

**IN THE COURT OF APPEALS OF IOWA**

No. 2-233 / 11-1146  
Filed June 13, 2012

**VERNON STONE,**  
Plaintiff-Appellee,

**vs.**

**KENNETH STONE,**  
Defendant-Appellant,

and

LEANNE LOVESTAD and KENNETH STONE,  
VERNON STONE and LEANNE LOVESTAD  
As Co-Executors of the Estate of Verna Stone,  
Defendants.

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Appeal from the Iowa District Court for Buena Vista County, Don E.  
Courtney, Judge.

Kenneth Stone appeals a district court ruling concluding that he waived his  
right of first refusal to purchase property owned by his brother and sister.

**AFFIRMED.**

Willis J. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellant.  
Andrew J. Smith of Mack, Hansen, Gadd, Armstrong & Brown, P.C.,  
Storm Lake, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

**VAITHESWARAN, P.J.**

Three siblings disagreed on their respective rights to inherited farmland. This appeal arises out of litigation involving one sibling's right of first refusal to purchase the other siblings' land.

***I. Background Facts and Proceedings***

Vernon and Kenneth Stone and Leanne Lovestad, n/k/a Leanne Mohr, each inherited a one-third undivided interest in their parents' farm. When they could not agree on how to divide the farm, Vernon filed a partition action seeking a sale of the land and distribution of the sale proceeds. Kenneth answered and affirmatively stated that the siblings signed an agreement providing that he was to receive the southern third and his siblings were to receive the northern two-thirds of the property. He sought to have the land partitioned pursuant to the claimed agreement.

Following trial, the district court found that there was indeed a written agreement, since lost, the terms of which entitled Kenneth to the southern one-third of the farm. The court further found that, under the agreement, Kenneth could "buy Vernon's and Leanne's interest if he [could] match their best offer." The court ordered the parties to "specifically perform the terms of their contract and partition accordingly."

Vernon and Leanne subsequently received a third-party offer to purchase their portion of the farm for \$5500 an acre. They notified Kenneth of their intention to accept the offer and asked him to let them know whether he wished to match it. Kenneth did not respond and the offer expired.

Shortly thereafter, Vernon and Leanne received a second third-party offer to purchase their portion of the farmland for \$5700 per acre. Again, they expressed an interest in accepting the offer. They also negotiated an agreement to have the purchaser lease the land to Kenneth and allow him to farm it.

On January 24, 2011, Vernon and Leanne's attorney faxed a letter to Kenneth's attorney, stating an offer of \$604,200 had been made on their property and the offer required acceptance by noon on January 25, 2011. The terms of the offer were also forwarded to Kenneth. The letter addressed Kenneth's right of first refusal as follows:

Pursuant to the Court's Order, Ken arguably has the right to match this offer if he so chooses. While we believe his failure to match the prior offers resulted in the relinquishment of that right, we are giving him another opportunity to match. Thus, if Ken wants to "match" this offer, he should do so in writing by noon tomorrow with the appropriate down payment. Please advise us as [soon as] possible but no later than noon tomorrow whether or not Ken intends to match the terms of the offer.

Kenneth did not see the letter until the following morning, January 25, 2011, at approximately 9:30 a.m. His attorney faxed Vernon and Leanne's attorney a request for an extension until January 28, 2011, at 5:00 p.m. On January 26, 2011, Kenneth received the following response: "The best offer we have required acceptance by yesterday at noon and Ken failed to 'match' it. The Order does not give him the additional time you have requested."

Vernon and Leanne's attorney sent a follow-up letter dated January 31, 2011, asking, "Can I assume that since we heard nothing further last Friday from Ken Stone as to his exercising his alleged right to submit a matching offer that the issue is now moot and that we can go about our business of executing

deeds?” Kenneth’s attorney responded that Kenneth was “willing to sign the Court Officer Deeds, as the Co-Executor of the estate, so long as the Court Officer Deed preserves Ken’s leasehold rights in the North 2/3 of the farm for the 2011 crop year.” Kenneth also requested a survey of the property.

Meanwhile, Vernon and Leanne prepared to close on the transaction. As part of that process, the buyer’s attorney asked for Kenneth’s signature on a quitclaim deed to ensure clear title to the property. Kenneth’s attorney responded with concerns that Kenneth’s signature might jeopardize an agreement to rent the land or might be construed as a waiver of Kenneth’s right of first refusal if the proposed sale was not finalized.

On March 22, 2011, Vernon and Leanne’s attorney informed Kenneth’s attorney that “the waiver of first refusal applies to this purchase. There will be no subsequent purchases. However, if this one falls through, which it will not, we are willing to re-extend his first refusal right.” When the attorney did not receive a response, he sent a follow-up e-mail, dated March 29, 2011, asking where Kenneth stood with respect to signing the quitclaim deed. The attorney noted that

we have addressed Ken’s lease issue, we have addressed his right of first refusal, the survey, and we have addressed giving him clear title to his portion. Thus, Ken Stone has no basis to refuse to sign the deed and help us clean up the title issues and get our sale closed.

On April 7, 2011, ten weeks after Vernon and Leanne’s attorney first informed Kenneth about the second third-party offer, Kenneth expressed a willingness to match that offer, subject to confirmation of the terms. Vernon and Leanne did not respond.

A month later, Vernon moved to enforce the original partition judgment and have Kenneth held in contempt. He sought a determination that Kenneth waived or failed to exercise his right of first refusal and an order compelling Kenneth to execute a quitclaim deed to the northern two-thirds of the property. After a hearing, the court found that Kenneth had not exercised his right of first refusal in a timely manner and he could not interfere with the sale of Vernon and Leanne's land. The court alternately concluded that Kenneth waived his right of first refusal.

Kenneth appeals. He asserts that our review is on error. Vernon does not dispute this standard of review. Accordingly, we will proceed with a review for errors of law. See Iowa R. App. P. 6.907.

## ***II. Analysis***

"A right of first refusal is a conditional option which is dependent upon the decision to sell the property by its owner." 17 C.J.S. Contracts § 58 (2011). It is considered a weak option, because it does not require the owner to offer the property for sale. *Id.*

Once the holder of a right of first refusal receives notice of a third party's offer, the right of first refusal is transmuted into an option, and the parties must then strictly comply with the terms stipulated in the contract for the exercise of the option to be effective. That is, on notice of a bona fide offer from a third party, a right of first refusal ripens into an option to purchase according to the terms of the offer.

*Id.*

Kenneth contends he was not given a reasonable time to exercise his right of first refusal on the second third-party offer. Vernon responds in several ways. First, he argues that Kenneth's right of first refusal expired when he failed to

exercise it by the deadline in the first third-party offer. He also argues that in any event the right expired by the deadline in the second third-party offer or by Kenneth's requested deadline of January 28, 2011. Alternately, he argues that Kenneth waived his right of first refusal.

We begin with Vernon's first argument. We need not decide whether Kenneth's right of first refusal permanently expired when it was not exercised by the deadline in the first third-party offer because Vernon and Leanne acted as if it did not expire. Specifically, when the first offer fell through, they extended Kenneth a right of first refusal on the second offer.

That brings us to Kenneth's argument that he was not afforded a reasonable period of time to exercise his right of first refusal on the second offer. We also find it unnecessary to decide this issue because we are persuaded by Vernon's alternate argument that, irrespective of the reasonableness of the time period for exercising the right, Kenneth waived his right of first refusal. See *McNabb v. Barrett*, 257 S.W.3d 166, 170 (Mo. Ct. App. 2008) ("Parties can waive rights of first refusal." (citation omitted)). We turn to the facts in the record supporting the district court's determination that there was a waiver.

Days after the period to exercise the right of first refusal expired, Vernon and Leanne's attorney did not simply proceed with the sale of their land. As noted, their attorney contacted Kenneth's attorney and asked if his right of first refusal was now a moot issue. They further asked Kenneth if they could proceed with execution of the deeds. Kenneth's response was essentially "yes," subject to the preservation of his right to rent and farm their property following the sale. Kenneth also proposed the construction of a partition fence between his one-third

section and his siblings' two-thirds, a proposal that was inconsistent with a desire to purchase his siblings' portion. And, he submitted a \$16,000 check payable to the purchaser and to Kenneth and Leanne to cover 2011 rent "owing by [him] for the 106.67 acre farm [the buyer] is purchasing from Leanne Mohr and Vernon Stone."

Kenneth argues these were simply acts to "cover" himself as his siblings had already accepted the third-party offer. However, nothing in his correspondence suggests that. When Vernon and Leanne asked if they could proceed with the execution of deeds, Kenneth responded with a concern about his leasehold rights, making no mention of his desire to purchase their land. When Kenneth was sent a quitclaim deed, which included a release of his right of first refusal, his attorney again did not intimate that Kenneth wished to exercise that right with respect to this offer. He only expressed a concern that his signature might be construed as a waiver of "his right of first refusal *if the proposed sale to [this purchaser] fell through.*" See *Treinen v. Kollasch-Schlueter*, 902 N.E.2d 998, 1001 (Ohio Ct. App. 2008) ("When the Treinens finally responded to Schlueter, they only quibbled about the FHA appraisal and again failed to convey their intent to exercise the first-refusal right.").

When Kenneth finally expressed an intention to exercise his right of first refusal, his statement was equivocal at best. He stated he had not received a fully executed agreement but, subject to confirmation of the terms, he was prepared to match the offer. Notably, Kenneth knew the terms of the offer ten weeks earlier; he did not need a fully-executed agreement to determine whether to exercise his right of first refusal. His belated and conditional expression of an

intent to exercise the right of first refusal does not alter our conclusion that he earlier waived the right. See *Keene v. Williams*, 423 So. 2d 1065, 1072 (La. 1982) (“It is also relevant that Keene never did unconditionally accept the offer.”).

We affirm the district court’s determination that Kenneth waived his right of first refusal and the court’s ruling sustaining Vernon’s motion to enforce the judgment and motion for contempt.

**AFFIRMED.**