

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-164

SEPTEMBER TERM, 2006

David A. Atkins and Betty A. Atkins

}

APPEALED FROM:

}

}

v.

}

Chittenden Superior Court

}

Raymond J. LaBarge, Norman Poulin and

}

Stacie Poulin

}

DOCKET NO. S0662-03 CnC

Trial Judge: Geoffrey Crawford

In the above-entitled cause, the Clerk will enter:

Plaintiff Betty A. Atkins appeals from the trial court's order granting summary judgment to defendants Raymond J. LaBarge, Norman Poulin, and Stacie Poulin in this dispute involving the sale of real property. Mrs. Atkins argues that the trial court erred in interpreting the terms of her right of first refusal. We affirm.

The following facts are undisputed. In March 1965, Leon Latham transferred a parcel of land in Essex, Vermont, to Hector, Cecelia, and Raymond LaBarge. In April 1981, the LaBarges transferred approximately sixty

acres of this land to David and Betty Atkins. The deed included a restrictive covenant, which provided:

Included with this conveyance will be a right of first refusal on the part of the grantees to acquire the remaining lands and premises of the grantors, it being understood, however, that the grantors may transfer the lands and premises to members of the family subject to the condition that it will continue to be used as a residence and subject to the condition that the right of first refusal will run with the land. The grantees shall have thirty days from notice to exercise the first refusal.

In December 1986, Raymond and Cecelia LaBarge transferred an additional fourteen acres of the original Latham parcel to the Atkins, which left Raymond and Cecelia with ten acres of land and a residence. Cecelia LaBarge and David Atkins have both died, and Raymond LaBarge is the sole owner of the ten acre parcel. Betty Atkins is the sole owner of the two parcels transferred to her and her husband by the LaBarges.

In November 2002, Raymond LaBarge entered into a purchase and sale agreement with Stacey Poulin, a blood relative, and her husband Norman, for the ten acre parcel. The agreement set a purchase price of \$150,000 and it contained a financing contingency. The agreement addressed the restrictive covenant as follows:

13. Special Conditions of Contract

The Seller=s obligation under this Contract is further subject to the following:

- a. At Buyer=s expense, Seller to remove first refusal and residential encumbrance/cloud on title held by Atkins prior to closing.
- b. At Buyer=s expense, Seller to join in any zoning, land use or permitting filings to determine project feasibility.

Despite the language above, the Poulins contacted the Atkins and asked them to waive the terms of the restrictive covenant. They refused, and instead indicated through their attorney that they were prepared to exercise their right of first refusal and close on the property according to the price and terms described in the Poulins= purchase and sale agreement.

In April 2003, Mr. LaBarge and the Poulins entered into a ARevival Agreement@ in which they stated their intention to close on the sale of the ten acre parcel at the conclusion of litigation commenced by the Atkins. The Revival Agreement stated that the Poulins were family members and that they Acovenant and agree to use the land for residential purposes@ as required by the terms of the 1981 deed.

The Atkins filed a complaint against defendants in May 2003, seeking to compel Mr. LaBarge to transfer the ten acres to them pursuant to their right of first refusal. Defendants moved for summary judgment in January 2005, and in January 2006, the court granted their request. The court found the question before it very narrow: did Mr. LaBarge=s execution of a purchase and sale agreement in November 2002 bring an end to his right to transfer the property to a family member? The court concluded that it did not.

