

FILED
DEC 30 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289796

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

AMMEX TAX AND DUTY FREE SHOPS WEST, INC.
a Maryland corporation

Appellants

v.

NORMAN G. JENSEN, INC., a Minnesota corporation

Respondent

APPEAL FROM THE SUPERIOR COURT
FOR OKANOGAN COUNTY
JUDGE JACK BURCHARD

AMENDED RESPONDENTS' BRIEF

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J. Kevin Bromiley
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I. INTRODUCTION

This is a classic case of being a day late and a dollar short – or, more precisely, many days late and \$43,000.00 short. Appellant Ammex Tax and Duty Free Shops West, Inc. (“Ammex”) admittedly failed twice to timely and properly exercise its preemptive option to purchase from Respondent Norman G. Jensen, Inc. (“Jensen”) the real property that is the subject of this lawsuit. After Ammex missed the deadline to exercise the preemptive option, Jensen voluntarily extended the deadline for Ammex to exercise, but Ammex again missed the deadline. When Ammex finally did inform Jensen that it wished to purchase the property, it was a number of days past the extended deadline, and it failed to pay the \$43,000.00 due at the time of exercising the preemptive option. These failures are examples of a pattern of unresponsiveness.

Having been given ample opportunity to exercise its preemptive option and having failed to do so, Ammex now tries to excuse its failure by complaining about the form and timing with which it received the opportunity to exercise the preemptive option.

The preemptive option is either a right of first offer or a right of first refusal. If it is a right of first offer: (1) it is void because it does not provide a purchase price or other relevant terms; and (2) the form and timing of the notice Jensen gave Ammex of its intent to sell the property did not deprive Ammex of the benefit of the bargain. If it is a right of first refusal, then Jensen was under no obligation to give Ammex notice of an intent to sell the property until after it had received an offer from a third party. If Ammex had properly exercised its preemptive option when it was admittedly given the opportunities, Ammex would have mitigated all of the damages it now seeks to recover from Jensen.

Having been a number of days late and \$43,000.00 short and having failed to mitigate its damages, Ammex's claims against Jensen were properly dismissed on summary judgment.

II. STATEMENT OF THE CASE

A. Exercise of the Preemptive Option

On April 6, 1992, Jensen entered into a contract with Ammex entitled Deed of Restrictive Covenant With Right of First Refusal ("Preemptive Option") regarding certain real property located in

Oroville, Washington, recorded under Auditor's File No. 792807. CP 29. This property was subsequently subdivided into two lots, one of which is the subject of this lawsuit, described as follows (the "Property"):

Lot 1 Eastport Short Plat, as per the map thereof recorded in the Okanogan County Auditor's File No. 3118236.

CP 104.

The Preemptive Option requires that if Jensen desires to sell the Property at any time within twenty years of signing the Preemptive Option, it must give Ammex written notice ("Sale Notice") of the price at which it is considering selling the Property and allow Ammex thirty days to exercise the Preemptive Option. CP 30-31. The Preemptive Option also requires that if Ammex desires to exercise the Preemptive Option, it must provide written notice to Jensen, "accompanied by a bank or certified check in the amount of ten percent (10%) of the Sale Price, to be held in escrow and applied to the down payment agreed upon in a contract of sale" (the "Option Payment"). CP 31-33. The Preemptive Option continues: "Time shall be of the essence with respect to said thirty (30) day period and the

failure of [Ammex] to [properly exercise its preemptive option] for any reason whatsoever shall be deemed an irrevocable waiver.” CP 31-32.

Approximately fifteen years after Jensen and Ammex signed the Preemptive Option, Jensen decided to sell the Property, and provided Ammex with a Sale Notice, which notice Ammex admits having received on May 8, 2007. CP 54, 65. The exchange that followed is detailed in the following timeline:

May 8, 2007	Ammex Received Sale Notice from Jensen
June 7, 2007	Last day to timely exercise Preemptive Option
June 12, 2007	Jensen granted extension of time to exercise Preemptive Option until June 22, 2007
June 22, 2007	Last day to timely exercise Preemptive Option under extension
July 12, 2007	At 5:25 PM, Ammex emails a request for more information regarding the purchase and sale conditions, and asks that Jensen respond by 11:00AM the next day
July 13, 2007	Jensen provides Ammex with the requested information
July 13, 2007	Ammex sends Jensen an email captioned “URGENT NOTICE”, attempting to exercise its Preemptive Option but fails to make the required \$43,000.00

payment, and requests that Jensen acknowledge receipt of the email by return email. No payment was ever made.

