IN THE SUPREME COURT, STATE OF FLORIDA

OLD PORT COVE HOLDINGS, INC., and OLD PORT COVE EQUITIES, INC.,

Petitioners,

v.

OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC.,

Respondent.
_____/

Case No. 07-1032
4DCA Case No.: 4D05-3601

On Discretionary Review From a Decision of the Fourth District Court of Appeal

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PETITIONERS' REPLY BRIEF

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PREFACE

Petitioners, Old Port Cove Holdings, Inc., and Old Port Cove Equities, Inc., shall be referred to as "the Property Owners."

Respondent, Old Port Cove Condominium Association One, Inc. shall be referred to as "the Association."

All other parties or documents shall be referred to as set forth later in this Brief.

Citations to the Record on Appeal shall be to the Volume and Page Numbers indicated in the Index to Record, as follows: (R_-_)

The trial transcript is included in the Record at Volumes 14-16. References to the trial transcript shall be to the Volume and Page Number as follows: (T_:_-_)

References to, respectively, the Association's and the Property Owners' trial exhibits shall be as follows: (P. Ex. _) and (D. Ex. _)

References to the Appendix to the Petitioners' Initial Brief shall be as follows: (App. _, p. _)

References to Petitioners' Initial Brief to this Court shall be as follows: (S. Ct. PIB at __)

References to the Respondent's Answer Brief to this Court shall be as follows: (S. Ct. RAB at __)

References to the Association's Initial Brief to the 4th DCA shall be as follows: (Assoc. IB at __)

References to the Property Owners' Answer Brief to the 4th DCA shall be as follows: (Prop. Owners AB at __)

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S RULING THAT THE AGREEMENT WAS VOID *AB INITIO*

A. The Trial Court Properly Ruled That The Agreement Was Subject to the Common Law Rule Against Perpetuities and that it Violated that Rule

In their Answer Brief, the Association attacks the applicability of the common law rule against perpetuities to a right of first refusal. The Association relies upon some Florida cases and a handful of out-of-state case authorities which generally assert conflicting propositions about the nature of a right of first refusal and the somewhat similar option to purchase. (See S. Ct. RAB at 24-31) The Association cites case law that it contends supports the Fourth DCA's ruling below that a right of first refusal is *vested from its inception* and simultaneously cites other cases that stand for the proposition that a right of first refusal *never* creates a vested property interest. See, e.g., Warren v. City of Leesburg, 203 So. 2d 522 (Fla. 2d DCA 1967) (discussion in dicta that an option to purchase or repurchase land *does not vest the holder with an interest in the land* but is simply a contractual right); Gautier v. Lapof, 91 So. 2d 324, 326 (Fla. 1956) (until an optionee exercises the right to purchase, he has no estate in the lands involved); *compare* Robertson v. Murphy, 510 So. 2d 180 (Ala. 1987) (court finds that a right of first refusal is a presently vested interest and therefore does not violate the rule against perpetuities). The Association cites other out-of-state authority for the proposition

that a right of first refusal does not cast a cloud of uncertainty on the title of the property or have the potential to restrain alienation such that the rule against perpetuities should not apply. See, e.g., Bortolotti v. Hayden, 866 NE 2d 882 (Mass. 2007). Some of the cases cited distinguish options to purchase from rights of first refusal, finding only options to purchase subject to the rule against perpetuities. e.g., Bortolotti, supra, at 888.

The cases relied upon by the Association do not state the majority rule. The vast majority of jurisdictions that have considered the issue have concluded that the rule against perpetuities applies to preemptive rights, such as rights of first refusal. See, e.g., Estate of Johnson v. Carr, 691 S.W.2d 161, 161 (Ark. 1985); Taormina Theosophical Community, Inc. v. Silver, 140 Cal.App.3d 964, 977 (Cal. 2d Dist. 1983); Atchison v. City of Englewood, 463 P.2d 297, 306-07 (Colo. 1969); Neusadt v. Pearce, 143 A.2d 437, 438 (Conn. 1958); Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1383 (Del. 1991); Stephens v. Trust for Public Land, 475 F.Supp.2d 1299, 1313-14 (N.D. Ga. 2007)(applying Georgia law); Martin v. Prairie Rod and Gun Club, 348 N.E. 2d 306, 309 (Ill. 3d Dist. 1976); Henderson v. Millis, 373 N.W.2d 497, 505 (Iowa 1985); Gore v. Beren, 867 P.2d 330, 338 (Kan. 1994); Three Rivers Rock Co. v. Reed Crushed Stone Co., Inc., 530 S.W.2d 202, 208 (Ky. 1975); Low v. Spellman, 629 A.2d 57, 58 (Me. 1993); The Arundle Corp. v. Marie, 860 A.2d 886, 894-95 (Md. 2004); Ferrero Const. Co. v. Dennis

Rourke Corp., 536 A.2d 1137, 1139-40 (Md. App. 1988) (acknowledging that the great majority of American jurisdictions have applied the rule against perpetuities to preemptive rights); Beets v. Tyler, 290 S.W.2d 76, 82 (Mo. 1956); North Bay Council, Inc., Boy Scouts of America v. Grinnell, 461 A.2d 114, 116 (N.H. 1983); Adler v. Simpson, 203 A.2d 691, 693 (N.Y.A.D. 3d Dept. 1994); Rich, Rich & Nance v. Carolina Const. Corp., 558 S.E.2d 77, 81 (N.C. 2002); Hamilton Cty. Bd. Of Commrs. v. Cincinatti Ohio, 797 N.E.2d 1027, 1032 (Ohio App. 1st Dist. 2003); Melcher v. Camp, 435 P.2d 107, 114-15 (Okl. 1967); Clark v. Shelton, 584 P.2d 875, 877 (Utah 1978); Firebaugh v. Whitehead, 559 S.E.2d 611, 615-16 (Va. 2002); Smith v. VanVoorhis, 296 S.E.2d 851, 853 (W.Va. 1982).

In addition to being the prevailing rule around the country, the best-reasoned rule, which is supported by the only Florida case to carefully analyze it, is that the public policy embodied in the common law rule against perpetuities is best served by applying it to a right of first refusal, especially one that affects properties in the way that the present one does. See Fallschase Development Corp. v. Blakey, 696 So. 2d 833 (Fla. 1st DCA 1997).

Although it has been stated in slightly different ways, there is no dispute that the rule against perpetuities was designed to prohibit property interests that vest too remotely and that a significant component purpose "is to ensure that property is reasonably available for development by prohibiting restraints that remove

property from a beneficial use for an extended period of time." Fallschase, supra, at 835 (citing Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980)). Similarly, the rule against perpetuities is a principle of common law "grounded in the public policy against restricting the alienability of land and interests in land." Stuart Kingston, Inc. v. Robinson, 596 A. 2d 1378, 1383 (Del. 1991)). The Fallschase court recognized that there was a split of authority about whether the rule against perpetuities applies to a right of first refusal but found that the stronger view was that it does and that such an agreement must not violate the rule against perpetuities. Fallschase, 696 So. 2d at 835. Fallschase relied, in part, on Watergate Corp. v. Reagan, 321 So. 2d 133, 136 (Fla. 4th DCA 1975), which recognized that the Restatement of Property at that time supported the view that a right of first refusal is subject to the rule against perpetuities.

The present case is a strong example of why a right of first refusal directly invokes the policy that the rule against perpetuities is intended to serve. The property subject to the right of first refusal in this case, Parcel 16, serves as the entirety of the parking for a nearby property owned by the Property Owners known as the North Marina. (T 14: 36/23-37/6) The photograph in evidence of the North Marina shows the Parcel 16 parking area. (P. Ex. 20B; T 14: 33/14-37/6) Not only is Parcel 16 a valuable piece of property for the owner of the North Marina, but Parcel 16 is critical to the ability to operate *and sell* the marina. (T 14: 78/8-18;

71/21-72/7) In other words, Parcel 16 has assumed a very high value, perhaps its highest and best use, in its support of the nearby related property also owned by the Property Owners, the North Marina. (Id.) Thus, the right of first refusal in this case serves as a significant restraint not only with respect to Parcel 16 but also with respect to the even more valuable, fully-operating marina.

The Maryland Court of Appeals, in a thorough discussion of the applicability of the rule against perpetuities to a right of first refusal, articulated the alienability issue that exists in the present case. As that court observed, a right of first refusal of the type in this case "chills" the interest of prospective purchasers who, "recognizing that a matching offer from the preemptioner will defeat their bids, simply will not bid on the property." Ferrero Construction Company, supra, 536 A. 2d at 1144. As that court further observed, "This in turn will depress the property's value and discourage the owner from attempting to sell."[1]

[1] The Ferrero court's observation about the impact on alienability of a right of first refusal followed the court's initial observation that restriction of alienability is actually the secondary purpose of the rule against perpetuities. The primary purpose, the court explained, is to prevent property interests from vesting remotely. Id. at 1142. As the court noted, the minority jurisdictions focusing solely on alienability are overlooking that there is a separate doctrine that deals with that, the rule against restraints on alienation. Id. at 1143. Thus, whether the rule against perpetuities governs rights of first refusal does not turn on whether such a right is a substantial restriction on alienability, if it vests too remotely. If the interest may vest too remotely, it violates the rule. The entire thorough discussion of the applicability of the rule against perpetuities to rights of first refusal is set forth in Ferrero at 1139-1144.

