278 A.2d 64, 69-70 (Md. 1971); Crow-Spieker No. 23 v. Robert L. Helms Constr. & Dev. Co., 731 P.2d 348, 350 (Nev. 1987); see also 3 Corbin on Contracts § 11.3 at 470 ("[T]he right is subject to an agreed condition precedent, typically the owner's receipt of an offer from a third party and the owner's good faith decision to accept it.").

Here, the license agreement between Kutkowski and Princeville Corporation afforded Kutkowski a license to occupy and use the "premises." The "premises" were explicitly defined by the agreement as the half-acre parcel located on Anini Road. Thus, the scope of the license agreement encompassed only Kutkowski's half-acre parcel, and did not extend to the master parcel. See Hi Kai Inv., Ltd. v. Aloha Futons Beds & Waterbeds, Inc., 84 Hawaiʻi 75, 78, 929 P.2d 88, 91 (1996) ("Absent an ambiguity, contract terms should be interpreted according to

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[2](...continued)
which an owner of realty enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time in the future, but without imposing an obligation to purchase upon the person to whom it is given." Id. at 1204.

Although the right of first refusal in the instant case was contingent on an intent to sell the premises on terms and conditions set by Princeville Corporation itself, rather than by a third-party offer, this did not alter the legal relations of the parties. Kutkowski's right of first refusal remained subject to the condition precedent of Princeville Corporation's decision to sell the premises.

their plain, ordinary, and accepted sense in common speech.").

Moreover, the license agreement reserved to Princeville Corporation the right to sell the premises, and to place signs on the premises relating to the sale, but afforded Kutkowski a right of first refusal in the event Princeville Corporation "decide[d] to sell the premises[.]"[3] The license agreement does not contain an express or implied agreement requiring Princeville Corporation to offer the premises for sale to Kutkowski in the event it "decide[d] to sell" the master parcel. Kutkowski has not alleged that Princeville Corporation received any offers to separately purchase the half-acre parcel, nor that it intended to sell the half-acre parcel separately. In these circumstances, I would conclude that Kutkowski's right of first refusal was not triggered.

This analysis does not render the right of first refusal meaningless. See majority opinion at 22. Unless and until the owner of the burdened parcel manifests its intent to sell the property, the right of first refusal "remains in an unripened or suspended state, awaiting the energizing spark provided when the condition precedent of intent and offer is

[3] Kutkowski's counsel acknowledged during oral argument that, "an ordinary person looking at that would say . . . . [y]ou're not going to put out a sign on our little half-acre parcel to sell your 1,040-acre resort. You're talking about putting out a sign to sell my half-acre parcel. . . . To me that means the sign out to sell that property not to sell the whole resort." Oral Argument, Hawaiʻi Supreme Court, at 49:15-49:52 (Oct. 18, 2012), available at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc28826.html.

met." Chapman, 800 P.2d at 1152. In this sense, a right of first refusal may never ripen into an option to purchase the property -- if the owner never manifests its intent to sell the property during the term of the agreement, the holder of the right cannot compel a sale. 3 Corbin on Contracts, § 11.3 at 481 ("[Owner's] promise to [Buyer] is not 'illusory,' although [Owner] has a choice . . . between alternatives -- the very limited choice between not selling to anybody or making an offer to [Buyer]."). Thus, Kutkowski could not have known, at the time he entered into the license agreement, whether the right of first refusal would ripen into an option to purchase during the term of the agreement.[4]

A minority of other jurisdictions have held that a right of first refusal is triggered in these circumstances on the ground that, "[t]o conclude otherwise would permit an owner and prospective purchaser to, in effect, destroy a bargained-for purchase preemption before the expiration of the term for which such preemption was obtained." Berry-Iverson Co. v. Johnson, 242 N.W.2d 126, 134 (N.D. 1976). However, no such concerns are implicated in the instant case. As the majority opinion

[4] The majority notes that Princeville Corporation could have drafted the right of first refusal provision to explicitly exclude the sale of the master parcel as a triggering event. Majority opinion at 27. However, the majority also concludes that the right of first refusal would be meaningless if interpreted to exclude the sale of the master parcel as a triggering event. See majority opinion at 22. Respectfully, if it is permissible for the parties to expressly contract for this result, then the result cannot be meaningless.

