4-12-2018

Mulberry v. Burns Concrete, Inc. Respondent's Brief Dckt. 45184

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORA A. MULBERRY and TN PROPERTIES LLC, an Idaho limited liability company,

Plaintiffs-Respondents,

v.

BURNS CONCRETE, INC., an Idaho corporation, and COVE DEVELOPMENT COMPANY, LLP, an Idaho limited liability partnership,

Defendants-Appellants.

Idaho Supreme Court
Docket No. 45184-2017

Bonneville County
Case No. CV-16-3413

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

Honorable Dane H. Watkins, Jr., District Judge, Presiding

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Statement of the Case

Plaintiffs-Respondents Nora A. Mulberry and TN Properties LLC (hereinafter collectively referred to as "Mulberry") agree, for the most part, with the Statement of the Case contained in Appellants' Brief. The various sections of Appellants' Statement of the Case will be addressed in order below for ease of reference.

A. Summary of the Case

This section primarily consists of argument, and as such, Mulberry disagrees with this section. Mulberry agrees that the judgment was prepared by Mulberry, and that it dismissed the all pending matters in the case. (R., p. 96). However, what Appellants fail to mention is that the order upon which the judgment is based dismissed Mulberry's *remaining claims as moot.* (R., p. 94). Mulberry had already been granted all the relief she requested, rendering her additional claims moot. If the district court's *Memorandum Decision and Order Re: Motion for Partial Summary Judgment* ("1st MSJ Decision") and *Memorandum Decision and Order Re: Motion for Reconsideration* ("2nd MSJ Decision") are overturned by this Court, then Mulberry's remaining claims will no longer be moot.

Mulberry disagrees with the remainder of Appellant's Summary of the Case.

B. Summary of the Proceedings in the District Court

Mulberry agrees with the fact stated in this section of Appellants' Brief.

C. Summary of the Facts

Mulberry agrees with all numbered paragraphs of this section of Appellants' Brief other than paragraphs 6 and 13.

Mulberry disagrees with paragraph 6 to the extent it contains a selection of provisions from the Right of First Refusal ("ROFR") which Appellants deem material, with selective highlighting. Appellants' Brief, p. 5. The remainder of that paragraph consists of argument. *Id.* Mulberry contends that the ROFR is a document which speaks for itself.

As to paragraph 13, Mulberry agrees that the Kirk Burns affidavit contains the language set forth in Appellants' Brief. Appellants' Brief, p. 7. However, Mulberry disagrees that such affidavit contains only facts. The last sentence of the second paragraph and the entire third paragraph (as copied into Appellants' Brief) consist of opinion and/or argument, with which Mulberry disagrees.

Attorney Fees and Costs on Appeal

Pursuant to Idaho Appellate Rules 35(b)(5), 40, and 41(a), Mulberry requests an award of costs and attorney fees incurred on appeal. Idaho Appellate Rule 40 provides that costs shall be allowed as a matter of course to the prevailing party.

Mulberry seeks an award of attorney fees on appeal pursuant to Idaho Code § 12-120(3). That statute allows for an award of attorney fees to a prevailing party in a civil action where the claim involves a commercial transaction. I.C. § 12-120(3). This extends to declaratory judgment actions. *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 424, 111 P.3d 100, 109 (2005). Appellants have agreed that the claims in the instant matter involve a commercial transaction. Appellants' Brief, p. 30. Therefore, if Mulberry prevails on appeal, she will be entitled to her costs and fees on appeal.

Argument

A. The district court correctly held that the ROFR was personal to Canyon Cove and was appurtenant to the Purchased Property.

Appellants argue that the district court's holding that "the ROFR was a servitude on the ROFR Property that ran with the land" and its holding "that the ROFR was personal and could not be assigned to Burns Concrete" are inconsistent. Appellants' Brief, p. 12. In so arguing, Appellants point out that "'[p]ersonal' means that a servitude benefit or burden is not transferable and does not run with the land." Appellants' Brief, p. 12 (internal citations omitted). What Appellants fail to recognize is that they are conflating two distinct holdings by the district court which are not at all inconsistent. The district court held that (1) the *burden* of the ROFR constituted a servitude on the *ROFR Property* that runs with the land; and (2) the *benefit* of the ROFR was personal to Canyon Cove and was appurtenant to the *Purchased Property*. (R., pp. 58 & 92).

1. The district court held that the "burden" of the ROFR runs with the ROFR Property.

In its 1st MSJ Decision, the district court held that that although the ROFR was personal to Canyon Cove as the grantee, it was not personal to Mulberry as the grantor, and that therefore "TN Properties, as donee, would be held subject to the ROFR in the same way that the Mulberrys were." (R., p. 60). In its 2nd MSJ Decision, the district court further clarified that the ROFR constitutes a servitude and that the *burden* of that servitude runs with the ROFR Property. (R., p. 85). In other words, the district court determined that the Mulberrys could not unilaterally extinguish the ROFR by conveying the ROFR Property

to a company wholly owned by them (TN Properties LLC). Appellants have (understandably) not challenged this holding.[1]

In so holding, the district court noted the language of a comment to the Restatement (Third) of Property (Servitudes), which states: "These terms [benefit and burden] indicate only that some part of the covenant runs with some interest in land. They do not necessarily mean that both burden and benefit run, nor do they mean that the burden or benefit will run with all estates in the land or to all successors." (R., p. 84, quoting Restatement (Third) of Property (Servitudes) § 1.3 (2000), Comment a.). The district court's holding that the *burden* of the ROFR ran with the land (the ROFR Property), but that the *benefit* of the ROFR was personal to Canyon Cove and appurtenant to the Purchased Property, is not inconsistent.

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[1] Note that this does *not* mean that the ROFR will survive Nora Mulberry's death and a subsequent demise of the ROFR property to her heirs or devisees. If that were the case, a parcel of land could be passed down through a family for hundreds of years, with a ROFR perpetually attached to the property, to spring into effect when an heir eventually decided to sell. (Although this scenario would only come to pass if the ROFR expressly stated that the benefit of the ROFR could be passed to the grantee's successors and assigns, which, as will be discussed further below, is not the case here). In any event, that issue is not before this Court.

2. The "benefit" of the ROFR was personal to Canyon Cove.

The district court correctly held that the benefit of the ROFR was personal to Canyon Cove and could not be assigned to Burns Concrete.

The district court correctly started with the proposition that "[g]enerally all contract rights which are not 'personal' in nature may be assigned." (R., p. 57, quoting *Sinclair Mktg., Inc. v. Siepert*, 107 Idaho 1000, 1002, 695 P.2d 385, 387 (1985), quoting Williston on Contracts (3d ed.) § 412). The district court then went on to note that "[w]hether a right of first refusal is personal in nature appears to be a case of first impression in Idaho." (R., p. 57). The district court relied on secondary sources (Am.Jur. and C.J.S.) to determine that rights of first refusal should be interpreted as being personal in nature unless the contract expressly states otherwise. (R., p. 57). Mulberry directs this Court's attention to those sources as quoted in the district court's 1st MSJ Decision.

In addition, many courts around the country have held that the benefit of a right of first refusal is personal in nature unless explicitly made assignable in the document. For example, in *Malone v. Flattery*, the Court of Appeals of Iowa addressed the question for the first time and determined that "a right of first refusal is generally personal to the party who contracted for it absent language to the contrary." 2011 Iowa App. LEXIS 110 (Iowa Ct. App. 2011). The facts in that case were substantially similar to the facts in the case at bar. After noting that "the prevailing rule in this country is that rights of first refusal are not assignable unless the instrument indicates otherwise," the Iowa court went on to discuss some of the policy reasons that underlie that "widespread assumption." *Id.* at *7. The court

noted: "[Rights of first refusal] operate as a restraint on alienation, but unlike options do so in an undefined and indefinite way. Options generally have a value that can be ascertained; rights of first refusal may not. Because their very indefiniteness can impede the marketability of real estate, it is logical to construe them narrowly." *Id.* The court concluded: "Thus, it is fair to presume a party who grants a right of first refusal usually intends to give the right to the grantee only." *Id.*

Similarly, the Court of Appeals of Maryland discussed "the principle, applied in numerous cases, that rights of first refusal are presumed to be personal and are not ordinarily construed as transferable or assignable unless the particular cause granting the right refers to successors or assigns or the instrument otherwise clearly shows that the right was intended to be transferable or assignable." *Park Station L.P. v. Bosse*, 378 Md. 122, 137, 835 A.2d 646, 655 (Ct. App. 2003). The court went on to summarize similar holdings from other jurisdictions:

> *See, e.g., Roemhild v. Jones*, 239 F.2d 492, 495 (8th Cir. 1957) (The owner "could only offer the land for sale during his lifetime. * * * There is no language in the reservation stating that the [right of first refusal] runs to the heirs or assignees"); *Vogel v. Melish*, 31 Ill. 2d 620, 622, 624-625, 203 N.E.2d 411, 412-414 (1964) (Right of first refusal if owner "desired to sell" is "a restraint on the alienation of the" property "and consequently is to be strictly construed. * * * It is unreasonable to assume that the parties intended it to survive the death of either of them . . . when no provision for that contingency is made in the agreement, other than the . . . general terms of paragraph 6 [which was the same as paragraph 10 of the agreement in the present case]"); *Barnhart v. McKinney*, 235 Kan. 511, 513, 519, 682 P.2d 112, 114, 119 (1984) (The contract contained a clause similar to paragraph 10 of the contract in the case at bar, and the court held that the

> right of first refusal could not "be passed on to the heirs and assigns of the Barnharts," that "it was personal to the Barnharts," and that, therefore, the "event [that] would trigger [the] preemptive right of purchase [would occur] well within a term not violative of the rule against perpetuities"); *Fisher v. Fisher*, *supra*, 23 Mass. App. at 206, 500 N.E.2d at 822 (The right of first refusal "was extinguished by William's death," as the clause granting the right did "not contain words such as heirs or assigns but speaks in personal terms"); *Kershner v. Hurlburt*, 277 S.W.2d 619, 623 (Mo. 1955)("The instant contract, reasonably construed, does not violate the rule against perpetuities because the rights [of first refusal] conferred by it are personal to the holders thereof and terminated at their deaths"); *Nickels v. Cohn*, 764 S.W.2d 124, 132-133 (Mo. App. 1989) (Same); *Bloomer v. Phillips*, 164 A.D.2d 52, 55, 562 N.Y.S.2d 840, 842 (1990); *Old National Bank of Washington v. Arneson*, 54 Wn. App. 717, 723, 776 P.2d 145, 148 (1989) ("preemptive rights are generally construed to be nontransferable"); *Sweeney v. Lilly*, 198 W.Va. 202, 205, 479 S.E.2d 863, 866 (1996); *In the Matter of Wauka, Inc.*, 39 B.R. 734, 737-738 (N. D. Ga. 1984); Mitchell, *Can A Right of First Refusal Be Assigned?, supra*, 68 U. Chi. L. Rev. at 994; 3 *Corbin On Contracts*, § 11.15 at 587 (Rev. Ed. 1996).

Id., 378 Md. at 137-138, 835 A.2d at 655.

This Court should follow the majority rule and hold that rights of first refusal are personal and not assignable unless the agreement creating the right of first refusal expressly states otherwise. In the instant case, this means that the ROFR was personal to Canyon Cove and was not assignable to Burns Concrete. The ROFR could have included language stating that it was assignable (or binding on each party's heirs, successors, and assigns), as contracts in Idaho often do. It did not include such language.

3. The "benefit" of the ROFR was appurtenant to the Purchased Property.

Servitudes, such as rights of first refusal, can be either appurtenant or in gross. Restatement (Third) of Property (Servitudes) § 1.5 (2000). This can apply to either the benefit or the burden of a servitude, or both. *Id.* at Comment a. A servitude is appurtenant "if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor." *Id.* at § 4.5(1)(a).

In the instant case, the "original beneficiary" of the ROFR, Canyon Cove, obtained a property interest in the Purchased Property at the same time as the execution of the ROFR. It seems obvious that the ROFR on the ROFR Property would be "more useful" to a subsequent owner of the Purchased Property than it would be to Canyon Cove after it no longer owned the Purchased Property. "More useful" is an extremely broad phrase. There are numerous ways in which property across the street and one parcel over from a person's own property would be "more useful" to that person than to someone not owning any property nearby.

