

FILED

AUG 28 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 309622

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OF THE STATE OF WASHINGTON**

CHERI ABEL JOHNSON,

Respondent,

v.

FRAME, LLC,

Appellant.

BRIEF OF APPELLANT FRAME LLC

Michael V. Hubbard,
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I. Introduction

Frame LLC (Frame) appeals the trial court's entry of the order granting summary judgment to plaintiff, Johnson, which terminated Frame's right of first refusal.

II. Assignments of Error

No. 1: The trial court erred in granting summary judgment to Johnson.

III. Issues Pertaining to Assignments of Error

No. 1: Was the language limiting the existence of Frame's right of first refusal to "for so long as David E. Frame and Harleen M. Frame are members of Frame, LLC" instead of for so long and David E. Frame **and/or** (emphasis added) Harleen M. Frame are members of Frame, LLC, the result of a scrivener's error?

No. 2: Was the language limiting the existence of Frame's right of first refusal to "for so long as David E. Frame and Harleen M. Frame are members of Frame, LLC" instead of for so long and David E. Frame **and/or** Harleen M. Frame are members of Frame, LLC, the result of mistake?

No. 3: On her death, did the passing of Harleen M. Frame's membership interest in Frame, LLC to her credit bypass trust, with David E. Frame as its trustee, substantially satisfy the condition of the Frame's continued membership in order to preserve the right of first refusal?

No. 4: Was the passing of Harleen M. Frame's membership interest in Frame, LLC to her credit bypass trust, with David E. Frame as its trustee, sufficient to excuse strict application of the condition of continued membership by both David and Harleen in Frame, LLC in order to preserve the right of first refusal?

No. 5: As a matter in equity and to avoid a forfeiture, was the passing of Harleen M. Frame's membership interest in Frame, LLC to her credit bypass trust, with David E. Frame as its trustee, reason to excuse continued, *inter vivos*, membership by both David and Harleen in Frame, LLC as a condition to the continued validity of its right of first refusal?

No. 6: Was plaintiff entitled to summary judgment as a matter of law declaring the right of first refusal terminated on Harleen's death?

IV. Standard of Review

The granting of summary judgment is reviewed *de novo* on appeal. *Briggs v. Nova Servs.*, 166 Wash.2d 794, 801, 213 P.3d 910 (2009).

V. Statement of the Case

On December 1, 2000, Johnson (then Cheri Lynn Abel and f/k/a Cheri Vining) granted Frame, LLC (Frame) a right of first refusal to purchase certain real estate in Columbia County, WA. CP 6-12. Frame paid Johnson \$17,000 for that right, which covered approximately 1,000 acres, as part of the terms and conditions of the October 2, 2000 agreement for Frame's purchase from Johnson (Vining) of other, adjacent lands. CP 18 (closing statement); CP 61, section 6; CP 68-70. Section 12 of that real estate purchase and sale agreement, phrased the duration of the right of first refusal thusly, "These rights shall be for the greater of ten years from the date hereof or, for so long as Frame owns lands adjacent to lands owned by Vining described in this paragraph 12." CP 69. Section 12.1 of that agreement provided, "At closing Vining shall deliver to Frame a Grant, of this Right of First Refusal, in a form suitable for recording in the Columbia County Courthouse records." CP 69.

At the time the real estate purchase and sale agreement was signed and on the December 1, 2000

closing of that transaction, Harleen M. Frame and David E. Frame, husband and wife, were the equal member/managers of Frame, LLC, a Washington Limited Liability Company. CP 62, 63, 64 and 73.

As to its duration, the subject right of first refusal provided:

These rights shall be for a term of (1) [sic] ten years from the date hereof, or (2) for so long as David E. Frame and Harleen M. Frame are members of Frame, LLC and Frame, LLC owns lands adjacent to lands owned by Cheri Lynn Abel as described in exhibit "B", whichever is greater. CP 7, section 1.

On the day before the parties signed the right of first refusal, Dave Frame was in contact with Johnson by telephone concerning its duration. CP 62, 63. Following that conversation Dave sent an e-mail (at 3:53 p. m., November 30, 2000) to attorney Scott Marinella, who was drafting the sale documents, alerting him:

"Scott, Cheri & I agreed to language in the First Refusal that requires Harleen and/or I to be a member of Frame, LLC for it to be exercisable. Otherwise, the language is okay." CP 19; CP 63, section 10; CP 72.

The Frame e-mail to Mr. Marinella had attached to it all the language for the section, "Right of First Refusal of

adjacent property”, including the provision that “These rights shall be for the greater of ten years from the date hereof or, for so long as Frame owns lands adjacent to lands owned by Vining described in this paragraph 12, provided that Dave Frame **and/or** [emphasis added] Harleen Frame are members of FRAME, LLC” CP 19; CP 63, section 10; CP 72

Six minutes later, Mr. Marinella replied to Dave via e-mail, “Ok, the Right of First Refusal and other documents will be ready for your signatures at the settlement closing tomorrow.” CP 19; CP 63, section 10; CP 72.

Harleen Frame later died and her estate settled in 2007. CP 63, section 11; CP 64, section 11 (continued). Her membership interest in Frame, LLC passed to David E. Frame as trustee of the Harleen M. Frame Bypass Trust. CP 64, sections 12-14; CP 73. At 33.19%, Harleen’s Bypass Trust currently holds the largest outstanding membership interest in Frame, LLC. CP 64, section 13; CP 73. Dave, as the sole trustee of that trust, controls and votes the trust’s membership interest in Frame, LLC on all matters submitted to its members, including those concerning Johnson’s (Cheri’s) lands and the right of first refusal. CP 64, section 14; CP 73.

Frame continues to own lands adjacent to lands owned by Johnson. CP 64, section 15.

Johnson does not remember being sent or receiving a copy Dave's November 30, 2000 e-mail to Mr. Marinella or recollect exactly what occurred at closing except that she "did not want the Right of First Refusal to continue for an indefinite or too long a period. I remember saying that I wanted the Right of First Refusal to say it would continue on so long as Dave 'and' Harleen were members of the LLC. I did not agree to any 'and/or' language as stated by Mr. Frame in the referenced email that he sent to Nealey & Marinella." CP 54, sections 10, 11, and 12.

Realtor, Garry Snyder, stated in his declaration, "From my discussions with Ms. Johnson [Cheri] at the time she listed the property [March 4, 2011] and completed her seller's disclosure statement, it was clear to me that she regarded the Frame, LLC right of first refusal on the property to [be] valid and in place." CP 57, at 2:18-21; CP 58, "Section 1 Title, Is the Property Subject to any of the following? (1) First Right of Refusal [x] yes."

In October 2011, Johnson brought suit against Frame, seeking judgment declaring the right of first refusal to have terminated upon the death of Harleen.

The trial court granted Johnson's motion for summary judgment. Frame appeals.

VI. Argument

6.1 Scrivener's Error (Issue No, 1). Frame submits that a scrivener's error caused the duration of the right of first refusal to be misstated as requiring Harleen and Dave's continued membership in the LLC instead of Harleen and/or Dave's. That Johnson disputes Frame's contention regarding scrivener's error raises a genuine issue of material fact. *Bort v. Parker* 110 Wn. App. 561, 579, 42 P.3d 980, 990 (2002); rev. den., 147 Wn 2d 1013 (2002).

A material fact is one upon which the outcome of the litigation depends. *Capital Hill Methodist Church of Seattle v Seattle*, 52 Wn 2d 359, 324 P. 2d 1113 (1958). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008). On a motion for summary judgment, the court considers evidence and all reasonable inferences therefrom in light most favorable to nonmoving party. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 930 P.2d 307 (1997). If the affidavits and counter-affidavits submitted by the parties

conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. See, e.g., *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967).

The above noted e-mail exchanges between Frame and Mr. Marinella, the day before closing, show that the expectation, at least to Frame, was that the duration of right of first refusal would include the language “for so long as Dave Frame and/or Harleen Frame are members of FRAME, LLC.” An inference can reasonably be drawn that Johnson considered that to be the case as well since she marked her seller’s disclosure statement in 2011 that the property she wished to sell was subject to a right of first refusal. (One wonders whether either Frame or Johnson actually read the subject right of first refusal before signing it, each instead relying on Mr. Marinella to have prepared the document in accordance with their mutual intention.)

Normally, the existence of mutual assent or a meeting of the minds is a question of fact. *Sea-Van Investments Associates v. Hamilton* 125 n.2d 120, 126, 881 P.2d 1035, 1039 (1994); citing, *Multicare Med. Ctr. v. Department of Social & Health Servs.*, 114 Wn.2d 572, 586 n. 24, 790 P.2d 124 (1990). However, a question of

fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). Where different conclusions may be reached from undisputed facts surrounding an alleged contract, such contract is ambiguous and summary judgment should not be entered in action on it. *Peoples Mortg. Co. v. Vista View Builders*, 6 Wn. App. 744, 496 P.2d 354 (1972).

“In contract law, a scrivener's error, like a mutual mistake, occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error. This permits a court acting in equity to reform an agreement.” *Estate of Harford*, 86 Wn. App. 259, 263, 936 P.2d 48 (1997) (citing *Berg v. Ting*, 125 Wash.2d 544, 554-55, 886 P.2d 564 (1995); *Snyder v. Peterson*, 62 Wn. App. 522, 526-27, 814 P.2d 1204 (1991)); as cited and quoted by *Bort v. Parker*, *supra*, at 579.

Bort presented the issue of whether a party to a home construction contract identified as an individual should have instead been identified as a corporation. There the court stated, at 579,

Mr. Parker, without citation to relevant authority, contends no

scrivener's error existed because of the multiple times the word "Company" does not appear in the contract. But given that the other evidence indicates the intent to contract with LBC, Mr. Parker highlights, at most, a factual dispute for the fact finder. Moreover, given this record, a scrivener's error seems likely, given the general carelessness in which LBC variously identified itself for purposes of contracting, insurance, bonding, and registration. In sum, we conclude genuine issues of material fact remain as to whether a scrivener's error affected the contract.

A like situation presents itself in the instant case; whether scrivener's error affected the right of first refusal is a genuine issue of material fact making summary judgment inappropriate.

6.2 Mistake (Issue No. 2). A related but further question of fact exists as to whether limiting the duration of the right of first refusal as written, i. e. "and" instead of "and/or" as to Dave and Harleen's continued membership in Frame, LLC, was the result of a mutual mistake by the parties.

Frame specified the language, based on a just concluded telephone conversation he had had with Johnson, to be "and/or" in the e-mail he sent to Mr.

Marinella the day before closing. And to which, Mr. Marinella replied, “Ok...” CP 72.

A reasonable inference is that Johnson believed that to be the agreement when, years after Harleen’ death, she affirmed in a 2011 seller’s disclosure statement that her lands were subject to a right of first refusal. CP 58.

A mutual mistake arises when the intention of the parties is the same but the writing signed by them fails to express that intention. *Rigos v. Cheney School Dist. No. 360*, 106 Wn .App. 888, 892, 26 P.3d 304, 308 (2001). In *Rigos*, a teacher claimed that both he and the District were mistaken as to his proper placement on the salary schedule and that his yearly contracts should accordingly be reformed. The trial court, siding with the District’s position, disagreed and summarily dismissed. In reversing, this court stated, “Whether the District was also mistaken is a question of fact requiring resolution at trial. The court erred by granting summary judgment.” *Rigos*, at 895.

Here, Frame’s intention was that the “and/or” language would be used. CP 19; CP 63, section 10; CP 72. The document he signed, of course, said only “and”. Consequently, it did not express his intent and was a mistake. Although Johnson disputes now that any mistake occurred in that regard, the record raises a question whether that was her state of mind when the agreement was signed.

To illustrate why a full, factual inquiry is needed in this case: Johnson states at section 11 of her declaration, regarding the November 30, 2000 e-mail exchange between Frame and Mr. Marinella, “I never agreed that the second Right of First Refusal [the one now at issue] would extend its term for an time longer that the Right of First Refusal in the Sale-Purchase Agreement.” CP 54, Section 11. However, since the one in the Sale-Purchase Agreement would continue so long as Frame owned lands adjacent to hers and had no condition on either Dave or Harleen remaining members in the LLC, it would appear that original version would have had the longer term than either the one signed at closing or one using the “and/or” limitation. CP 7; CP 19, CP 69, section 12; CP 72.

With Johnson’s expressed concern being not to exceed the term of the original right of first refusal, it is difficult to reconcile that view with section 12 of her declaration where she actually insists—on what would be a shorter not longer term—that the right continue for only so long as “Dave and Harleen were members of the LLC”. CP 54. (Originally, the right extended for the longer of ten years or that Frame owned land adjacent. CP 69, sec 12.)

Only from evidence adduced at a trial can a just determination be made a whether these parties were both

mistaken when they signed the right of first refusal as written on December 1, 2000. CP 6-8.

Satisfaction or Excuse of Condition (Issues No. 3, 4 5 and 6). In granting Johnson’s motion for summary judgment, the trial court terminated Frame’s right of first refusal. It did so on the basis that Harleen and David were no longer both members of Frame, LLC due to Harleen’s death. In effect, Frame’s right was forfeited for failure of a condition to its exercise.

As discussed above, material factual issues exist in regards to that determination. *See, e.g., Pardee v. Jolly*, 163 Wn. 2d 558, 182 P.3d 967 (2008) (further proceedings required to determine whether vendee was entitled to specific performance). Moreover, Frame submits that in every material respect the condition of Harleen’s continued membership remains satisfied or should be excused through its being held in her trust with Dave as the sole trustee and that Johnson, therefore, is not entitled to summary judgment in law or as a matter of equity.

A right of first refusal is an interest in land. *Manufactured Housing Communities of Washington v. State* 142 Wn .2d 347, 364-368, 13 P.3d 183 (2000) (condemnation). It vested in Frame when granted by Johnson. “A right of first refusal to purchase is a valuable prerogative, limiting the owner's right to freely dispose of

his property by compelling him to offer it first to the party who has the first right to buy.” *Norrrthwest Television Club, Inc. v. Gross Seattle, Inc.*, 26 Wn. App. 111, 116, 612 P.2d 422 (1980), *rev'd in part on other ground by*, 96 Wn.2d 973, 634 P.2d 837 (1981) (citing 11 Samuel Williston, *A treatise on the law of contracts* § 1441A, at 949-50 (3d ed.1968)).

Harleen Frame’s membership in the LLC is settled in her trust and solely administrated by Dave Frame as Trustee. CP 64, secs., 13, 14. Section 5 of the subject Right of First Refusal provides that it shall “accrue to and bind the successors, assigns and heirs of the parties.” CP 7. While Harleen individually was not a party to that undertaking, it should be recognized that in terms of preserving the right of first refusal and the intent that its duration be limited, that her interest in the LLC remains viable in the trust over which her husband, Dave, is trustee. CP 64, secs. 13, 14.

Yet the trial court, on Johnson’s motion for summary judgment, declared the right of first refusal terminated on the grounds that Harleen was no longer a member. With all respect, that decision was the result of misguided reliance on a technicality without regard for the good faith and fair dealing components present in every contract. *Miller v. Othello Packers, Inc.*, 67 Wash.2d 842,

844, 410 P.2d 33 (1966). The duty of good faith requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). *Edmonson v. Popchoi* 172 Wn.2d 272, 279-280, 256 P.3d 1223 (2011).

That the law abhors forfeiture is a well known axiom of justice. As recognized by the *Pardee* court, *supra*, at 574, “[F]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.’ ”, citing, *Hyrkas v. Knight*, 64 Wn.2d 733, 734, 393 P.2d 943 (1964) (quoting *State ex rel. Foley v. Superior Court*, 57 Wn.2d 571, 574, 358 P.2d 550 (1961)). “In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a ‘period of grace’ to a purchaser before a forfeiture will be decreed.” *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 783, 215 P.2d 425 (1950); *see also Dill v. Zielke*, 26 Wn.2d 246, 252–53, 173 P.2d 977 (1946).” *Pardee v. Jolly*, 163 Wn.2d 558, 574-5, 182 P.3d 967, 976 (2008) (recognizing equitable grace period may apply in extending time to make final payment on real estate option).

Hence, the law will excuse the non-occurrence of a condition that is not material to the exchange between the

parties. *Restatement Second, Contracts* § 271 (1981).
Pardee, 574-5.

The condition in the right of first refusal that Harleen and Dave remain members of Frame, LLC was apparently a protective limitation sought by Johnson on its duration. (However, the parties' declarations are in dispute as to their respective intentions and expectations in that regard. CP 53-55, secs. 8-15; CP 64-67, secs. 16.1-5).

As written, that right could remain viable under several circumstances that would be materially less favorable to and more difficult for Johnson than Harleen's membership being reposed in her trust. For example, since the right was assignable by its terms, it could have passed from Frame to Boise Cascade or other company as part of a transaction that also gained that company a controlling voting interest in Frame, LLC and reduced Harleen and Dave's control to one per cent each. Or, more basic yet, Frame, LLC itself could have been acquired by a third party, like Boise Cascade, in a deal that reduced Harleen and Dave's membership/voting interest to a minority percentage between them. More examples can be readily derived from a scenario where Harleen and Dave's marriage dissolves and membership interests are altered as a result.

The condition that Frame, LLC continues to own land adjacent remains satisfied today. CP 60, sec. 2. The point is that the other condition, Harleen's membership interest in the LLC, now in her trust, administered by Dave as trustee, in every meaningful way meets the requirement of continued membership better than the just discussed hypotheticals, especially in terms of protecting any reasonable expectation of Johnson. Under these circumstances, it is a less than reasonable for Johnson to seize on the limited distinction between "and" versus "and/or" in order to forfeit Frame's right of first refusal and retain the \$17,000 Frame paid her for it.

Finally, it should be recognized that membership interests in Limited Liability Companies are assignable. RCW 25.15.250. Assignees can become members of the LLC, as Harleen's trust has in Frame, LLC. RCW 25.15.260.; CP 64, sec. 13. Of course, Harleen and Dave were not parties individually to the right of first refusal, but as members had an interest in it. The Grant of that right was not made personal to either of them and does not state that it terminates on their death or by assignment of their membership. In substance, Harleen's membership continues. Given the unique character of real property and the good faith covenant that inheres in every contract, the

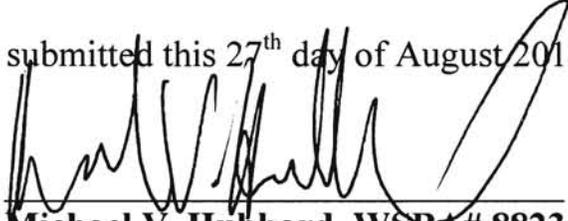
Frame right of refusal should remain effective as a matter of law. *Edmonson v. Popchoi*, 172 Wn.2d 272, 279-280, 256 P.3d 1223 (2011).

VII. Conclusion

Genuine issues of material fact, concerning here whether scrivener's error and/or mutual mistake affected the right of first refusal as granted, require that the decision below be reversed and the cause remanded for further proceedings.

Further, in law or equity, that Harleen's membership interest in the LLC is now in her trust, should be held sufficient to satisfy or excuse the condition of continued membership; and thereby to allow Frame the benefit of its bargain.

Respectfully submitted this 27th day of August 2012



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