CP 54-70.

This pattern of unresponsiveness has continued throughout this litigation:

December 29, 2008	Third Party purchaser of the Property Alan and Margaret Kelly and Glenn and Pemela Toppings ("Kelly") sue Ammex because it will not agree to lift the restrictive covenant prohibiting additional financing on the property
March 26, 2009	Ammex answers Kelly's complaint and files a third party complaint against Jensen for breach of the Preemptive Option
September 22, 2009	Court compels Ammex to respond to five interrogatories propounded by Jensen, and imposes \$1,000 in sanctions against Ammex
November 18, 2009	Ammex fails to pay sanctions, so Jensen reduces \$1,000 in sanctions to judgment
December 21, 2009	Jensen files motion for summary judgment, with hearing scheduled for March 1, 2010
February 18, 2010	Ammex requests Jensen agree to continue summary judgment hearing, one day before its response materials are due

CP 21.

B. Subdivision of the Property

The Preemptive Option contains two restrictive covenants, which restrict Jensen from: (1) selling goods normally sold in duty-free stores; and (2) obtaining additional financing for the Property.

CP 30. Ammex admits that the Preemptive Option “permit[s] Jensen to ‘sell the premises, or any portions or portion thereof’”, subject to Ammex’s right to purchase. Appellant’s Opening Brief, pg. 9.

Each of the two lots created in the subdivision is subject to the Preemptive Option. Ammex was aware of the subdivision of the property.

C. The Purchase Price to Kelly Was Equal to the Price in the Sale Notice

Ammex has claimed – for the first time on appeal – that the purchase price paid by Kelly was lower than the price at which Jensen offered to sell the Property to Ammex. Appellant’s Opening Brief, pg. 1, 2, 5, 9, 13, 18. This statement is both false and not supported by the record on review. In reality, Kelly purchased the

Property for \$430,000.00 – the exact price at which Jensen offered to sell the Property to Ammex.

Jensen has brought a motion to strike all references to this claim from Appellant's Opening Brief. In the alternative, Jensen has presented the court with copies of the closing documents whereby Jensen sold the Property to Kelly for \$430,000.00.

III. ARGUMENT

Ammex was many days late and \$43,000.00 short of timely and properly exercising the Preemptive Option. CP 54-70. Having so failed, it complains about the form and timing with which Jensen gave it notice of its intent to sell the Property. Ammex's arguments blur the line between a right of first offer and a right of first refusal because it wants the notice requirements of a right of first offer, but does not want to call the Preemptive Option a right of first offer and risk it being void as lacking material terms.

If the Preemptive Option is a right of first offer, it must specify the sale price and other relevant terms or else it is void. Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 140 (3rd Cir.,

2001). It does not specify the sale price and other relevant terms, so it is void.

If the Preemptive Option is a right of first refusal, Jensen need not give Ammex notice of intent to sell the Property until Jensen has received an offer from a third party to purchase the Property. See 17 WAPRAC §6.61. Jensen gave Ammex notice of its intent to sell, but Ammex failed to timely and properly exercise its preemptive option to purchase.

Under either analysis, Jensen did not deprive Ammex of the benefit of the bargain. Ammex failed to purchase the Property because it failed to perform its obligations under the Preemptive Option.

**A. APPELLANT'S ASSIGNMENT OF ERROR #1 –
Subdivision of the Parent Parcel and Sale of Lot 1 Only**

At the time the parties signed the Preemptive Option, Ammex restricted Jensen's use of the Property in certain ways. CP 30. Particularly, the property was not to be used to sell goods normally sold in duty-free stores, and no additional financing was to be obtained for the Property without Ammex's consent. CP 30. The Preemptive Option does not restrict Jensen from subdividing

the Property. Rather, as Ammex admits, the Preemptive Option contemplates a portion or portions of the Property being sold, subject to Ammex's right to purchase whatever portion that is to be sold. CP 32.

If Ammex desired to prevent Jensen from subdividing the property, it should have included such a restriction with the other restrictive covenants contained in the Preemptive Option. See Burton v. Douglas County, 65 Wn.2d 619, 622, 399 P.2d 68 (1965), Having decided not to include such a restriction in the Preemptive Option, Ammex cannot now complain that Jensen has subdivided it.

As the owner of the Property, Jensen generally has free use of the Property. "Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land." Id. Here, there was no clearly expressed restriction on subdividing the Property.

Ammex argues that Jensen had to offer the entire parent parcel to Ammex before Jensen could sell either of the two lots

created in the short plat. However, the Preemptive Option states that Jensen can only sell “the premises, or any portions or portion thereof, to others... at a Sale Price not less than that specified in the Sale Notice.” CP 61.

Both Lot 1 and Lot 2 of the short plat are subject to the Preemptive Option. Jensen gave Ammex the opportunity to exercise its Preemptive Option on Lot 1. CP 54-70. When Ammex failed to exercise, Jensen sold Lot 1 to Kelly. Jensen still owns Lot 2. Lot 2 is currently still subject to the Preemptive Option.

**B. APPELLANT’S ASSIGNMENT OF ERROR #2 –
Negotiating before offering to Ammex**

**1. The Preemptive Option is Either a Right of
First Offer or a Right of First Refusal**

*a. If the Preemptive Option is a Right of
First Offer, it is Void Because it Does Not Provide a Purchase Price
or Other Relevant Terms.*

A right of first offer is not recognized by Washington courts. The 3rd Circuit has addressed a claimed right of first offer as follows:

A right to receive a first offer may exist if

the contract provides price and other relevant terms, or a means of ascertaining them. But a bald 'right of first offer,'...is meaningless and void unless the parties intended to create a right of first refusal. Contractual language providing for a first offer to sell in reality may be read as a 'right of first refusal.'

Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 140 (3rd Cir., 2001). There are no Washington or Ninth Circuit cases that address rights of first offer. However, the exercise of preemptive options is governed by general contract law. See Northwest Television Club, Inc. v. Gross Seattle, Inc., 96 Wn.2d 973, 980, 634 P.2d 837 (1981). Since general contract law is common across states, the Gleason case is persuasive authority.

Here, the language of the Preemptive Option clearly reads as a right of first offer, and describes itself as such:

If [Jensen] shall desire to sell the premises, [Ammex] shall have the single, non-recurring right ("Right of First Offer") to have [Jensen] submit written notice ("Sale Notice") to [Ammex] of the desire to sell, which Sale Notice shall be deemed an offer of the premises to [Ammex].

CP 30-31. However, the Preemptive Option does not specify a price

or other relevant terms, nor does it specify a means of ascertaining these terms. Rather, it states:

The Sale Notice shall set forth (i) the price (the "Sale Price") at which [Jensen] is then considering the sale of the Premises, indicating in the Sale Notice whether the Sale Price is "all cash" or whether [Jensen] would accept purchase money financing and terms thereof, and such other matters as [Jensen] may deem appropriate for such Sale Notice.

CP 31.

Since no price or other relevant terms are provided in the Preemptive Option, it is bald – and therefore meaningless and void.

b. If the Preemptive Option is a Right of First Refusal, Jensen Was Allowed to Negotiate With Third Parties Before Informing Ammex of its Intent to Sell.

If the parties intended to create a right of first refusal rather than a right of first offer, Ammex has no basis for complaining about the form and timing in which it received Jensen's Sale Notice, since Ammex was provided sufficient time to exercise the Preemptive Option and failed to properly do so.

A right of first refusal is:

an option...exercisable only upon the condition that the [owner] has received and wishes to accept an offer of purchase from a third person...Usually the [holder of the right of first refusal] is given a period of time, such as 30 days, to purchase upon the same terms as those of the third party offer...Only if the [holder of the right of first refusal] fails to exercise the option may the [owner] consummate the sale to the third person.

17 WAPRAC §6.61

The terms of an option “are to be strictly construed.” Pardee. v. Jolly, 163 Wn.2d 558, 569, 182 P.3d 967 (2008). “If an optionee fails to exercise the option within the time specified or in the manner provided, **all rights under the contract, along with any consideration given, are forfeited.**” Id. (emphasis added).

The Preemptive Option required that Ammex deliver to Jensen written notice of Ammex’s desire to exercise the Preemptive Option on the terms offered by Jensen, “which notice of election to purchase shall be accompanied by a bank or certified check in the amount of ten percent (10%) of the Sale Price, to be held in escrow and applied to the down payment agreed upon in the contract of sale.” CP 31-32. Ammex was required to provide this notice within thirty days of having

received the Sale Notice from Jensen. CP 31. The Preemptive Option states: "Time shall be of the essence with respect to said thirty (30) day period and the failure of [Ammex] to [properly exercise its preemptive option] for any reason whatsoever shall be deemed an irrevocable waiver." CP 31-32.

Ammex admittedly did not provide any payment with its untimely notice of intent to exercise the Preemptive Option. CP 56. Since Ammex failed to properly exercise the Preemptive Option, Jensen sold the Property to Kelly. Having failed to properly exercise the Preemptive Option, Ammex forfeited any rights it had under the Preemptive Option and cannot now claim any damages for Jensen selling the Property to someone else.

2. Even If Jensen Breached the Preemptive Option, Such Breach Was Not Material

Ammex has identified when a breach of contract is 'material': "A breach is considered 'material' so as to justify the other party in abandoning the contract only where the breach 'substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of the benefit

which he or she reasonably expected.' Park Ave. Condominium Owners Ass'n v. Buchan Dev., LLC, 117 Wn.App. 369, 71 P.3d 692, 698 (2003)." CP 45.

Here, Jensen provided Ammex with Sale Notice with sufficient time for Ammex to exercise its Preemptive Option. CP 54-70. The timing of Jensen's notice to Ammex did not deprive Ammex of the benefit of the Preemptive Option. In fact, Jensen voluntarily extended the time within which Ammex was required to exercise its Preemptive Option. CP 54, 67. If Ammex had properly exercised the Preemptive Option within the time required after receiving the Sale Notice from Jensen, Jensen would have sold Ammex the Property.

3. The Preemptive Option Does Not Prohibit Jensen From Testing the Market

Ammex argues without support that the Preemptive Option encourages Jensen to make its offers to Ammex as attractive as possible because it cannot test the market before approaching Ammex. This does not make logical sense. In the market, sellers want to sell for the highest possible price and buyers want to buy

for the lowest possible price. The way the Preemptive Option is written, Jensen could have made the sale price in an offer to Ammex unattractively high, so that Ammex would reject the offer and Jensen could then market the Property to any third party purchasers (albeit at the high sale price). Furthermore, Jensen could effectively test the market by obtaining an appraisal of the Property or having a real estate agent perform a comparable market analysis.

4. Ammex Has Failed to Mitigate Its Damages

“The doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, prevents recovery of those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed.” Bernsen v. Big Bend Elec. Co-Op, Inc., 68 Wn.App. 427, 433, 842 P.2d 1047 (Div. 3, 1993) (internal citations omitted). “Generally speaking, the doctrine applies in both contract and tort cases.” Id. (internal citations omitted).

If Jensen in some way breached the enforceable provisions of the Preemptive Option, the decision of the trial court is still

correct, because Ammex failed to mitigate its alleged damages by failing to timely and properly exercise the Preemptive Option.

Ammex had the same opportunity to purchase the Property it would have had if Jensen had provided Ammex with the Sale Notice before it received the offer from Kelly. Ammex could have mitigated its damages by properly exercising the Preemptive Option by June 22, 2007. Having failed to do so, Ammex cannot now claim any damages resulting from its failed transaction. Ammex has failed to mitigate any alleged damages it suffered from the form and timing in which it received the Sale Notice from Jensen.

C. APPELLANT'S ASSIGNMENT OF ERROR #3 – Jensen's Alleged Refusal to Sell

Ammex claims that Jensen breached the duty of good faith and fair dealing by not giving Ammex even more time to properly exercise the Preemptive Option. Ammex and claims that Jensen should have given Ammex yet another grace period when it failed to timely and properly exercise the Preemptive Option after repeated extensions. Ammex's argument regarding a grace period was not made at the trial court level, and should not be entertained for the first time on appeal.