Applying the logic set forth in Ferrero and adopted in Fallschase, the impact on alienability is especially great in the present case. Any purchaser interested in purchasing the North Marina must contend with the right of first refusal on Parcel 16. Such a prospective purchaser will be forced to play a game of "cat-and-mouse" with the preemptioner, facing pressure to overpay significantly to create a disincentive for the preemptioner to exercise the right. In addition, because a purchase of the North Marina is only workable if it includes a purchase of Parcel 16, the right of first refusal raises difficult issues and complexities about the structure of the deal, such as whether a purchase of the two properties can take place together, or whether they must be purchased separately subject to various contingencies. Those factors logically create a disincentive to prospective purchasers and tend to restrict alienability. Thus, while, as the Ferrero court points out, the rule against perpetuities is first and foremost a rule preventing remote vesting, its secondary purpose of prohibiting significant restraints on alienability is also served by following the majority rule that the rule against perpetuities applies to rights of first refusal.

B. The Fourth DCA's Decision Cannot Be Reconciled With the Fallschase Decision or With the Law In Existence At the Time of the Agreement

As discussed in Petitioners' Initial Brief, the Fourth DCA decided this matter on two grounds, the first of which was never argued by the Association. As

the first ground, the Fourth DCA ruled that the right of first refusal "became vested from the moment of the Agreement" and therefore was not subject to the rule against perpetuities. (App. A at 2-3) In support of the Fourth DCA's ruling, the Association cites a series of cases which contradict each other. (See S. Ct. RAB at 32) The Association relies upon a Florida case for the proposition that a right of first refusal creates *only a contractual right* and not a potential interest in real property (citing Warren) and an Alabama case for the proposition that a present vested interest *is created* in the preemptionor at the time of the agreement (citing Robertson). On the other hand, the Association relies upon a New Mexico case for the proposition that a right of first refusal does not create a *future* interest (citing Gartley) and a Washington case for the proposition that a right of first refusal does *not* create an interest in land at the time of its inception (citing Robroy).

Aside from the Alabama case, the other cited authorities do not appear to stand for the proposition that a right of first refusal somehow creates a *vested* property interest from the moment the agreement is made. As explained in the Initial Brief, the concept of a "vested interest" requires, by definition, that the right to the enjoyment of that interest no longer be subject to the happening of a condition precedent. (See S. Ct. PIB at 13-14) Florida case law and the case law from other states have usually gotten this right. The Fallschase court recognized that a right of first refusal cannot vest until the property owner decides to sell the

property. See Fallschase, 696 So. 2d at 837. In the Watergate Corporation decision, the court recognized that a right of first refusal vests only when the settlor elects to transfer the subject property. See Watergate Corporation, supra, at 136. Out-of-state examples include the Ferrero case, in which the Maryland Court of Appeals recognized that with respect to a right of first refusal, "the preemptioner acquires an equitable interest, which will vest only when the property owner decides to sell." Ferrero, supra, at 1139. In Stuart Kingston, the Delaware Supreme Court addressed the same issue and stated:

> Because the holder of the right of first refusal acquires merely an equitable interest, it remains inchoate until the owner decides to sell thus triggering the right of first refusal. (internal citation omitted)

See, Stuart Kingston, supra, at 1384.

In addition, as noted earlier in this brief, any argument that a right of first refusal is purely a contract right and not a potential interest in real property overlooks the true nature of the right. The vast majority of courts and commentators view rights of first refusal as equitable claims sufficient "to support an action for specific performance if the property owner attempts to sell to someone other than the owner of the right of first refusal." See, Stuart Kingston, supra, at 1384; Ferrero Construction, supra, at 1139. In Ferrero, the Maryland Court of Appeals observed that the vast majority of courts and commentators "have held that rights of first refusal, which are more commonly known as

'preemptive rights,' are interests in property and not merely contract rights." Id. at 1139. As the court explained, "This is so because, if the property owner attempts to sell to someone other than the owner of the right of first refusal ('the preemptioner'), the latter may have a court of equity enter a decree of specific performance ordering that the property be conveyed to him." Id. The court concluded, "Thus, the preemptioner acquires an equitable interest, which will vest only when the property owner decides to sell." Id.

The other basis for the Fourth DCA's opinion was that Florida Statutes § 689.225 applies retroactively to negate the common law rule against perpetuities and to revive the right of first refusal, even if the right was void in 1977. (App. A at 4-6) That issue is addressed at length in Petitioners' Initial Brief at pages 15-24. In response, the Association does not raise any substantial new arguments, and, except as briefly discussed hereafter, the Property Owners will rely upon the Initial Brief. The Association does cite a case for the proposition that Florida courts should not construe an unambiguous statute in a way that would limit its "reasonable and obvious implications." (S. Ct. RAB at 35-36) However, the issue here is the retroactivity of the statute, not its meaning. Setting aside for the moment the explanation in Petitioners' Initial Brief that the statute affects substantive rights and therefore cannot be applied retroactively, the statute itself in the "Application" section says that it is intended to apply to interests "created *on or*

after October 1, 1988." Section 689.225(6)(a), Fla. Stat. (2000) (emphasis added). The legislative history is instructive. The analysis and impact statement of the House of Representatives Committee on Judiciary indicates that the statement of application means what it says:

> Subsection (6) provides that the uniform rule will be *primarily applied prospectively* rather than retroactively. It will generally apply only to contingent interests and powers of appointment created on or after the effective date of its enactment, although retroactive application is provided in some circumstances. The section will apply to a power of appointment created before the effective date to the extent that it remains unexercised on the effective date. Also, courts, upon the petition of an interested person, may reform the disposition of a nonvested property interest or a power of appointment created before the effective date which is determined in a judicial proceeding commenced on or after the effective date to have violated the rule against perpetuities as it existed before the effective date. Courts are not mandated to reform invalid instruments as they are in subsection (4), rather they are given discretionary jurisdiction to reform instruments violative of the present rule.

House of Representatives Committee on Judiciary, Staff Analysis and Economic Impact Statement, CS/HB 0172, Apr. 9, 1988 (emphasis added). Thus, with the possible exception of reformation, the statute, by its own terms, does not apply to the Agreement at issue, which was entered into in 1977.[2]

[2] As explained in Petitioners' Initial Brief, the Property Owners do not agree that the statute can be applied retroactively even for the purpose of reformation but, instead, believe that the Fallschase court's analysis of that issue is correct.

The Association ignores the statute's statement of its application and simply continues to argue that there was no rule against perpetuities in 1977 based upon the amendment to the statute in the year 2000. (S. Ct. RAB at 36) Moreover, the Association's apparent suggestion that the common law of Florida is only that law which existed as part of the common and statutory law of England on July 4, 1776, overlooks the entire development of the common law in Florida since it became a state. (See St. Ct. RAB at 38-39) The law that applied in 1977 when the Agreement was made is not necessarily that which existed in the law of England in 1776 but is based upon the development of the law in Florida since Florida became a state. The Association's argument implies that the common law cannot develop beyond that which existed in England in 1776, a proposition for which there is no legal support. There is no serious doubt that, historically, Florida's common law included a rule against perpetuities. See, e.g., Adams v. Vidal, 60 So. 2d 545, 549 (Fla. 1952). Moreover, while the Iglehart decision in 1980 expressly did not decide it, there is Florida case authority before the Fallschase decision that the rule against perpetuities applies to a right of first refusal. See Watergate Corp., supra, at 136.

Nevertheless, if the statute were determined to be retroactively applicable, it is only the reformation provision that would apply. (See S. Ct. PIB at 27-29)

C. The Trial Court Properly Determined that the Association's Defenses Do Not Apply

The issues raised by the Association about their defenses were largely already addressed in Petitioners' Initial Brief. While the Association briefly argues that the trial court could not properly find that the Agreement was void without at least considering the Association's equitable defenses, whether that is true or not in the case of a void instrument, the trial court did consider the Association's defenses in detail. (See App. B, pp. 4-13; see also Property Owners AB at 16-24)

The Association's defenses fail for both a legal reason and a factual reason. The legal reason the defenses fail is that consideration makes no difference where an instrument is void. See Fallschase, supra. In fact, in Fallschase, the consideration conferred by the holder of the right of first refusal was more than $700,000, yet that did not change the outcome. See Fallschase, supra, at 834.

The factual problem with the Association's defenses is that there is no evidence of laches, estoppel, or waiver. Although the Association suggests that there were benefits conferred by the Association upon the Property Owners which the Property Owners may not repudiate twenty-five years later, that argument fails for two reasons. First, there is no evidence of any significant benefits. The Association briefly discusses what it referred to as a "draft agreement" in its records and speculates from that document that the Association "likely gave up claims it had against the developer" as consideration for the right of first refusal.

(S. Ct. RAB at 18-19) Although this issue was not an important legal consideration, it was covered in detail in the Fourth DCA briefs. (Prop. Owners AB at 21-24; Assoc. IB at 26-34.) In short, however, no witness could testify as to where the draft came from or whether it even related to Parcel 16. Moreover, if one were to engage in the speculation that the Association seeks to engage in, the better inference is that because the final Agreement made no mention of giving up claims and did not include a release, there were no such claims against the developer and no such consideration was ever given. (P. Ex. 9) Indeed, if there were claims at that time against the developer, and the Association sought to bring a legal action for those claims after entering into the Agreement, the developer would not have been able to use the Agreement to defend the suit because it does not mention a release or anything about claims against the developer. Thus, in fact, no release from any such claims was given by the Association, and the only identifiable consideration in the record is the nominal ten dollars mentioned in the right of first refusal. (P. Ex. 9)

As for the appropriateness of discretionary reformation under § 689.225(c), the Association cites Atchison v. Englewood, 193 Colo. 367, 373 (1977), as an example of a case in which a right of first refusal was reformed to comply with a state's (Colorado) rule against perpetuities. (S. Ct. RAB at 46) However, Atchison is completely distinguishable from the present case. In Atchison, the

court decided that reformation was appropriate because the evidence was uncontradicted that there was a drafting error and the agreement did not reflect the true agreement of the parties. Id. at 372. Therefore, Atchison involved a mistake of fact, a proper basis for reformation, rather than a mistake of law, such as the Association argues exists here. To apply even the reformation provision of the statute retroactively is to completely change the meaning of the term "void." Because the right of first refusal was void ab initio in 1977, it does not matter what a later statute says about rights of first refusal or about the earlier law that voided the right of first refusal. (See Fallschase, supra.)

II. ALTERNATIVELY, THE FOURTH DCA'S DECISION FAILED TO INSTRUCT ON REFORMATION

The Association responds to this issue in two ways: by arguing that it is beyond the scope of the conflict issue and that this Court should decline to address it, and by arguing that the Property Owners should be judicially estopped from arguing this point.

First, the Property Owners agree that the conflict certified by the Fourth DCA is not based upon differing authorities on whether a matter like this one should be remanded for the trial court's consideration of reformation. However, the possibility of reformation is an issue that has been briefed throughout in this appeal, both at the Fourth DCA and before this Court and is an integral part of the main issue, the application of the rule against perpetuities. Moreover, even if it

were a separate issue, the law is settled that once this Court has accepted jurisdiction to resolve a conflict, it may review all issues briefed in the appeal. See Caufield v. Cantele, 837 So. 2d 371, 377, f.n. 5 (Fla. 2002). In the event that this Court determines that the statute is in part retroactive, the Court should exercise its discretion to provide the appropriate instructions to the trial court, in the interest of resolving the case.

The Association's other argument, judicial estoppel, misapprehends the nature and purpose of the Property Owners' argument about reformation. As set forth in the Petitioners' Initial Brief and above, it is the Property Owners' position that the statute should *not* be applied retroactively, including the reformation provision. It is only if this Court does not agree with Fallschase and rules that at least some aspect of the statute is to be applied retroactively, that this Court should consider the Property Owners' additional reformation argument. The Property Owners have not made "completely inconsistent" arguments but simply alternative arguments, contingent upon this Court's determination about retroactivity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Daniel S. Rosenbaum, Esq.** and **John M. Siracusa, Esq.,** Becker & Poliakoff, P.A., 625 North Flagler Drive, 7th Floor, West Palm Beach, Florida 33401; **Paul Erickson, Esq**., Alley, Maass, Rogers & Lindsay, P.A., 340 Royal Poinciana Way, Ste. 321, Palm Beach, Florida 33480; **Nanette Gammon, Esq.**, 1555 Palm Beach Lakes Blvd, Suite 1100, West Palm Beach, Florida 33401; and **Mayra Colon, Esq.**, Douberly & Cicero, 1550 Sawgrass Corporate Parkway, Sunrise, Florida 33323, this 30th day of January, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

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