acknowledges, PPGC purchased the master parcel subject to Kutkowski's right of first refusal. Majority opinion at 28. Accordingly, Kutkowski's right of first refusal has not been destroyed, but instead remains enforceable against PPGC for the remainder of his holdover tenancy.[5]

Nevertheless, the majority opinion concludes that triggering the right of first refusal best effectuates the intent of the parties in the "specific circumstances of this case." Majority opinion at 2. In so doing, the majority relies primarily on the language of the right of first refusal. Majority opinion at 21-23. To reiterate, that provision states: "In the event Licensor [Princeville Corporation] decides to sell the premises, it shall be first offered to Licensee on terms and conditions provided by Licensor[.]" Respectfully, nothing in this provision contains an express or implied agreement requiring Princeville Corporation to offer the premises for sale to Kutkowski prior to the sale of the master parcel.

Moreover, Kutkowski does not cite to any evidence appearing in the record that would indicate the parties intended to trigger the right of first refusal upon Princeville

[5] Accordingly, I would hold that neither injunction nor rescission of the sale of the master parcel would be an appropriate remedy in this case, both because Kutkowski did not seek those remedies, and because the right of first refusal remains intact and enforceable in the event PPGC intends to sell the half-acre parcel during Kutkowski's tenancy. Additionally, there is no evidence that Princeville Corporation, in selling the master parcel to PPGC, acted with a wrongful intent to defeat Kutkowski's right of first refusal.

Corporation's intent to sell the master parcel.[6] Indeed, the record supports a contrary conclusion. For example, in seeking the right of first refusal contained in the license agreement, Kutkowski informed Princeville Corporation, "If this property is dividable from the large amount of property Princeville owns, we would be very serious about making a market value offer on this parcel." (Emphasis added). Similarly, in an internal memorandum, Princeville Corporation's representatives memorialized their understanding of the right of first refusal: "The tenant will be provided a first right of refusal in case of subdivision and sale of the property he occupies." (Emphasis added). This evidence indicates the parties intended that the right of first refusal would not be triggered unless and until the master parcel was subdivided and Princeville Corporation intended to make the half-acre parcel available for sale.

Thus, PPGC should not, "by an acceptance of an offer to sell the whole, be compelled by judicial decree to dispose of the optioned part separately from the property as a whole." See Guaclides, 170 A.2d at 493. Indeed, the potential unfairness of requiring a land owner to sell the smaller parcel in these

[6] Kutkowski cites only to the following statement in his declaration: "Despite its intention to sell the Property, Princeville [Corporation] did not first offer to sell the Property to me, which Princeville was obligated to do under the Option to Purchase contained in the Agreement." However, this statement does not indicate whether the parties intended, at the time of entering into the license agreement, to trigger the right of first refusal upon Princeville Corporation's intent to sell the master parcel.

circumstances is noted by majority and minority jurisdictions alike. See, e.g., Wilber Lime Prods., Inc. v. Ahrndt, 673 N.W.2d 339, 342-43 (Wisc. Ct. App. 2003) (noting that attributing a per-acre ratio of the value of the larger parcel to the smaller parcel "would bear no relation to [the smaller parcel's] worth and the holder of the right of first refusal would have acquired the property at an absurdly low price and on terms never really agreed to between the parties") (citation, internal quotation marks, and brackets omitted); Chapman, 800 P.2d at 1151 (noting that the holding that the right of first refusal was not triggered "protects the owner from making a sale he did not desire and from problems and potential inequities which may result from deriving a value for the smaller burdened tract by allocation, either proportionally . . . or by some sort of judicial determination of market value"). Perhaps in recognition of these difficulties, the majority opinion does not opine on the terms upon which PPGC must offer to sell the property to Kutkowski, but concludes only that PPGC must do so. Majority opinion at 28. Respectfully, the majority's holding is unlikely to resolve the dispute in the instant case and, in effect, returns the parties to the trial court to argue whether any offer propounded by PPGC complies with the broad standard articulated by the majority opinion.

Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald