IN THE COURT OF APPEALS OF IOWA

No. 0-912 / 10-0904
Filed February 9, 2011

WILLIAM E. MALONE JR. and SHARON J. MALONE,
Plaintiffs-Appellants,

vs.

LEO DAVID FLATTERY, GRACE M. FLATTERY, JEFFREY EDWARD FLATTERY, PAT FLATTERY, GAROLD DAVID FLATTERY, LENELLE FLATTERY, MARILYN ANN POPSON, BRIAN JOSEPH FLATTERY, CYNTHIA MARIE REINKE, BRYAN REINKE, MICHAEL ANTHONY FLATTERY, SARAH FLATTERY, TIMOTHY JOHN CRALL, and DEANN L. CRALL,
Defendants-Appellees.

TIMOTHY JOHN CRALL and DEANN L. CRALL,
Cross-Claimants,

vs.

LEO DAVID FLATTERY, GRACE M. FLATTERY, et al.,
Cross-Claim Defendants.

Appeal from the Iowa District Court for Monroe County, Annette J. Scieszinski, Judge.

William and Sharon Malone appeal the district court's grant of summary judgment denying their claim for specific performance of a contractual right of first refusal. **AFFIRMED.**

Bryan J. Goldsmith of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for appellants.

Matthew J. Hektoen and Robert S. Hatala of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar Rapids, for appellees Flatterys, Popsons, and Reinkes.

John A. Pabst of Pabst Law Firm, Albia, for appellees Cralls.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

In this appeal we are asked to determine what is the default rule in Iowa: Is a right of first refusal in a real estate contract freely assignable, or is it personal to the party who contracts for it unless stated otherwise? Because we conclude a right of first refusal is generally personal to the party who contracted for it absent language to the contrary, and there is nothing in the record to overcome that presumption here, we affirm the district court's grant of summary judgment.

I. Background Facts and Proceedings

The relevant facts in this case are not in dispute. In December 1993, Leo and Grace Flattery entered into a contract to sell their farmland to Stanek Cattle Co., Inc. Under the contract for sale, the Flatterys retained the acre of land on which their homestead was located, and Stanek acquired a right of first refusal to that one-acre tract.

The right of first refusal was set forth in paragraph 17(b) of the real estate contract and provided as follows:

> The Buyer shall have a right of first refusal to acquire the one-acre tract. In the event that the Sellers intend to sell the one-acre tract, the Sellers will notify the Buyer at the Buyer's address as disclosed by this contract by Certified Mail, return receipt requested. The notice shall be deemed to have been given upon the Buyer receiving the notice. The Sellers shall provide the Buyer with a copy of the written Offer to Purchase and Acceptance for the sale of the one-acre tract. The notice shall disclose the terms and conditions of the sale. The Buyer shall be entitled to purchase the one-acre tract on the same terms and conditions. Buyer shall exercise the right of first refusal created by this paragraph within ten days from receipt of Sellers' written notice to Buyer of Sellers' intent to sell. Buyer's notice of intent to exercise its right of first refusal shall be sent to the Sellers by Certified Mail, return receipt requested, and shall be deemed to have been given on the date of mailing. Failure of the Buyer to exercise the right of first refusal within the time period set forth in this paragraph shall cause the

> right of first refusal to terminate and be of no further force and effect whatsoever; provided, however, if the Sellers fail to complete the sale of which the Buyer is given notice for any reason, the Buyer's right of first refusal shall continue as if no notice was ever given to the Buyer by the Sellers.

The contract for sale also gave Stanek an easement for ingress and egress over and across the one-acre homestead. The easement was set forth in paragraph 17(a) and stated in part:

> The easement referred to in this paragraph shall run with the land and shall be binding on the Sellers' and Buyer's personal representatives, distributes, heirs, successors, transferees and assigns.

The real estate contract was prepared on an Iowa State Bar Association form. However, both paragraph 17(a) and paragraph 17(b) were typed in as "Additional Provisions." The Flatterys executed a warranty deed to Stanek transferring title to the farmland in satisfaction of the real estate contract on April 2, 1996.

A year later, on March 27, 1997, Stanek in turn transferred the farmland to William and Sharon Malone. Stanek's warranty deed stated the farmland was being transferred along with the easement and the "right of first refusal to purchase the [one acre homestead] on the terms provided in paragraph 17(b) of the real estate contract [between the Flatterys and Stanek]."

On November 4, 2002, the Flatterys quitclaimed their interest in the one-acre homestead to their children while retaining a life estate in the property. The Flatterys and their children later transferred the one-acre homestead by warranty deed to Timothy and Deann Crall on May 19, 2004. No formal notice was given to the Malones of either transfer.

On May 14, 2009, the Malones filed a petition against the Flatterys, their children, and the Cralls. Their petition sought to rescind the deeds transferring the homestead, to quiet title to the homestead, and to enforce the right of first refusal through specific performance by allowing them to purchase the homestead.

In December 2009, the Flatterys, their children, and the Cralls moved for summary judgment. They argued the right of first refusal was "personal" to Stanek and thus the alleged assignment of this right to the Malones in 1997 was invalid. The Malones resisted, arguing the supreme court's decision in *Black v. First Interstate Bank of Fort Dodge*, 439 N.W.2d 647, 650-51 (Iowa 1989), made contractual rights of first refusal assignable "as a species of an option."

Following a hearing and briefing, the district court granted summary judgment in favor of the Flatterys, their children, and the Cralls. The court determined that *Black*'s holding was limited to former Iowa Code section 524.910(2) (1987) and the particular context of the Alternative Nonjudicial Voluntary Foreclosure Procedure, and thus was not applicable. The court then held that rights of first refusal were presumed personal unless express language confirmed an intent to the contrary. Referencing the different language that had been used with respect to the easement, the court determined "these parties were aware of what language to use, in order to make the right of first refusal transferable to a subsequent farmland owner. The contracting parties did not do that." Accordingly, the court found the right of first refusal did not survive Stanek's sale of the farmland to the Malones in 1997. The Malones appeal.

II. Standard of Review

We review rulings on motions for summary judgment for the correction of errors at law. *Stew-Mc Development, Inc. v. Fischer*, 770 N.W.2d 839, 844 (Iowa 2009). A grant of summary judgment is appropriate only when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). "When no genuine issue of material fact exists, our job is to determine whether the district court correctly applied the law." *Zimmer v. Vander Waal*, 780 N.W.2d 730, 732-33 (Iowa 2010).

III. Analysis

A. Under Iowa Law, Are Rights of First Refusal Presumed Assignable or Not?

The prevailing rule in this country is that rights of first refusal are not assignable unless the instrument indicates otherwise:

> [R]ights of first refusal are presumed to be personal and are not ordinarily construed as transferable or assignable unless the particular clause 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 Ltd. P'ship, L.L.L.P. v. Bosse, 835 A.2d 646, 655 (Md. 2003) (citing other jurisdictions); *accord Jones v. Stahr*, 746 N.W.2d 394, 399 (Neb. Ct. App. 2008); 77 Am. Jur. 2d *Vendor and Purchaser* § 34, at 152 (2006); 3 Eric Mills Holmes, *Corbin on Contracts* § 11.15, at 587 (Joseph M. Perillo ed., rev. ed. 1996); Jonathan F. Mitchell, *Can a Right of First Refusal be Assigned?*, 68 U. Chi. L. Rev. 985, 993 (Summer 2001). This principle is in direct contrast to the general rule regarding options, which may be assigned absent specific language to the contrary. *Dahl v. Zabriskie*, 249 Iowa 584, 586, 88 N.W.2d 66, 67 (1958).

Several policy reasons underlie the widespread presumption that rights of first refusal are not assignable. They 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. Additionally, because a right of first refusal, unlike an option, is not a vested right, *see Henderson v. Millis*, 373 N.W.2d 497, 505-06 (Iowa 1985), construing such rights as nonassignable can limit their duration and thus avoid issues under the Rule Against Perpetuities. *See, e.g., Roemhild v. Jones*, 239 F.2d 492, 495-96 (8th Cir. 1957); *Estate of Johnson v. Carr*, 691 S.W.2d 161, 162 (Ark. 1985); *Kershner v. Hurlburt*, 277 S.W.2d 619, 623 (Mo. 1955); *Stratman v. Sheetz*, 573 N.E.2d 776, 778 (Ohio Ct. App. 1989); *Peters v. Hoover*, 31 Pa. D. & C. 2d 641, 650-51 (Pa. 1963). 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.

We see no reason to deviate from this general rule in Iowa. On appeal, the Malones continue to assert the supreme court's decision in *Black* dictates a different result, but we disagree.

In *Black*, John and Beth Banwell deeded their farm to a state bank under threat of foreclosure. As a result, the Banwells gained a statutory right of first refusal to repurchase their farm in accordance with Iowa Code section 524.910(2), as then worded. The bank subsequently contracted to sell the Banwell farm to Dean and Jackie Black. This contract was specifically made subject to the Banwells' statutory right of first refusal. After the bank notified the

Banwells of their opportunity to repurchase, the Banwells assigned their opportunity to repurchase to John's sister. John's sister then bought the Banwell farm. The Blacks subsequently filed an action for declaratory judgment arguing the right to repurchase created by section 524.910(2) was not assignable. *Black*, 439 N.W.2d at 648.

In rejecting the Black's argument, the supreme court found the opportunity to repurchase granted by section 524.910(2) to be a "preemption." *Id*. at 650. The court then reasoned:

> A preemption ripens into an option when the owner has elected to sell. Generally, absent specific restriction to the contrary, options may be assigned by the option holder. Section 524.910(2) does not explicitly prohibit assignment of the opportunity to repurchase. Therefore, the lack of legislative direction on the assignment issue does not indicate that the opportunity may not be assigned. Rather, given the nature of the opportunity to repurchase as a species of option, the legislative silence on the issue supports the conclusion that the opportunity may be lawfully assigned by the prior owner.
>
> Additionally, as our discussion above indicated, the opportunity to repurchase embodied in section 524.910(2) is one facet of a separate nonjudicial foreclosure procedure. The prior owner's opportunity to repurchase under the nonjudicial foreclosure procedure is analogous to the debtor's redemption rights in the judicial foreclosure setting. In that context, the debtor's redemption rights may be assigned to a third party and the debtor's assignee is entitled to the same quantity and quality of rights as the debtor, which would include the exclusive right to redeem within three months of the sheriff's sale.
>
> In light of this clear relationship to redemption under our standard foreclosure procedures, and the nature of the opportunity to repurchase as a preemption, we are persuaded that the prior owner's opportunity to repurchase under the alternative foreclosure procedure may be effectively assigned to a third person.

Id. at 650-51 (citations and quotations omitted).

Invoking this language, the Malones argue that *Black* set forth a general rule of law that preemptions are freely assignable. Nonetheless, like the district court, we believe their reading of *Black* is overly broad.

Black involved a statutory right of repurchase under section 524.910(2) as it then existed. In addressing this statutory right, our supreme court specifically noted that the right was enacted as "a part of the fabric" and as "one facet of a separate nonjudicial foreclosure procedure." *Id*. at 650, 651. In determining the scope of this statutory right, the supreme court's task was to ascertain legislative intent, not the presumed intent of parties to a contract. Even at that, the specific outcome in *Black* was immediately abrogated by our general assembly, suggesting the legislature did not have the same understanding of its own intent. The year after *Black* was decided, the legislature deleted the language granting the right of first refusal and inserted in lieu thereof sections 654.16 and 654.16A. *See* 1990 Iowa Acts ch. 1245. The new statute specifically stated, "The right of first refusal provided in this section is not assignable, but may be exercised by the mortgagor's successor in interest, receiver, personal representative, executor, or heir only in case of bankruptcy, receivership, or death of the mortgagor." 1990 Iowa Acts ch. 1245, § 3 (enacted at Iowa Code § 654.16A(5)). Thus, we do not think *Black* applies to common law rights of first refusal, as opposed to this specific statutory right as it then existed.

Moreover, *Black* involved a right that had ripened into a "species of option" before it was assigned. Options are typically considered to be assignable. *Dahl*, 249 Iowa at 586, 88 N.W.2d at 67. More particularly, in *Black*, the Banwells' right to repurchase had already been triggered before they assigned it. Here by

contrast, Stanek assigned the right of first refusal to the Malones prior to any sale by the Flatterys. Thus, the right of first refusal had yet to ripen into an option. Accordingly, we believe that *Black* is not on point for this issue, and the district court was correct in not relying upon it.

B. Did the Contract Language Overcome the Presumption Against Assignability?

Finally, we must consider whether anything in the Flattery-Stanek contract should override the default rule that rights of first refusal are not transferable. The language of the contract is, of course, critical. *Fisher v. Fisher*, 500 N.E.2d 821, 822 (Mass. Ct. App. 1986); *Old Mission Peninsula Sch. Dist. v. French*, 107 N.W.2d 758, 759 (Mich. 1961); *Adler v. Simpson*, 610 N.Y.S.2d 351, 353 (N.Y. App. Div. 1994).

In this real estate contract, the parties expressly granted the right of first refusal only to "The Buyer," a clear reference to Stanek. Yet when describing the easement over the one-acre homestead in the preceding paragraph, the parties said it was being conveyed to "The Buyer," but would be "binding on the Sellers' and Buyer's personal representatives, distributees, heirs, successors, transferees and assigns." This contrast, if anything, supports a conclusion that the parties intended the right of first refusal to be personal and not assignable. *See, e.g., Adler*, 610 N.Y.S.2d at 353 (comparing the language granting the right of first refusal ["the party"] with the language in the original land conveyance [the party as well as to his "heirs, successors and assigns"] and holding: "The right of first refusal, executed on that same date, did not include such language and, had the parties intended that result, such could have been accomplished by the

inclusion of appropriate language."); *see also Old Mission Peninsula Sch. Dist.*, 107 N.W.2d at 760 ("Significantly, twice repeated in the warranty clause which the draft employed, we find the familiar words of heirship which he omitted in the pre-emption clause. . . . This contrast within the deed, we regard as lending further weight to the conclusion of the circuit judge that the parties intended the pre-emption to be a personal one.").

Hence, for the foregoing reasons, we find the district court properly granted summary judgment to the Flatterys, their children, and the Cralls.

AFFIRMED.