Appellants note that "this Court has resorted to Idaho's law applicable to easements in deciding whether other rights related to property are" appurtenant or in gross. Appellants' Brief, p. 17. Appellants cite *Joyce Livestock Co. v. United States of America*, in which this Court "reasoned by analogy from appurtenant easements, holding that water rights and easements were sufficiently similar to have the relevant law applicable to

appurtenant easements apply to appurtenant water rights." 144 Idaho 1, 13, 156 P.3d 502, 514 (2007). Based on that, Appellants argue that this Court should apply to rights of first refusal the rule applicable to easements: that they are appurtenant if they "serve[] the owner of that land in a way that cannot be separated from his rights in the land." Appellants' Brief, p. 18, quoting *Abbott v. Nampa School District No. 131*, 119 Idaho 544, 550, 808 P.2d 1289, 1295 (1991).

Appellants' argument is not well-founded. Unlike with water rights, there has been no holding by this Court that rights of first refusal are sufficiently similar to easements to reason by analogy and apply the same concepts to rights of first refusal as to easements. Both easements and water rights give a holder of land the right to enter onto and use property of another for certain purposes. A right of first refusal gives the holder no right to access or use the burdened parcel. It simply means that they may have a right to buy it in the future if certain conditions are met. The general "more useful" rule applicable to servitudes makes more sense in the context of a right of first refusal than does the "cannot be separated from his rights in the land" rule applicable to easements. Accordingly, this Court should find that the ROFR in this matter was appurtenant to the Purchased Property, and that it was no longer exercisable by Canyon Cove after it sold the Purchased Property.

Because the ROFR was personal to Canyon Cove, the assignment of the ROFR to Burns Concrete is void. Burns Concrete cannot exercise the ROFR. Because the ROFR is appurtenant to the Purchased Property and Canyon Cove divested itself of that property, Canyon Cove also cannot exercise the ROFR. The district court's decisions on summary

judgment and the motion for reconsideration should be upheld by this Court.

B. The district court correctly held that the Plaintiffs were the prevailing parties and properly awarded Plaintiffs their fees and costs.

Appellants argue that Mulberry did not prevail before the district court because a judgment was entered dismissing her claims. Appellants' Brief, p. 30. Appellants fail to mention that the judgment was based on an underlying order finding that Mulberry's "remaining claims" were moot. (R., p. 94). Mulberry's "remaining claims" were moot precisely because she had already obtained the relief she sought in her Complaint – that the ROFR could not be exercised by Defendants-Appellants.

Idaho Rule of Civil Procedure 54(d)(1)(B) states that "[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). "The determination of who is a prevailing party is committed to the sound discretion of the trial court, and [appellate courts] will not disturb that determination absent an abuse of discretion." *Lower Payette Ditch Co. v. Harvey*, 152 Idaho 291, 295-296, 271 P.3d 689, 693-694 (2012). In determining whether or not the trial court has abused its discretion, Idaho appellate courts analyze: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Farm Credit Bank v. Wissel*, 122 Idaho 565, 568, 836 P.2d 511, 514 (1992).

In this case, the district court recognized that the determination of who was the prevailing party was within the discretion of the Court. (R., p. 123). The court reviewed case law and then proceeded to reason and hold: "This Court's declaration that the ROFR was extinguished and non-binding was in accordance with the relief sought by Plaintiffs. Although Plaintiffs' complaint was, upon Plaintiffs' motion, thereafter dismissed as moot, Defendants cannot be said to have prevailed in the matter. Plaintiffs ultimately received the result they sought – a determination that the ROFR was not assignable." (R., p. 129). The district court acted within the outer boundaries of its discretion and consistently with applicable legal standards, and reached its decision by an exercise of reason. The award of attorney fees and costs should be affirmed.

Conclusion

For the foregoing reasons, Mulberry respectfully requests that the Court affirm the district court's *Memorandum Decision and Order Re: Motion for Partial Summary Judgment*, *Memorandum Decision and Order Re: Motion for Reconsideration*, and *Memorandum Decision and Order Re: Attorney Fees and Costs*. Mulberry also respectfully requests an award of her attorney fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 12th day of April, 2018.

CAREY ROMANKIW, PLLC

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Certificate of Service

I HEREBY CERTIFY that on this 12th day of April, 2018, I served a true and correct copy of the foregoing document by:

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