The covenant of good faith and fair dealing “casts on each party a duty not to interfere with the other party’s performance. It does not, however, cast on either party a duty to affirmatively assist in the other party’s performance.” State v. Trask, 91 Wn.App. 253, 272-73, 957 P.2d 781 (Div. 2, 1988) (State’s failure to provide expedited relocation assistance benefits to landowner whose property has been condemned by eminent domain did not interfere with landowner’s ability to move off the property in timely fashion).

Ammex claims that Jensen had an obligation to inform Ammex that its attempted exercise of its Preemptive Option failed to include the required payment and was untimely. Jensen had no obligation to affirmatively assist Ammex in timely and properly exercising its Preemptive Option.

Review of the timeline makes the current claim one which should be viewed with a very large dose of skepticism. After sending an “URGENT NOTICE” on July 13, 2007, and allegedly receiving no response, there is nothing in the record to indicate that Ammex did anything further until it filed a third party complaint against Jensen on March 26, 2009, after Ammex was sued by

Kelly.

**D. APPELLANT'S ASSIGNMENT OF ERROR #4 –
Ammex's Claim That the Purchaser of the Property Paid only
\$420,000, Rather than \$430,000**

This incorrect contention was not raised at the trial court level, and should not be entertained at the appellate court level. Alternatively, Jensen has filed a motion for the appellate court to consider additional evidence that the purchase price that Kelly paid for the Property was \$430,000, not \$420,000. This is the exact price at which Jensen offered to sell the Property to Ammex.

IV. CONCLUSION

Ammex admittedly failed to timely and properly exercise its preemptive option to purchase the Property from Jensen. Jensen voluntarily extended the deadline for Ammex to exercise its preemptive option after the deadline had already passed, but Ammex still failed to timely and properly exercise the preemptive option. This is indicative of a pattern of unresponsiveness by Ammex. Ammex cannot excuse its failure by complaining about the form and timing with which it received the opportunity to exercise the preemptive option.

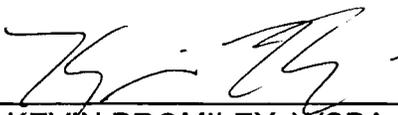
The form and timing of the notice Jensen gave Ammex of its intent to sell the property did not deprive Ammex of the ability to exercise its preemptive option. If Ammex had properly exercised its preemptive option when it was admittedly given the opportunity, Ammex would have suffered none of the damages it now claims.

Having failed to timely and properly exercise its preemptive option and having failed to mitigate its damages, Ammex's claims against Jensen were properly dismissed on summary judgment. Jensen asks the court to affirm this dismissal.

Respectfully submitted this 18th day of December, 2010.

JEFFERS, DANIELSON, SONN
& AYLWARD, P.S.

By



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corporation) AFFIDAVIT OF MAILING
)
Appellants,)
)
vs.)
)
NORMAN G. JENSEN, INC., a)
Minnesota corporation,)
)
Respondent.)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

SUZANNE M. JONES, being first duly sworn on oath,
deposes and says: That she is, and all times hereinafter mentioned
was, a citizen of the United States of America and a resident of the
State of Washington, over the age of twenty-one (21) years, and
competent to be a witness in this action and not a party thereto;

That on the 17th day of December, 2010, she mailed
the original Amended Respondents Brief in this action by depositing

AFFIDAVIT OF MAILING

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in the United States mails, postage prepaid, the original of said Amended Respondents Brief addressed as follows:

Ms. Renee S. Townsley
Clerk/Administrator
Washington State Court of Appeals, Division III
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Spokane, WA 99201-1905

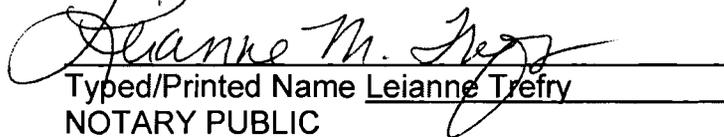
and mailed copies of said Amended Respondents Brief by depositing in the United States mails, postage prepaid a copy of these documents to:

Mr. David M. Schoeggl
Mills Meyers Swartling
1000 Second Avenue, Suite 3000
Seattle, WA 98104-1064

DATED this 17th day of December, 2010.


SUZANNE M. JONES

SUBSCRIBED AND SWORN to before me this 17th day of December, 2010, by Suzanne M. Jones.


Typed/Printed Name Leianne Trefry
NOTARY PUBLIC
In and for the State of Washington.
My commission expires November 30, 2011