The court turned first to the language of the 1981 deed, finding it unambiguous and noting that the parties did not contend otherwise. Accordingly, the court held that the deed must be given effect according to its terms. The court found that, with the appearance of the Poulins as purchasers, the Atkins= right of first refusal became an option to buy the property on the same terms offered by the Poulins. The court then considered what happened to the Afamily member@ exception when the Atkins= right of first refusal matured into an option to purchase. It concluded that the Afamily member@ exception survived as an exception to Mrs. Atkins= mature option to purchase the property for \$150,000. The court explained that Mr. LaBarge had not repudiated this exception, and moreover, the Afamily member@ exception survived because by necessity it was exercised separately and later in time. The court reasoned that the maturation of the right of first refusal and the exercise of the Afamily member@ exception were conceptually distinct events. The first occurred when a potential buyer appeared and the parties agreed on terms; the second occurred when a Atransfer of lands and premises@

occurred at closing. In addition to reflecting the plain language of the agreement, the court also found its conclusion consistent with basic principles of fairness. The court therefore granted summary judgment in favor of defendants, and ordered that the transfer of land could take place between Mr. LaBarge and the Poulins subject to the requirements of the 1981 deed. Mrs. Atkins appealed.

On appeal, Mrs. Atkins challenges the trial court's interpretation of the terms of her right of first refusal. She maintains that it is well-settled that there must be a triggering event before a right of first refusal matures into an option to buy, and in this case, the triggering event was plainly stated in the deed. According to plaintiff, the Poulins' offer was the trigger and because the purchase and sale agreement did not contain the restrictions set forth in the 1981 deed, her right of first refusal attached and she should have been given the opportunity to purchase the property at the same price offered by the Poulins. Plaintiff argues that the court erred in concluding that the "family member" exception continued to apply despite the triggering event, asserting that her right of first refusal ripened into an "irrevocable" option upon notice of a bona fide offer to purchase from a third party.

Our review is de novo, and we conclude that summary judgment was appropriately granted to defendants. See V.R.C.P. 56(c)(3) (summary judgment appropriate where there is no genuine issue as to any material fact and party is entitled to judgment as a matter of law). While plaintiff spends much time identifying general principles concerning rights of first refusal and option contracts, this case turns on the specific language used in the 1981 deed, as the trial court recognized. Our goal in construing a contract is to ascertain the parties' intent. *In re Verderber*, 173 Vt. 612, 615 (2002) (mem.). "[W]hen the language of the contract is clear on its face, we will assume that the intent of the parties is embedded in its terms." *Id.* It is apparent from the plain language of the 1981 deed that the "family member" exception would always trump the Atkins' right of first refusal. See *Maglin v. Tschannerl*, 174 Vt. 39, 45 (2002) (when language in agreement is clear, parties' intention and understanding must be taken to be that which their agreement declares). Regardless of when or whether the Atkins' right of first refusal was triggered, Mr. LaBarge always possessed and continued to possess the right to convey his property to a family member under the conditions specified in the deed. That is exactly what occurred here.

While plaintiff suggests that her right became irrevocable once it was triggered, this assertion is belied by the specific terms of the parties' agreement. The cases cited by plaintiff do not compel a contrary result; none involve language similar to that at issue here. In Cameron v. Double A. Services, Inc., 156 Vt. 577, 579 (1991), for example, the right of first refusal at issue expressly provided that the grantee was obligated to provide written notice to the grantor before the property he had purchased could be conveyed or encumbered in any way. The parties' agreement specifically provided that the grantors (the Camerons) had a right of first refusal to repurchase the property, and it stated that at the time the grantee received a bona fide offer to acquire the premises, the grantee would be deemed to offer the property to [the Camerons] under the identical terms offered by the third person. Id. A bona fide offer was made to the grantee, and given the express terms of the parties' agreement, we upheld the trial court's finding that the Camerons' right of first refusal had ripened into an irrevocable offer from the grantee on the terms offered by the bona fide purchaser. Id. at 583.

The right of first refusal in this case is not unconditional; instead, by its terms, it expressly reserves the right of the grantor to convey his property to a family member under specified conditions. Certainly, as this case illustrates, one who possesses such a conditional right may sue to ensure that the conditions set forth in the deed are satisfied. While Mrs. Atkins complains generally that this interpretation is illogical and contrary to the parties' intent, she does not provide any specific explanation as to why this is true. We find the terms of the parties' agreement plain, and conclude that Mrs. Atkins must be held to her promise. Defendants were entitled to judgment in their favor, and we find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice